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HEARING

BEFORE THE

SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SECOND CONGRESS

FIRST AND SECOND SESSIONS

SEPTEMBER 28, 29, 30, OCTOBER 12, 13, 14, 19 AND 20, 1971
AND
FEBRUARY 1, 2, 8, 16 AND 17, 1972

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FREEDOM OF THE PRESS

TUESDAY, SEPTEMBER 28, 1971

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 318, Old Senate Office Building, Senator Sam J. Ervin, Jr., presiding.

Present: Senator Ervin.

Also present: Lawrence M. Baskir, chief counsel, and William E. Pursley, Jr., counsel.

Senator ERVIN. This subcommittee will come to order.

Many years ago, at the birth of our great Republic, Thomas Jefferson observed:

"No government ought to be without censors and where the press is free, no one ever will."

Today, nearly two centuries since our Founding Fathers incorporated Jefferson's observation in the First Amendment to our Constitution, the Senate Subcommittee on Constitutional Rights opens a series of hearings to examine the state of freedom of the press in America.

These hearings, and the subcommittee study of which they are a part, have been organized because it is apparent that in today's America, many people doubt the vitality and significance of the first amendment's guarantee of freedom of the press. There have been at least four recent examples of this:

First, the increased subpenaing of journalists by grand juries and congressional committees;

Second, the recent publication by several newspapers of classified information and the government's unsuccessful attempt to enjoin the publication;

Third, the widespread use of false press credentials by government investigators; and

Fourth, new fears about government control and regulation of the broadcast media.

These developments have brought into sharp relief existing concern about the relationship between government and the working press.

In addition, we have heard sharp and angry attacks upon the news media by high government officials. These attacks have brought forth equally hostile responses from spokesmen for the press. Some government officials appear to believe that the purpose of the press is to present the Government's policies and programs to the public in the best possible light. These officials have forgotten Jefferson's words. Indeed, they appear to have lost sight of the central purpose of a free press in a free society.

Likewise, some members of the press appear to have forgotten that the First Amendment's guarantee of free speech and free press was not intended as their exclusive possession. Those enlightened men who devised our constitutional system did not mean to secure freedom of the press by suppressing the right of Americans, whether private citizens or public officials, to criticize the press. Not every critical word about the press is an attack on the first amendment.

These continuing controversies, and the bitterness and suspicion that accompany them, make it evident that many Americans are uncertain about both the role of a free press in a free society and the necessary conditions for its preservation.

In my judgment, it is time to challenge this uncertainty by considering again the reasons underlying the Constitution's guarantee of freedom of the press.

It is time to reexamine and to reemphasize First Amendment principles.

And, it is time to measure developments in the law as they affect both the printed and broadcast press against these principles. Such are the objects of this series of hearings.

The struggle to establish and preserve freedom of the press has been long and bitter. From the moment the type was set on the first printing press, kings and parliaments have attempted to control the press. Public officials have always feared the threat which a free and vigorous press poses to their power and tenure.

Anglo-American history has been no exception to this struggle. During the reign of Henry VIII, the manuscript of any material intended for publication had to be submitted to royal officials empowered to censor objectionable passages. Licensing was another means of controlling the press, and these officials also had the power to approve or deny a license for printing the material. Licensing continued in England until 1694. Thereafter, the common law crime of seditious libel emerged as a substitute for the system of licensing as a means of control.

Chief Justice Holt set forth the underlying concept of seditious libel in *Tuchin's* case, in 1904. He wrote:

> A reflection on the government must be punished because if people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it.

Historical studies indicate that there were hundreds of convictions for seditious libel during the 17th and 18th centuries in England.

American colonial history is replete with examples of government attempts to censor the press. A gentleman named John Wise, of Massachusetts, was tried and convicted of seditious libel in 1687 for bringing the King's government "into hatred and contempt in the minds of the people." He had dared to declare that a tax not levied by the Assembly was contrary to Magna Carta and did not have to be paid. His punishment was suspension from the Ministry, a fine of 50 pounds, and the posting of a 1,000 pounds bond to guarantee his "good behavior" for 1 year.

Time and time again in colonial America, men were arrested and thrown in jail for "wicked lyes and slanders upon Government," and for "sundry vile insinuations against his Majesty's rightful and lawful authority," and "for inflaming the minds of his Majesty's subjects."

There is a fundamental similarity among these and other historical instances of restriction of the press in the Government's rationale. Governments justified prior restraint or prosecution on the grounds of the necessity of preserving its good reputation among the people. All too often, this is still the real, if no longer the explicit justification for Government attempts to control the press.

In a truly free society this is not a sufficient justification. Our Founding Fathers understood that however incomplete, unfair, and even vicious the press may be in its attacks upon Government and Government officials, the press cannot be censored or punished, without undermining one of the cornerstones of free thought and expression.

The first widespread discussion in America of the significance of the First Amendment's guarantee of freedom of the press occurred during the bitter days at the close of the 18th century. By 1798, our young republic was on the verge of collapse. A federalist majority in Congress, determined to stifle opposition, enacted the alien and sedition laws of 1798. The Sedition Act made it a Federal crime, punishable by fine and imprisonment, to publish any false, scandalous, and malicious writing against the Government, Congress, or the President. Ironically, this legislation passed the Senate on July 4, 1798.

The sedition law was vigorously enforced. The Government brought to trial, convicted, and imprisoned many Americans who dared to put in print their opposition to the policies of the incumbent administration. Many others were intimidated—or as we now say "chilled"—by fear of retribution. Confronted by this reign of terror against freedom of the press, Thomas Jefferson in 1799 was moved to tell a group of college students:

> To preserve the freedom of the human mind . . . and freedom of the press, every spirit should be ready to devote itself to martyrdom; for as long as we may think as we will, and speak as we think the condition of man will proceed in improvement.

From this sad chapter of repression in the history of our country came a greater appreciation for the necessity of protecting the press from Government intimidation. While the alien and sedition laws were repealed and never held to be unconstitutional by the Supreme Court, most Americans accepted the view that the first amendment's guarantee of freedom of the press was incompatible with the traditional common law of seditious libel. Americans who believed in freedom—freedom of thought and freedom of expression—determined that a free and robust press was an absolutely essential ingredient for a truly free society. Not since that time has criticism of Government policies and officials by the press constituted a crime.

Our historic commitment to freedom of the press means that we must tolerate absurd, misleading, and vindictive reports which sometimes appear in newspapers, magazines, and on radio and television. It means that thoughts and ideas which we hate and despise will appear in print and be broadcast across the land. James Madison recognized that some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press. Most Americans have come to understand that the irritating excesses of the press are a small price to pay for a press independent of Government control.

They realize that only an independent press can vigorously and effectively contribute to that wide ranging and critical discussion of public affairs which is a prerequisite to a democratic society.

This view of the role of a free press in a free society necessarily means that there will be tension and sometimes hostility between the press and Government. Indeed, it is the conflict between the press and Government which attests to the vitality of the first amendment.

This conflict exists today. It is manifested in a number of relationships between Government and the press.

In recent years an increasing number of subpenas have been issued to newsmen in connection with various Government investigations. In the past, government prosecutors and members of the press have attempted to adjust their different interests in a way that would serve justice without endangering freedom of the press. Apparently, the mutual understanding on the part of the press and the Government which underlay this adjustment of interest has disappeared, perhaps another victim of the fear and suspicion that has developed between them. Confrontation has replaced negotiation. Today, there are members of the press who believe that their integrity and independence is being threatened by Government's zealous demand for their notes, their pictures, their films, and other working materials. Some of them suggest that the Government views the reporter as another investigative arm of Government. The Government, on the other hand, sees no reason why members of the press do not have exactly the same obligations as any other citizen when it comes to law enforcement.

It is not an easy task to resolve the conflict between first amendment interests and the interests of justice that is involved in the subpena controversy. The Attorney General, in August 1970, issued guidelines to govern the issuance of subpenas at the Federal level. A case is presently under consideration by the Supreme Court which directly raises the issue of whether or not the first amendment requires the granting of a privilege for newsmen not to appear before a grand jury under certain circumstances.

Senator James Pearson of Kansas, and Congressman Charles Whelan of Ohio, have introduced legislation in the Senate and House of Representatives to establish a statutory privilege for newsmen to protect their confidential information and sources from compulsory disclosure. Senator Pearson's bill, S. 1311, has been referred to the Subcommittee on Constitutional Rights. Many of our witnesses will comment upon this legislation and the underlying problem.

The conflicting interests of the Government and the press were dramatically underlined this past summer in connection with another problem. On June 30, 1971, the Supreme Court handed down one of the most important opinions ever issued concerning freedom of the press. The case of *New York Times* v. *United States* is a touchstone for any analysis of the state of the law concerning freedom of the press. The conflicting positions put forth by the parties in this case underscore the need to reexamine first amendment principles.

The Government sought to enjoin publication by the New York Times and the Washington Post of the Pentagon papers which contain classified information concerning our country's involvement in the Vietnam war. The Government argued that the President's constitutional responsibility for foreign affairs and for national security entitled the President to an injunction against publication upon persuading a court that the information to be revealed threatens grave and irreparable injury to the country. Quite simply, it was an argument that the inherent Presidential power to protect the national interest was superior to the proscriptions of the first amendment.

In wisely rejecting the Government's application for an injunction, the Supreme Court reaffirmed the belief of our Founding Fathers that a press free from governmental control is essential to a free society.

Mr. Justice Black in his opinion emphasized the purpose of a free press:

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government.

Notwithstanding the Supreme Court's holding in this case, the Government's attempt to restrain publication of the Pentagon papers has raised serious doubts about the security of freedom of press. This case represented the first time since the adoption of the Bill of Rights that Federal courts have been asked by the Government to halt publication. Furthermore, a careful analysis of the various opinions filed in this case makes uncertain just how free from Government restraint the press is.

It is my hope that these hearings will provide a forum for the examination of the impact of this important case on the state of freedom of the press. Whatever the differing views concerning this historic case and the circumstances surrounding it, it is important that we understand the consequences of this decision for freedom of the press.

Another special concern of these hearings is the first amendment implications of existing Government regulation of the broadcast industry. The increasing amount and scope of Government regulation of broadcasting has occurred without sufficient attention to its effect upon principles of freedom of press.

While the Founding Fathers did not contemplate the media of radio and television when they wrote the first amendment, the reasons for protecting the printed press from Government control apply equally to the broadcast media. More people get their news from radio and television today than any other single source. Studies show that the impact of the broadcast media upon Americans is without precedent in the history of communications. If first amendment principles are held not to apply to the broadcast media, it may well be that the Constitution's guarantee of a free press is on its death bed.

Great confusion surrounds the Federal statutes, regulations, and the few court decisions which affect broadcasting. Congress enacted the Radio Act of 1927 and the Communications Act of 1934 to prevent the air waves from being flooded with such a host of voices that the medium of broadcasting would be rendered useless. Whatever Government regulation of broadcasting was authorized, it was only for the purpose of securing the most effective use of available air waves and communications technology. As is often the case with Government control, this limited authority with respect to broadcasting has greatly expanded.

The power of the Federal Communications Commission has increased to the point that many broadcasters believe principles of freedom of the press no longer have significance with respect to broadcasting. With the promulgation by the Federal Communications Commission in 1949 of the fairness doctrine, the Commission's power over broadcasting was greatly enhanced.

Whatever one's view of the fairness doctrine, it must be clear to everyone that such a doctrine has placed in the hands of a Federal agency a not very subtle form of censorship. A recent Federal court of appeals decision, for example, has sustained an FCC determination that since the relationship of smoking to health is no longer a controversial issue, tobacco interests are not entitled to the benefit of the fairness doctrine. In other words, mankind, at least as personified by the FCC, has discovered the ultimate truth with respect to the hazards of smoking. There is no reason for further discussion.

The irony of this decision underscores its absurdity and its danger. It was only a few years ago that opponents of smoking were fighting an uphill and largely discouraging battle to convince the FCC and the courts that smoking was dangerous and therefore a controversial issue. In less than 10 years, absolute truth has shifted from one side of this issue to the other.

The lesson of this one example is that whatever the dangers to freedom of expression that result from concentrated ownership of the broadcast media, it is nowhere near as dangerous as leaving to a few Government officials the power to decide what can be discussed and what cannot and when ultimate truth has been discovered and what it is.

There are some Americans who apparently think they know what is good and what is bad for other Americans to hear on the radio and to see on television. They believe that the power of Government should be used to protect Americans from falsehood, bad programing, harmful thoughts, and zealous advertising. While I do not quarrel with the good intentions of these people, I believe that the sweeping Government regulation of broadcasting implicit in this view foreshadows the end of the free broadcast media and with it, a mortal blow to the first amendment.

Our Founding Fathers were wise enough to know that there is no way to give freedom of speech and press to the wise and deny it to fools and knaves. Certainly, they did not intend for the Government to decide who were the wise and who were the fools and who were the knaves. With broadcasting, just as with the printed press, governmental power to protect the public from excess and foolishness is governmental power to censor.

The troublesome consequences of Government regulation of broadcasting were dramatized this summer when Dr. Frank Stanton, president of Columbia Broadcasting System, relied upon the first amendment in refusing to appear before the House Committee on Interstate and Foreign Commerce. That committee issued a subpena to Dr. Stanton in connection with its investigation of a controversial television broadcast. The committee's assertion of authority to protect the public from misleading presentation of the news was challenged by Dr. Stanton's insistence that first amendment principles apply to broadcasting as well as to the printed press.

This controversy clearly sets forth the problems involved in authorizing Government regulation of broadcasting in the public interest and simultaneously protecting freedom of the press.

Another manifestation of today's tension between Government and the press involves the issuance of press credentials by Government to reporters and the alleged use of these press credentials as covers by Government investigators. This problem was underscored by a recent incident in Madison, Wis. This summer, members of the Madison Newspaper Guild unanimously voted to destroy their press cards and denounce them as a form of license. Speaking for its members, the Guild president said, "We take this step not lightly but in response to repeated police use in this country of undercover agents using press cards." He added, "The power to license * * * implies the power to withdraw the right."

These and other conflicts between Government and the press should give liberty-loving Americans cause for concern. They have prompted this subcommittee study and this series of hearings on the state of freedom of the press. In many situations the interests of Government and the press appear to be irreconcilable. Often they are not, but only seem so because the two sides have taken intransigent positions out of mutual distrust and fear. Rarely if ever in our history have we actually had to choose between suppression of the press or disaster. In every national war, where security was truly at stake, the press and Government found means of accommodating their apparently irreconcilable interest. I see no reason why suppression or censorship is required now, if it was not when national survival hung in the balance.

Nonetheless, it is easier to preach freedom of the press than it is to practice it. In the midst of controversies which seem to us now as earth shaking, we tend to lose sight of the higher issues at stake. These hearings are designed to let us take pause from the daily battle, and assess where we are and where we should be going. Hopefully, they will produce a better understanding by press, government, and the American people of the purposes of the first amendment.

The topic freedom of the press is obviously much too broad and deep to be thoroughly covered in one set of hearings. There are many issues that will not be mentioned, or at most only touched upon. For example, it should not be thought that freedom of the press refers only to the working news press, and of them, only the establishment press. Movies, scholars, the underground press, obscenity—all raise issues under the first amendment. Because we will not discuss them here should not be understood as meaning that the subcommittee has drawn a circle and left them outside the first amendment.

It is a sad coincidence that the subcommittee's hearings begin on the same day that the Nation mourns the passing of the greatest modern advocate and defender of the first amendment. Many eloquent words have been written about the amendment, and many of them have come from the pen of Justice Black. But none are more eloquent than those he used in his opinion in the *New York Times* case this past June. I think there can be no more fitting tribute to Justice Black and the freedom he loved so well than to quote from his opinion:

> The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly. Madison and the other Framers of the First Amendment, able men that they were, wrote in language they earnestly believed could never be misunderstood: "Congress shall make no law . . . abridging the freedom of the press . . . "Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.
>
> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.
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> And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the *New York Times*, the *Washington Post*, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that lead to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.
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> The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged. This thought was eloquently expressed in 1937 by Mr. Chief Justice Hughes—great man and great Chief Justice that he was—when the Court held a man could not be punished for attending a meeting run by Communists.
>
> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

Assisting the subcommittee in these hearings are Americans with diverse and wide-ranging experiences in journalism, in publishing, in government, and in the law. Among those invited to appear before the subcommittee are members of Congress; the Attorney General; members of the Federal Communications Commission; newspaper reporters, editors, and publishers; broadcast journalists;

presidents of broadcast networks; professors of constitutional law and constitutional history; and representatives of newspaper, publisher, photographer, and broadcast associations. Because of the experience and knowledge of the witnesses who are scheduled to appear before the subcommittee, I am confident that these hearings will make a significant contribution to a better understanding of freedom of the press.

The subcommittee had scheduled as its first witness Senator James Pearson, of Kansas, author of S. 1311—the Newsmen's Privilege bill. Unfortunately Senator Pearson is ill and cannot appear before the subcommittee today. He has given to the subcommittee a prepared statement and I would ask that this statement be printed in the record following the testimony of the other witnesses this morning. We are fortunate to have Congressman Charles Whalen, of Ohio, author of the companion bill in the House of Representatives, here to testify as our first witness. In addition, this week the subcommittee will receive testimony from Mr. Harding Bancroft, executive vice president of the New York Times; Mr. Norman Isaacs, of the Columbia University Graduate School of Journalism; Mr. Frank Stanton, president of the Columbia Broadcasting System; Mr. Richard Barnet, author and political scientist; Congressman Ogden Reid, of New York; Mr. Walter Cronkite, of CBS News; Prof. Philip Kurland, of Chicago Law School; and Mr. James J. Kilpatrick, newspaper columnist and television commentator.

STATEMENT OF THE HON. CHARLES W. WHALEN, A REPRESENTATIVE IN CONGRESS FROM THE THIRD CONGRESSIONAL DISTRICT OF THE STATE OF OHIO

Mr. WHALEN. Thank you very much, Mr. Chairman.

I am indeed honored to appear before you and your distinguished subcommittee this morning. I am confident that your review of the constitutional issues and practical problems surrounding the first amendment guarantee of freedom of the press will be an extremely thorough one from which meaningful recommendations will be forthcoming. I am most grateful for this opportunity to participate in these monumental proceedings. I certainly regret that Senator Pearson, who was to lead off this hearing, is not here to testify due to illness.

Mr. Chairman, the specific subject I wish to discuss is the Newsmen's Privilege. This issue is not new. It first was brought to congressional attention in 1857, when the New York Times published a story indicating that Congressman had taken bribes. James Simonton, the reporter who wrote the article, was asked to reveal his sources before a select committee of the House of Representatives. When he refused on the grounds that it would be a dishonorable breach of confidence, he was found in contempt of Congress.

The privilege asserted by Simonton more than a century ago has been claimed by American journalists ever since. For many years the privilege was summarily rejected by the courts. Today the newsman's claim that confidential information merits protection is not always denied, but neither is it generally accepted. The privilege occupies a particularly confusing legal position in 1971.

The executive branch tried to ameliorate the uncertainty surrounding the privilege by releasing guidelines last year regarding the issuance of subpenas to journalists. Although the guidelines probably reduced tensions, the privilege issue was not resolved.

In some States, journalists are protected by law. Maryland enacted the first law to shield newsmen from forced disclosure of confidential sources in 1896. However, only 18 other States have since adopted similar legislation.

Recent court decisions have not clarified the issue. Judicial interpretations of the privilege have varied more during the past year than ever before. As the Wisconsin Supreme Court noted in February of this year, the courts ruling on privilege cases have not found a consistent approach to the problem.

The Supreme Court soon will hear several privilege cases, but it is doubtful that the privilege issue will be resolved. Furthermore, as many courts have observed, only the legislative branch of Government can establish a privilege with requisite specificity.

Thus, I believe that an act of Congress—specifically, the Newsmen's Privilege Act—is the only viable method of insuring a privilege for the Nation's journalists.

As you know, Mr. Chairman, H.R. 4271 is identical to S. 1311 which the distinguished Senator from Kansas is so actively supporting in the Senate. In the House, 52 members have cosponsored the bill. In addition, one similar measure has been introduced.

Briefly, Mr. Chairman, this legislation provides that courts of the United States or other government bodies cannot require a person to disclose any confidential information or the source of any information obtained in his capacity as a journalist.

The privilege does not apply in three instances. First, it is not applicable in defamation cases if the defense is based on the source of information. Second, the source is not privileged if the source has provided a reporter with information required by law to be secret. Third, the privilege may be divested if disclosure is required to prevent a threat to human life, of espionage, or of foreign aggression.

The uncomplicated language of the bill conceals complexities which the committee should examine closely. In my opinion, two areas in particular merit your security.

First, it may be desirable to protect all unpublished information from government subpena. The dangers of government subpena of unused notes, files, and film are distributing regardless of whether or not the information was confidentially obtained.

Second, the exceptions to the privilege should be inspected thoroughly to determine if they can be narrowed or eliminated. Ideally, the privilege should be as nearly absolute as possible, realizing that it must be reconciled with other worthy objectives.

Mr. Chairman, these two points certainly deserve intensive study. However, today I would prefer to focus on the broader concepts of the Newsmen's Privilege Act.

While I believe there are many reasons for adopting the act, let me outline the two most compelling.

First, the Newsmen's Privilege Act will strengthen first amendment guarantees for all Americans. This argument rests on four solid premises.

(a) A free press is the very foundation of our democratic institutions. The most reliable indicator of whether a society strives to be free or totalitarian is the extent to which the press is free: free to investigate, free to criticize, free to publish what it deems fit to publish. The Supreme Court repeatedly has emphasized "the preferred place given in our scheme to the great, the indispensible democratic freedoms secured by the First Amendment."

(b) The First Amendment must always be interpreted to insure that the freedoms it guarantees are protected in modern times. The Amendment does not simply prohibit police from smashing printing presses: it protects indirect abridgement, unintended restraints, and it is not limited to protecting the freedom from any particular way of abridgement. Furthermore, the Court has stated that the people have a first amendment right to receive "the widest possible dissemination of information from diverse and antagonistic sources."

(c) Information received from confidential sources is an integral part of modern newsgathering operations. Every day many newspapers publish articles based primarily on confidential information. Historically, newsmen have used confidential information to expose crime and corruption—particularly in the government. And today confidential information is used in two additional ways: It provides reporters with background information, enabling them to analyze and interpret the news with greater insight and accuracy; and it informs the public about normally inaccessible groups and unfamiliar issues, such as the Black Panthers and the use of drugs.

(d) Without a legal privilege for newsmen, public access to valuable information is imperiled. An individual who reveals confidential information may place his job or even his life in jeopardy. If potential sources cannot be assured that their identities will be protected, they will not give information to reporters. In particular, radical and minority groups are understandably wary of providing information to newsmen without certainty of protection. But the fear of the government subpena is not confined to a few radicals: a number of American journalists and newspapers have instituted policies of destroying film and notes because of the threat of government intrusion. Thus, the government's power to subpena confidential information creates a chilling effect that inevitably jeopardizes the free flow of information to the public.

In summary, the Newsmen's Privilege Act is essential if Americans are to benefit from the First Amendment right to receive "the widest possible dissemination of information * * * ".

Second, the Newsmen's Privilege Act should be enacted because it will help to insure separation between government and the press. When a reporter's notes are subpenaed, in a very real sense he is transformed into an agent of the government—and he certainly is viewed as such by many potential sources of information. Some commentators fear that the press has lost much of its independence already—that the pervasiveness of the government has smothered many reporters' critical perception. If newsmen are viewed as walking wiretap devices, the press is no longer an independent entity, and we all suffer.

The major argument against the establishment of a newsmens' privilege is that it would hinder the search for truth in the courtroom. Two responses to such an argument immediately arise.

First, while all citizens generally are compelled to testify in court, there are exceptions. We strongly support a person's right to plead the fifth, although it unquestionably hinders the search for truth. And courts could quickly determine the truth by compelling attorneys to divulge information from their clients—but society has recognized the value of a confidential lawyer-client relationship. Furthermore, the identities of government informers are generally privileged in the courts. Law enforcement offices often depend on professional informers to furnish them with a flow of information about critical activities, and informers would be subject to risks if their identities were revealed in court.

The identical analysis, of course, can be made for reporters' sources of information.

Second, the power to compel journalists to testify about confidential information does not actually contribute to the search for truth in the courtroom anyway. Reporters frequently accept punishment rather than divulge confidential information. Even if it is assumed that newsmen would testify, however, the argument for the retention of the power to force reporters to reveal information is weak.

If the government does not use its subpena power often, it cannot be argued that such power is vital. Obviously, in the vast majority of cases, the search for truth would not be hindered by the absence of testimonial compulsion.

On the other hand, if the government does use the power frequently, sources will completely dry up. Under these circumstances, the power soon will be useless since reporters would no longer have access to confidential information.

And yet, the chilling effect created by the mere knowledge that the government has the power to subpena newsmen—whether or not it is utilized—is enough to impede the free flow of news.

Mr. Chairman, I introduced H.R. 4271 with the conviction that Congress must acknowledge its responsibility in establishing and defining a national newsmen's privilege. I am convinced that the adoption of the Newsmen's Privilege Act would be a decisive step to insure that freedom of the press will occupy a strong unassailable position in the final decades of this century.

Mr. Chairman, this concludes my statement.

Senator ERVIN. Mr. Whalen, your bill and Senator Pearson's bill are identical, are they not?

Mr. WHALEN. Yes, sir.

Senator ERVIN. Let the record show that a copy of the bill, H.R. 4271, will be included in the record.

I have here a copy of an editorial from the *New York Times*, dated September 26, 1971, entitled "The Public Sentinel." The editorial points out that there are three conflicting views as to the interpretation which is to be placed on the first amendment.

The first of these views is that which was expressed very elegantly by Justice Black; namely, that the freedom of the press is within the purview of the First Amendment and is absolute. The press is free to print anything.

The second view according to this editorial, is that expressed by the Solicitor General in arguing the case involving the Pentagon Papers on behalf of the Government in the *New York Times* and the *Washington Post* cases before the Supreme Court—namely, that there are other competing claims on the part of the Government, and that the Government has a right to prevent the publication of documents which they deem prejudicial to the national interest.

Then the *New York Times* editorial points out that the proper or possible interpretation of the freedom of press provision of the First Amendment is that expressed by one Prof. Alexander M. Bickel of the Yale Law School, who argued the case for the *New York Times*. He stated that while the reach of the First Amendment is broad and strong, it is not all-encompassing. A free society's vital interest in an enterprising, uninhibited press has to be reconciled with society's other interests such as effective administration of justice. Congressman Whalen, from your views on this matter, and your study of the issue during the preparation of the bill which you have introduced, have you come to the conclusion that the editorial is correct in stating that there are three schools of thought in this matter?

Mr. WHALEN. I believe so, Mr. Chairmen. I think they are the same as I have pointed out.

Senator ERVIN. I think this editorial should be made available to everybody who is concerned with this bill, so with no objections, I would order that a copy of this be printed in the record at this point.

[From the New York Times, September 26, 1971]

THE PUBLIC SENTINEL

In recent years, press and Government have appeared to be increasingly on a collision course. The Justice Department's attempt to restrain publication of the Pentagon papers and the House Commerce Committee's effort to examine the unused film prepared for a Columbia Broadcasting System documentary both ended in failure, but both were significant efforts by Government to constrict the traditional freedom of the press. Grand juries investigating criminal cases have increasingly resorted to the practice of subpoenaing reporters and their notes in an effort to use the press as an arm of the law.

In the light of the wide uneasiness stirred by these developments, the Senate Subcommittee on Constitutional Rights chaired by Senator Ervin of North Carolina has decided to hold public hearings this week on the present status of the press's liberties. These hearings are certain to bring forward at least three distinct viewpoints with regard to the rights of the press under the First Amendment.

One view is that when the authors of the Bill of Rights wrote that Congress shall make no law abridging freedom of the press, they meant exactly that—no law. In numerous opinions, most recently in his concurrence in the Pentagon papers case, the late Justice Hugo Black vigorously and eloquently argued this absolutist construction. It is a position which commands the support of the American Society of Newspaper Editors and of many civil libertarians.

A conflicting view is that the press's right to publish or broadcast news and opinion is not overriding and that there are competing claims which should take precedence. Thus, the Solicitor General argued in the case of the Pentagon papers that the Government had a right to prevent the publication of documents which it deemed prejudicial to the public interest. Similarly, local prosecutors have contended that newsmen have no right to protect the confidentiality of their news sources if they have knowledge of a criminal act.

In a "friend of the court" brief filed the other day on behalf of The Times and several other newsgathering organizations in a case pending before the Supreme Court involving Times reporter Earl Caldwell, Prof. Alexander M.

Bickel of the Yale Law School sets forth an intermediate position which this newspaper believes is both reasonable and realistic. In essence, he argues that, although the reach of the First Amendment is broad and strong, it is not all-encompassing. A free society's vital interest in an enterprising, uninhibited press has to be reconciled with society's other interests such as the effective administration of justice.

The crucial question is what are the terms on which this necessary accommodation should take place. Such an accommodation is not impossible. Indeed, much of the time of appellate courts is taken up with the sensitive, unremitting work of defining and interpreting means of cushioning valid but conflicting interests. Where a grand jury's right to know contradicts a reporter's right to protect his sources, the problems in need of resolution are comparable to those involved in reconciling freedom of the press and the right of every individual to a fair trial—an area in which considerable progress toward rational guidelines has been made.

The press obviously cannot serve society effectively if it prints only what Government officials say or what private persons want known about their activities. Nor is it likely to serve society effectively if it recognizes no responsibilities in respect to the individual's right to fair trial or if it claims for its agents an absolute immunity from their obligations as citizens.

To do their job, reporters develop sources among radicals or in the underworld or among persons who, though entirely conventional, fear loss of jobs or other harassment if publicly identified. Such relationships would be destroyed—to the detriment of the public—if at the whim of prosecutors, reporters could be forced to become police informants. Only proof of the most overriding and pressing public necessity could justify subpoena of information gathered by newsmen in the performance of their duties.

The First Amendment was not written to protect anyone's career or profits. Those are private concerns. The Constitution protects the press because the press serves a high and essential public interest. When it does its work with courage and enterprise and integrity, the press acts as a sentinel guarding every citizen against tyranny, corruption and injustice. Government itself is also one of society's sentinels but with different and far stronger powers. Citizens are best served when press and Government operate independently in their different ways to defend the public interest.

Senator ERVIN. Now, this statement, which I would think is one of the greatest statements ever made about the overall purpose of the First Amendment, was made by Justice Robert H. Jackson, in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 638. Justice Jackson stated:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote, they depend on the outcome of no election.

Do you concur with Justice Jackson's conclusion, that this is the fundamental principle of the First Amendment?

Mr. WHALEN. I would concur with that, Mr. Chairman.

Senator ERVIN. There can be no doubt that Congress has the power to change the rules of evidence to be used by the Federal courts in the administration of justice.

Mr. WHALEN. Mr. Chairman, I am not an attorney, and I am not as well informed on this particular area. I would certainly presume that Congress has the right to do this within the confines of the Constitution.

Senator ERVIN. That is I think a good statement—as good as any attorney would make. In so far as Federal rules of evidence may be changed, Congress has the authority to do so.

Mr. **Whalen**. This is correct, Mr. Chairman.

Senator **Irvin**. And the purpose of your bill is to establish a new rule of evidence.

Mr. **Whalen**. That is right, to provide the rules that thus far have been lacking.

Senator **Ervin**. There can be no doubt that the Nation has a vital interest in the gathering and the publication of news.

Mr. **Whalen**. I think the public has a right to know and I think our news media have done a very excellent job in fulfilling this objective.

Senator **Ervin**. Now, by the same token, there is no doubt that the Government has an interest in procuring the truth for presentation in the administration of justice.

Mr. **Whalen**. This is correct, they must also weigh the two objectives.

Senator **Ervin**. In other words, there are two different principles?

Mr. **Whalen**. Exactly.

Senator **Ervin**. Which demand that the press, for the benefit of the people, shall have the right to gather and publish the truth.

Mr. **Whalen**. That is correct.

Senator **Ervin**. And the interest of the Government being that of protecting the public, being able to obtain the truth, in connection with trials.

Mr. **Whalen**. This is correct, Mr. Chairman. Just to illustrate, I might just refer to the case which I cited earlier in my remarks, namely, the *Simonton* case involving testimony before the House of Representatives. Mr. Simonton had indicated in the New York Times that three Congressmen had taken bribes in land grant cases. As I said earlier, he was called before the House of Representatives, and he refused to disclose his source of information. He was then sentenced by the House of Representatives for refusing to testify.

The first point I would like to make is that had Simonton not written his story, charges never would have been leveled against the three Congressmen.

Second, even though Simonton did not reveal his source, the committee of the House of Representatives, through its own investigative staff, was able to compile sufficient evidence to force the Members to resign.

Thus, truth was obtained despite the fact that Mr. Simonton had not revealed his source of information.

Senator **Ervin**. It is your view that these two interests, which sometimes come into conflict, should be balanced and that decisive weight should be given to one or the other, depending upon the circumstances. Your contention is that your bill does not absolutely prohibit government from having the benfit of the testimony of the reporter. In other words, your bill provides for a balancing of these conflicting interests.

Mr. **Whalen**. That is correct. Mr. Chairman. As I indicated, the bills that Senator Pearson and I have introduced do provide for certain exceptions.

As I also indicated in my formal presentation, you and the subcommittee might want to investigate these exceptions in greater depth.

Just as a matter of interest, information from CBS was recently subpenaed by a committee of the House of Representatives, I am not sure if that situation would be covered by this legislation, as it stands now, because the information which CBS refused to release to the committee was given freely.

Senator ERVIN. And your bill only attempts to grant the newsmen this privilege if the information is received by him in a confidential way from his informant.

Mr. WHALEN. That is correct. Although I would like to reiterate that we may want to establish this privilege for all information, regardless of whether the information is confidential or not.

For example, New York State recently passed such a bill which would cover all information, not just confidential information.

Senator ERVIN. That would be like that of an attorney-client relationship, physician-patient——

Mr. WHALEN. That is correct.

Senator ERVIN. Now, someone has suggested there is little difference between granting the privilege to newsmen, and the others to whom one gives this privilege. You would be establishing an attorney-client relationship, where the attorney may serve the client.

Mr. WHALEN. That is correct.

Senator ERVIN. And the physician-patient relationship, in order that the physician may serve the patient, and the priest-penitent relationship, in order that the priest may serve the penitent. And so, it would raise the point that the newsmen are gathering information—not for some benefit [to] his informant, but for the benefit of the public. Now, I take it that your answer would be that the qualified privilege that your bill would establish is in effect establishing the benefit for the public.

Mr. WHALEN. That is correct.

Senator ERVIN. I take——

Mr. WHALEN. And the fact that a profit is being made would not enter into it.

Senator ERVIN. I take it from your statement that you entertain the view that in so far as the profit motive in news gathering and news publication is concerned, it is not the primary purpose of the freedom of the press. It is an incentive, but the overall purpose of the freedom of press would be to serve the people.

Mr. WHALEN. It is designed primarily to serve that purpose, although there is another purpose, that of making a profit.

Senator ERVIN. I am a great champion of the profit motive. There is the old story by Rudyard Kipling: The Germans were having a town meeting, and the suggestion was made that they all start to work for the state. They all agreed. But one old man stood up in the back of the room and said it wouldn't work. He said that they should work for themselves, and that that would be a great enterprise system.

Mr. Baskir, do you have any questions?

Mr. BASKIR. Yes, sir; one question. Do you have any information about the laws enacted by the States with—concerning the freedom of the press?

Mr. WHALEN. Some have argued that law enforcement would be hampered if a national news men's privilege were enacted. However, apparently there has not been any problem with law enforcement in the 19 States which currently have privilege acts.

Mr. **Baskir.** Thank you.

Senator **Ervin.** As I construe it, your interpretation is based on the interpretation of the first amendment—made by most courts. Now, there is no doubt that if government tries to put a ban or limitation on freedom of the press by legislation, or on the existence of the freedom of the press—that would be a violation of the first amendment.

Mr. **Whalen.** That would be my judgment.

Senator **Ervin.** And that such a decision by the Government would have a "chilling" effect on the willingness of the press and the people to give information—which also would be a violation of the first amendment. Do you agree with that?

Mr. **Whalen.** I think it depends on your definition of chilling effect. For example, if it does not involve legislative action, I don't know if that would be chilling or not.

Senator **Ervin.** I think elected officials of the Government have the same freedom of speech as everybody else. I had a group come into see me recently about the Vietnam war—that was in May of last year. I listened to them for about 2 hours and I was very patient with them—besides I am a good listener. When they got through, they said that there were other things that they didn't like, one example being the speeches of Vice President Agnew. I told them that I was a great believer in freedom of the press, speech, and so forth, and that I also extended to Vice President Agnew the right of freedom of speech. I would like to point out that the Founding Fathers were not wise enough to devise any method in which the freedom of speech was given to wise men only. I am going to allow him the tolerance which is required for him to use his freedom of speech.

Mr. **Whalen.** Mr. Chairman, you use the word tolerance, and I think this is the price that we have to pay for the freedom of speech. We may not agree with what others say or we may not like what they said, but as you pointed out they have the right to say it.

Senator **Ervin.** It is easy for us to tolerate views which we believe to be sound. Oliver Wendell Holmes said that we hate to listen to ideas that we don't like, but we have to tolerate those ideas in order to enjoy the benefits of freedom.

Mr. **Whalen.** Yes.

Senator **Ervin.** Thank you very much.

Mr. **Whalen.** Thank you. I would like to make one other comment. You referred to the *New York Times* editorial. I would like to commend you on your remarks in the Sunday *Washington Post* on the 26th of this month, in which you were quoted—I clipped it out, and I have used it several times in letters and correspondence concerning the first amendment.

Senator **Ervin.** Thank you, and I think that we have to defend the first amendment in all respects, and——

Mr. **Whalen.** I am involved in a case, and I don't want to go into the details, but I have found out in the 17 years that I have been a legislator, that one becomes very unpopular when he defends the first amendment.

Senator Ervin. Yes; I have been accused of that. We certainly appreciate hearing your statement on this bill.

Mr. Whalen. Thank you.

Senator Ervin. Would counsel call the next witness.

Mr. Baskir. The next witness is Mr. Harding F. Bancroft, executive vice president of the *New York Times*, and he is accompanied by Mr. James C. Goodale, vice president, and general counsel.

Senator Ervin. Gentlemen, I am delighted to welcome both of you, and I regret that more members of the subcommittee are not present, but unfortunately every Senator has 10,000 jobs that he must attend to, and he can't get around to all of them. But the record will be made available to all of them and to all others who are interested in this hearing.

STATEMENT OF HARDING F. BANCROFT, EXECUTIVE VICE PRESIDENT OF THE NEW YORK TIMES CO., ACCOMPANIED BY JAMES C. GOODALE, VICE PRESIDENT AND GENERAL COUNSEL

Mr. Bancroft. Thank you, Mr. Chairman.

We are pleased to have an opportunity to appear before this subcommittee and present the views of the *Times* on the important questions which you are considering. Your inquiry comes at a particularly opportune time for the public, and the press and other forms of news media which serve it. The publication of the Pentagon Papers, and the litigation which it occasioned, focused attention in dramatic fashion on the role of a free press in a democratic society.

A hundred years ago this summer, the *New York Times* was involved in a controversy which has some analogous aspects. In July 1871, the *Times* was presented—by a confidential source whom it would not and did not reveal—with documents from the office of the comptroller of New York City. The charts, vouchers, receipts, and other materials which we received were published, and the activities of the notorious Tweed ring were thereby exposed to the public.

Of course, such dramatic examples of the vital role played by a truly free press and its struggle to remain free from government interference, are rare. There have been less dramatic episodes occurring with increasing frequency in recent years, which show us that the guaantees of the first amendment must be vigilantly guarded.

We have seen, for example, a substantial increase in subpenas directed to newsmen in all forms of information media for the purpose of compelling disclosure of confidential sources and other confidential information secured in the course of their professional duties.

Thus, although *Times*' reporters received a total of only five subpenas or demands for documents in the entire period from 1964 through 1967, three were received in 1968, six in 1969, and 12 in 1970. The accelerating pace at which subpenas have been served on the Times has also been the experience of other media. NBC, CBS, and their wholly owned affiliates, in the period from 1969 through July 1971 alone, have been served with more than 123 subpenas.

The problem has been recognized by the President, and the

Attorney General has issued guidelines designed to restrict the Justice Department's use of such subpenas.

Of course, neither the President's remarks nor the Attorney General's guidelines have the force of law, even within the Federal system, and the problem still remains one of serious proportions.

I do not believe that it is necessary to present evidence to this subcommittee to demonstrate the absolute necessity for reporters to be able to gather the news free from governmental interference or inhibition; nor to deny the pernicious chilling effect on news gathering that such forced disclosure of confidential sources can have.

Once a reporter is compelled to breach confidences, his sources disappear, sources which insure a truly informative news story rather than one based on official press releases and similar public relations handouts. Indeed, confidential sources are crucial to the profession.

As Arthur Krock has put it:

> Another attribute is peculiarly necessary for this work: a Washington correspondent must keep more rigidly the confidence of news sources, for it is in confidence that much important news is acquired which otherwise would be withheld from the public that has a right to know it. One breach of such faith, and that news source is closed.

That is the end of the quotation.

Mr. Chairman, when these sources disappear, when they dry up by reason of forced disclosure or the possibility of forced disclosures, the first amendment has been eroded, if not directly violated. The reporter's access to news is the public's access to news.

His role, to borrow a phrase from Madison, is that of a sentinel over the public rights.

It must not be constricted in a manner not compatible with our stated profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open.

That commitment, of course, has its roots deeply set in the first amendment guarantee of freedom of the press.

The courts have recently been called upon to fashion rules designed to protect a journalist's confidences to insure that the integrity of his news gathering and news reporting activities can be preserved. Three such cases involving subpenas directed to newsmen will be heard by the U.S. Supreme Court this year.

United States v. *Earl Caldwell* involves a *New York Times* reporter whose stories on the Black Panther Party in San Francisco prompted a Federal grand jury there to subpena him and his notes. Caldwell refused to appear and his refusal was upheld—on constitutional grounds—by the Ninth Circuit Court of Appeals. *Branzburg* v. *Hayes* involves a reporter for the *Louisville Courier-Journal* who refused to appear before grand juries seeking to quiz him on stories he had written about marihuana traffic in Franklin County, Ky. The Kentucky Supreme Court affirmed the propriety of the subpenas. And *In Re Paul Pappas*, a reporter for WTEV, an ABC affiliate in New Bedford, Mass., refused to tell a grand jury about his evening in the Black Panther building in New Bedford. The Massachusetts Supreme Court held that Pappas had to tell all.

The resolution of these cases by the Supreme Court will have an important substantive impact on the news media and their ability to fulfill their first amendment obligations to the public.

There are, of course, differing views among the news media and students of our constitutional processes, as to the extent of the newsman's first amendment privilege. Some argue eloquently for an absolute rule unequivocally barring the Government from obtaining evidence from a newsman by compulsion. Others have urged a firm but not absolute privilege. The argument made by the *New York Times* in its amicus brief in the *Caldwell* case, is that a reporter can be compelled to divulge his confidential sources and other confidential information, only if the Government established (i) that the reporter has knowledge of a specific crime under investigation; (ii) that there is no alternative source for the information; and (iii) that there is a compelling and overriding Government interest in the information. This compelling and overriding interest cannot, in our submission, be established unless, at the very least, a major crime is involved.

The reporters privilege has also been the subject of legislative action by at least 17 States, and the State statutes vary considerably with respect to the scope and absoluteness of the privilege granted. However, because of the national nature of much of the news media and the constitutional dimensions which the subpena problem assumes, there is a pressing need for uniformity in the law on the subject. It is to be hoped that the Supreme Court will set forth ground rules that will clarify this important and perplexing question.

We are not convinced, therefore, that Federal legislation at this time is needed. In general, we believe that judicial resolution of difficult constitutional questions involving the Bill of Rights, is more desirable. There is the danger that legislative attempts to define rights under the first amendment may raise more problems than are put to rest and thus prevent the courts from making reasoned determinations based on the particular facts and circumstances of the cases before them.

Should protective legislation become necessary, the *Times* would urge a statute as broad as that enacted last year by the New York Legislature. This law gives the reporter an absolute privilege against disclosing confidential communications as well as the identity of his news source. This, in our view, would be an effective model for Federal legislation on the subject.

The extent of and the limitations on a reporter's duty to give evidence in court or before a grand jury has been the subject of frequent judicial review and the topic has been widely discussed in books and articles in law reviews and other periodicals. The brief of the *New York Times* and others as amici curiae in the case of *United States* v. *Earl Caldwell* contains a comprehensive bibliography which may be of some interest to this subcommittee. We have supplied copies of our brief to the subcommittee's staff.

I would like now to turn to the problems under the first amendment raised by the publication of the so-called Pentagon papers. So much has been said and written on this subject that I will confine myself to certain aspects which seem to us to be of particular concern to the press.

First, in our opinion, the fact that publication was enjoined for

15 days itself thwarted and subverted the constitutional principle of the freedom of the press.

As the *Times* stated on its editorial page, the basic reason that impelled the *Times* to publish the material was that we believed it was in the interest of the people of this country to be informed. Once the material fell into our hands, it was not only in the interest of the American people to publish it, but, even more emphatically, it would have been an abnegation of responsibility and a renunciation of our obligations under the first amendment not to have published it.

Although the Supreme Court ultimately denied the Government's request for a prior restraint, the hard fact remains that for the first time in the history of our nation, the Government sought and obtained a direct suppression of news. Even though the restraint lasted for only 15 days, an extremely unfortunate precedent, we submit, has been established.

Second, the fact that the Government sought and obtained an injunction leaves us with the prospect—despite the Supreme Court decision—that it may seek similar restraints in the future.

The possibility of future attempts by the Government to suppress the news is not good for the country and is a prospect with the Nation's press cannot easily live. It is of first importance that this threat not result in journalistic timidity or unwarranted self-censorship. What Judge Gurfein called a cantankerous press, an obstinate press, a ubiquitous press must, in his words, be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know.

But there is the danger that this unfortunate precedent will indeed have a chilling effect on the reporting of sensitive matters and will deter reporters from conducting the kinds of thorough investigations which responsible journalism requires. A reporter who, in the past, routinely checked his facts with Government officials might well think twice before doing so, always fearful that by revealing his knowledge he will put into motion the Government censorship machine.

Third, there are other ways by which the Government can effectively deter publication of facts the public has a right to know. The threat of unjustified criminal prosecution, for example, can be as effective a prior restraint as a pre-publication injunction.

A related issue raised during the Pentagon Papers litigation is the whole problem of the classification of Government documents. There is no doubt that new procedures are needed in order to avoid the unnecessary and arbitrary removal from public scrutiny of so much material that belongs in the public domain. The Pentagon Papers are a valid example of this classification overkill. Nearly all of the contents of the 43 volumes of papers upon which the *Times'* series was based have now been declassified and delivered to the public printer. Last June they were classified top secret and it was the contention of the Government in its application for a temporary restraining order that "irreparable injury to the national defense" would result if the *Times* were permitted to continue publication.

What makes the system even more arbitrary is the way in which classified information is routinely "leaked" by Government sources.

Max Frankel, our Washington Bureau Chief, has described the way it works:

> The Government and its officials regularly and customarily engage in a kind of ad hoc, de facto declassification that normally has no bearing whatever on considerations of the national interest. To promote a political, personal, bureaucratic or even commercial interest, incumbent officials and officials who return to civilian life are constantly revealing the secrets entrusted to them. They use them to barter with the Congress or the press, to curry favor with foreign governments and officials from whom they seek information in return. They use them freely, and with a startling record of impunity, in their memoirs and other writings.

Aside from the problem posed by classification and declassification of documents, *New York Times* reporters have frequently had great difficulty in securing nonsensitive information to which the public is clearly entitled. Actual cases where our reporters have met official resistance have been in respect to such matters as the number of medals awarded to generals in Vietnam, the identities of contractors who are found to have made excessive profits by the Renegotiation Board, reports of Government tests on consumer products, the intercession of Members of Congress in the affairs of administrative and regulatory agencies, and so on.

The Freedom of Information Act was intended to insure that much of this kind of information would be available to the public. The act was hailed by President Johnson as safeguarding the people's right to know. Unfortunately, the high purposes of the act have not in practice been fulfilled. Its passage does not appear to have altered previous notions as to private Government property or deterred Government bureaucrats from routinely denying proper informational request.

Such denials can effectively stymie a reporter's investigation. Ordinarily, there is no time to enter into prolonged negotiations, or litigation, with the agency in question. The initial refusal thus often ends the matter.

We believe that strict and speedy compliance by Government agencies with the Freedom of Information Act is essential in the public interest.

I have tried to touch upon what we consider to be some of the major problems faced by the news media today. Other witnesses—especially those representing the broadcast media—will surely enlarge the list.

The freedom, integrity and independence of the press are facing new challenges, which must be met vigorously. The accretion of Executive power in recent decades gives added emphasis to this imperative if the great purposes of the Constitution are to be sustained. The late Mr. Justice Jackson once observed that these purposes do not depend upon the approval or convenience of those they restrain. Such sentiments cannot be repeated too often, especially at a time when those they restrain believe in good faith that they are acting in the public interest. A warning especially pertinent today was articulated years ago by Mr. Justice Brandeis:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evilminded rulers. The greatest dangers to liberty lurk in invidious encroachment by men of zeal, well-meaning, but without understanding.

That concludes my statement, Mr. Chairman.

Senator Ervin. I want to commend you on the excellence of your statement. As you point out, I think that the great majority of the American people are not against the publication of the Pentagon Papers—and in my study of all the opinions in that case, I am left with a great feeling that some of the things said in those opinions upheld the first amendment.

Mr. Bancroft. Yes, I think the net result of the case was good, in the sense that prior restraints were not permitted. Nevertheless, there does rest the possibility that there may be future restraining orders.

Senator Ervin. I am sure you are familiar with the fact that the people who drafted our Constitution were well-versed in the law and in language. When they wrote freedom of the press into the Constitution, they meant that the press should not have prior restraints. This does not prevent the press being held liable afterwards.

I was very much interested in your observation, that you doubt whether we should at this time support legislation in this field of privilege—generally speaking, at least until the Supreme Court has an opportunity to pass on several pending cases.

Mr. Bancroft. Yes, sir, that is the point. It seems to us that until the Supreme Court reaches a decision—in the *Caldwell* and other cases, we think that it would be unwise for the Congress to pass legislation until it is known what that decision is.

There may be no need for any legislation at all, if the courts take the extreme view of absolutely no compulsion.

Senator Ervin. Now, Justice Jackson stated in the *West Virginia Board of Education* case, that the objectives of the Founding Fathers are found right in the First Amendment, and in other provisions of the Bill of Rights. It made these matters dependent upon an interpretation by the courts, and put them beyond the reach of the legislators. When Congress goes into the Bill of Rights, no matter how worthy its purpose, it might have the effect of curtailing the Bill of Rights.

Mr. Bancroft. I don't think there is any doubt with questions on prior restraints. In respect to the privileges of newspaper reporters, not to have to testify in courts, and before grand juries, the legislation can in effect have the result that you don't have to look to the Constitution to get that immunity from testifying, but it can be right in the legislation itself. That is why we think 17 of our States have all ready enacted legislation on the subject.

Senator Ervin. Are you satisfied with the ruling of the circuit court in the *Caldwell* case?

Mr. Bancroft. Yes, sir. I think the circuit court tried to impose a ruling which meets the competing interest between a reporters news gathering function and the need for successful prosecution in criminal cases, where the information is in the reporters hands is unavailable anywhere else, where it is necessary to get the information from the reporter as a last resort, and where there is a serious crime committed.

Senator Ervin. In this case, the *Caldwell* case, Caldwell was a black reporter for the *New York Times* who had specialized to a large degree in writing about the Black Panthers. He had contacts with officers and members of the Black Panthers, and had, after some time, developed so much confidence in many of them, that he would not expose them, but would present their aims fairly, and justly, and that he would not go to the police. In this manner he also built up their confidence in him.

Mr. Bancroft. There was a special facet in the *Caldwell* case, and that is the fact that he had obtained the confidence of the Black Panthers.

Mr. Caldwell was asked to appear before a grand jury with his notes, and he would not appear. If he had, he would have lost his sources of information, even though he might not have said anything. This is because the Black Panthers would never know what he might have said.

Senator Ervin. The grand jury could be called—a dragnet investigation into the aims and activities of the Black Panthers, and so, they summoned Mr. Caldwell before them. The court placed restrictions on his subpena, which would have excused him from many things, but required him to make an appearance before the grand jury. He was granted certain privileges before the grand jury: He was allowed to have counsel.

Caldwell's position was that if he merely went before the grand jury, even if he gave no testimony whatever, the Black Panthers would be uncertain as to whether or not he had divulged any information to the grand jury, and that this would dry up his sources of information.

Mr. Bancroft. That is correct.

Senator Ervin. So the court held that under the particular circumstances of this case, that it would chill the First Amendment, freedom of the press, to appear before the grand jury.

Mr. Bancroft. That is correct.

Senator Ervin. And I was struck with the very fine opinion, not only the opinion of the court of appeals, but also the district court. The district court held in effect that the Government cannot abridge the First Amendment, unless it is clearly shown that there is a contrary and overriding public interest that cannot be served by any alternative means.

I think one thing is clear, that the reporters must not be made a part of the investigative apparatus of the Government for whatever reason. It would certainly have a very chilling effect upon the capacity of the reporter to gather information from their sources or from anybody—if the people from whom he obtained such information felt the reporter would be or could become a Government agent in some form. This would definitely chill his sources.

Mr. Bancroft. It would not only chill his own sources, it would also chill future situations with other reporters and other groups.

Senator Ervin. And I take it that your position in respect to the First Amendment guarantee of freedom of press would be the same as Justice Black: That the Government should not be permitted to do anything that would have a chilling effect on the published press, unless there was an overriding public interest which demands an exception.

Mr. Bancroft. That is right, sir.

Senator Ervin. As I mentioned when Congressman Whalen was testifying, you also have two interests. The first being that of gathering information of interest to the public and the other being the necessity for the Government to gather information for criminal prosecution. These two interests sometimes collide as they did in the *Caldwell* case.

Mr. **Bancroft**. Yes, sir.

Senator **Ervin**. I must say I agree with what you have said concerning classification. Senator Roth of Delaware introduced a bill, which I have cosponsored, which would establish a commission to study this problem. I think security classification is run into the ground. Through the use of classification, information is not only hidden from the President, but I can assure you, that it is hidden from the legislative branch of Government.

Mr. **Bancroft**. That was the exact case, Senator, with Senator Fulbright, where he wanted to get a copy of the Pentagon study.

Senator **Ervin**. This subcommittee started investigating charges that during President Johnson's administration, the military was spying on civilians. It was extremely difficult to get the evidence on formal military intelligence, since it was hidden by security classifications. We would get the information that we needed in some other way. Finally, one person wrote an editorial exposing it. With that information, and with his help, we were able to get many other military agents to come and testify.

Do you have any questions?

Senator **Ervin**. Counsel has a question.

Mr. **Baskir**. One of the questions is in relation to the Pentagon papers. It was stated that if these papers were published, it would effect the national security. I was wondering what you thought the danger would be, if any, if you relied on the press to make its own judgment?

Mr. **Bancroft**. I think our comment, Mr. Baskir, is that the First Amendment decided that the newspapers should have this responsibility. When the question is raised as to who elected us to decide if the Pentagon Papers are a risk to our national security, you can come up with a quick answer that the first amendment did. That is the net result of the provision of the Constitution, that Congress shall not abridge the freedom of the press.

Mr. **Baskir**. Have you any idea about the frequency of the subpenas since the guidelines were issued by the Attorney General?

Mr. **Bancroft**. Certainly we thought it was a very good thing that the Attorney General did issue the guidelines. As to their frequency since the guidelines were issued, Mr. Goodale may know.

Mr. **Baskir**. We have been told, and we don't know how to evaluate this, that since the guidelines have been set, the issuing of subpenas has declined—almost stopped.

Mr. **Bancroft**. The reason is that the attorneys around the United States don't want to be bothered with going through the Attorney General, so they just don't bother anymore.

Mr. **Baskir**. If that is the case, the subpenas stopped because of the Attorney General's guidelines. The question then arises about how important the information was that was being sought from the reporter. If it's not important enough to write a letter, it could not have been too important.

Mr. **Bancroft**. I think that is exactly right. I think when the prosecutors subpenaed the reporter, they were just looking for an easy method of investigation, and that is not the way it ought to be done. The reporters have other functions which they must carry out. Only when there is an overriding demand and a serious crime has been committed, should the reporter have to appear and testify.

Mr. BASKIR. One last question. With respect to classified information—I noticed that the Government Printing Office just released its competing version of the *New York Times* publication on the Pentagon Papers. I am told there are discrepancies in some of the material that the *New York Times* published, and also in its articles.

Mr. BANCROFT. I really don't know how, but to answer your first question, we have not had a chance to examine their version, but we will in the future, as for the discrepancies that you spoke about, if we thought that something stated could have an adverse effect on the national security, it was not published but I think if you examined them closely, there will be very few changes.

Mr. BASKIR. I would like to ask you this question, and maybe you feel that you cannot answer because of potential allegations, but obviously your own staff made judgments as to what should be and what should not be contained in your publication of the Pentagon papers.

Mr. BANCROFT. Yes; we did make this decision, as to what should and what should not have been included in the publication. I think I should say that the editors and reporters of the New York Times are not a bad group of men to make such a judgment. They are highly intellectual, very knowledgable and very sophisticated, and if anyone has to make this type of decision, they are a very capable group to do it.

Senator ERVIN. And I think you might add that they are patriotic.

Mr. BANCROFT. I take that for granted, sir.

Mr. BASKIR. Some of the decisions—some of the judgments made were in terms of whether it would effect national security?

Mr. BANCROFT. Exactly.

Mr. BASKIR. And maybe if you have to choose between the judgment of a judge, a reporter or editor, and the United States Government, maybe on the practical basis the best decision for the country is the one that would be made by the editor rather than the courts.

Mr. BANCROFT. I think that would be very often true. The editors—the staff are a very excellent group, and they see the issues before them, and they see all this not only in the light of their own particular jobs but in the broad view, and as I said earlier, the first amendment gives this judgment to the press. The Founding Fathers were content to leave it up to the press to make those decisions. Clearly, a reporter's function is to publish information, but he will bend over backwards in making the judgment not to print anything that would result in the loss of American lives for example in a war situation.

Mr. BASKIR. I expect that you have had considerable experience in this kind of decisionmaking.

Mr. BANCROFT. Yes; there was the example that we had some information about the Bay of Pigs invasion, and we did not publish the information we had in our possession—and later on, President

Kennedy expressed the opinion that he wished we had. That was a hindsight view of it—he wished that he had never been engaged in the Bay of Pigs invasion.

Mr. **Baskir.** It is really a matter of judgment, because you don't know at that moment if it would be a risk to the national security—only with a hindsight. How would you make a really well founded judgment on that?

Mr. **Bancroft.** When you talk about government action like the Bay of Pigs invasion, it does require some hindsight. But in the normal course, we take everything into consideration that would affect national security. The national interest must also be evaluated when you have some information that is of general public interest. We think that the right of the people to know, and the right of the Congress to know the facts and information that we have in our hands is an important consideration in the decision of the newspaper.

Mr. **Baskir.** The real problem of injunctions in this area—those seeking injunctions in the national interest—may well be the attempt to protect their own interest, just as with respect to classification.

Mr. **Bancroft.** That is very true—I think.

Senator **Ervin.** You have mentioned in your statement, the concern, even though it might be unfounded, of newsmen that they may be subject to subsequent prosecution. This has a deterring effect upon his freedom to inform the public.

Mr. **Bancroft.** I think there is no doubt about it.

Senator **Ervin.** I think for the sake of the record that I should read from the court of appeals opinion in the *Caldwell* case and make it a part of the record. After the Court set out the facts it said,

> We hold that where it has been shown that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand Jury interrogation, the Government must respond by demonstrating a compelling need for the witness's presence before judicial process properly can issue to require attendance.

Now, I would submit that this particular narrow holding is in harmony with a number of holdings on the part of the court, to the effect that government cannot infringe upon the freedom of the press or any other first amendment right, unless it can demonstrate a compelling or overriding interest of the public, which outweighs the particular circumstances under the first amendment.

Mr. **Bancroft.** That is exactly it, there are competing public interests, and——

Senator **Ervin.** And I would take it, on the whole, you agree with the thought that perhaps in the light of those decisions and interpretations of the first amendment, it is better to leave this as it is in the Constitution, rather than have specific legislation.

Mr. **Bancroft.** Exactly.

Senator **Ervin.** Thank you very much for a very fine statement. Would counsel call the next witness.

Mr. **Baskir.** Mr. Earl Caldwell planned to testify today, but on the advice of counsel, because of the pending litigation before the Supreme Court, he will not appear.

Senator **Ervin.** I regret that he will not be here to appear, but I would say that the position of his counsel is quite understandable. It is his right under the first amendment to be silent.

Mr. Baskir. Our concluding witness, Mr. Norman E. Isaacs, is editor in residence at the Graduate School of Journalism, Columbia University.

Senator Ervin. We are delighted to welcome you, and we appreciate your willingness to come and give us the benefit of your views with respect to some of the most important questions ever to come up in America.

STATEMENT OF NORMAN E. ISAACS, EDITOR IN RESIDENCE AT THE GRADUATE SCHOOL OF JOURNALISM, COLUMBIA UNIVERSITY

Mr. Isaacs. Thank you, Senator.

Mr. Chairman, I appreciate the invitation to testify because this is an issue of immense importance to journalism in this country. Because of a broad correspondence and other communication with editors, plus active research into this issue over the past few years, I am convinced that the vast majority of the Nation's newsmen support the concept behind the legislation which you are now studying. It may seem a small point, but I am among many who deplore the titling of any shield law as a "Newsmen's Privilege Act." While it is in the law quite correct as a technical description, many editors wince over any language that would seem to be conferring on the press a special privilege. I am sure your committee will be hearing more about this aspect as these hearings progress and I would only urge at this time your sympathetic consideration of some change in description to eliminate any phrasing that seems to accord newsmen any exemption from the law. What newsmen seek, Mr. Chairman, is what almost all of them consider their right under the First Amendment: The right to gather and report news and be able to maintain a confidence without capricious legal challenge.

There are a few observations I would like to offer concerning Senator Pearson's S. 1311.

The first of these is that I believe sections 2 and 3 have inadvertently overlooked the necessity of including photographers in the listing of those to whom the protection would apply. On countless occasions, a newsman with a camera is as much privy to confidential information as are his colleagues carrying notebooks or tape equipment.

I welcome Representative Whalen's statement that improvements in the bill may well be desirable. In this connection what I also do not find in S. 1311 is any mention of what we of the press consider a major essential in consideration of any such legislation: The protection of notes, tapes, correspondence, lists of private telephone conversations, unpublished photographs, or any similar information that might be used to trace the identification of confidential sources.

There is also question about the impact of the part (2) provision in section 4 of S. 1311—that the protection shall not apply to the sources of any information concerning the details of any grand jury or other proceeding which was required to be secret under the laws of the United States. Any reference to grand jury proceedings brings to newsmen's minds many instances of leaks emanating from such proceedings where such information has been of important value to the public. These, I concede, often have had to do with proceedings sometimes referred to as runaway grand juries or political grand juries. I do not have the data available at this time, but I am certain there have been many times when advance information provided confidentially to newsmen has had the effect of forewarning the public about indictments being prepared that were suspect either of political rigging or pure irresponsibility. To open newsmen in these instances to interrogation and the threat of court confrontation could block off what has been a valuable flow of information both to the public and other governmental officers. I have no desire to draw a parallel with the current episode in Chicago, but I call attention to the fact that the leaking of advance information on grand jury proceedings is widespread. My point in citing the case is simply to emphasize that there often is some value to the public in such information coming into newsmen's hands and I cannot help but express concern over any provision that may make us targets under a shield law definition.

Many editors with whom I have been in contact have offered no objection to provisions calling for Federal court review of what has been referred to in Mr. Caldwell's case as "compelling need." But I have noted some concern expressed over the language in the last two lines of S. 1311, where the phrasing reads "prevent a threat to human life." The concern expressed has been to the effect that this may be too broad for comfort; that it opens the door to many problems relating, for hypothetical example, to the manufacture of automobiles or the production of certain polluting chemicals, which could be construed to have the end effect of constituting threats to human life. Like you, I am quite cognizant of the intent of Senator Pearson in the drafting of this passage and merely submit this thought for further consideration.

Although it relates more directly to still another aspect of your study, I am reminded of the conversation between David Kraslow of the *Los Angeles Times* and Professor Paul Freund, the distinguished constitutional scholar. They were discussing prior restraint and Professor Freund was expressing the feeling it might be preferable to have Congress enact a statute defining when prior restraint would be permissable and saying any restrictions should be absolutely minimal. When Mr. Kraslow asked if he would be willing to draft such a law, Professor Freund replied, "No, thank you. It would be a very tough thing to do." So it is, Mr. Chairman, in this field of our enterprise. All of us know what it is that is intended. What we need is to find the precisely proper terminology.

Almost every newsman I have known wants everything to be on the record with complete attribution. But we are pragmatic people and recognize that there are many instances when important information can be obtained only by assuring sources of protection from public identification. This, I submit, is particularly true in the relationships between newsmen and public officials. While an adversary relationship generally maintains, as I am convinced it should, it is also a partnership that encompasses confidentiality as a necessary part of the transmission of information. Whether the public is fully aware of this I do not know, but I do know that this partnership has existed all my working life and it has never been more prevalent than it is today. It distresses me to have to urge legislation to protect this kind of mutual trust, but, unlike Mr. Bancroft, I have become convinced it has clearly become necessary because of the threat posed to the newsman's ability to gather information.

The most direct threat has been posed by the issuance of subpenas at the behest of law enforcement officers. All of us in journalism consider this highly dangerous procedure. If the belief were to become widespread that newsmen are required to identify sources and thus serve as auxiliary forces for law enforcement agencies, we can only expect a steady drying-up of news sources. It is my contention that the problems of law enforcement officers would be made all the more difficult and those who govern, either in executive or legislative roles, would be deprived of much information essential for a sound appraisal of public affairs.

In the instance of photographers, I need only point out that this is an exceedingly delicate area because it will serve no good purpose to have those who carry cameras readily recognized as sources of evidence. Our photographic colleagues have suffered attack, injury and the destruction of their equipment in crisis areas these past several years simply because of their visibility and I earnestly urge the same protections for them as for all others who gather news.

You know, of course, that some newsmen oppose the concept of bills like S. 1311 on the ground that journalism's first amendment protection is absolute and who contend that any legislation would be counterproductive in the sense it would place limits on our constitutional rights. Many of these men, I believe, are now worried about these matters because of the Supreme Court's ruling on the Pentagon papers. When it comes to prior restraint, I have been, and remain, absolutist myself, and like so many other newsmen, find myself deeply disturbed over the import of some of the opinions.

Dr. Thomas I. Emerson, Lines professor of law at Yale University, has made the statement that the opinions of five members of the Court "seriously undermined" the doctrine against prior restraint. Professor Lines further has asserted that the Court did nothing to advance the doctrines of the right to know. He took occasion to stress the two components of this doctrine: the public's right and the legislature's right. With Professor Lines, I agree that some legal principles in this area need to be developed if our democratic society is to grow.

As matters stand, I am not certain any of us really know how much damage has been done to the press's freedom of action as the result of the opinions entered in the case of the Pentagon papers. Clearly, we are unsettled by all that has transpired. I would project the thought that if important governmental information were to be leaked tonight to a newspaper or broadcast station, there would be what we can only term agonizing appraisal given as to the risks involved. I frankly prefer the days when we felt free to publish and accept the consequences. But this administration's pressure on journalism has been so persistent and covered so much territory that I am afraid much of our traditional forthrightness has been eroded. If the administration actually had a planned campaign for intimidating the press, I am sad to concede that it has had its effect on all too many in the news media.

One other lesser issue, Mr. Chairman, and I will desist. I gathered that you might be interested in whatever views I hold on the problem of the issuance of press credentials by local police departments. There have been repeated protests about some police departments which have refused to issue such credentials to certain arms of communications, such as the underground press or to collegiate journalists. Certainly, there are problems in the indiscriminate issuance of police press credentials. Indiscriminate issuance has the effect of creating mob coverage, thereby obstructing, rather than aiding justice. At the same time, it seems clear there should be no political judgments made by local police departments as to which agency of the press should be granted credentials, and which not. In the eyes of journalism, all the branches have equal rank as observers of the scene and it is unseemly for police departments to assume the role of community censors as to who, and who shall not, have the oppportunity to report public events.

What all of us seek so earnestly is to be of honorable service to the society. The news media is a restless and difficult force; it is always a constant and visible target. We of the press need to improve our standards constantly, and we need the assistance of public officials in helping to see that we are not restricted or punished for seeking the truth about the public business.

Thank you, Mr. Chairman.

Senator **Ervin**. You frankly take the position that under no circumstances should there be a prior restraint on news.

Mr. **Isaacs**. Frankly, I take that position.

Senator **Ervin**. This is the same viewpoint as Justice Black and Justice Douglas set forth. I followed with interest the Pentagon Papers arguments. Professor Alexander M. Bickel, counsel for the *New York Times*, contended that there could be a case for prior restraint in certain circumstances such as where publications could jeopardize a pending troop movement or something of that nature. Would you care to comment on that?

Mr. **Isaacs**. We have had prior voluntary restraints in those areas, Mr. Chairman, and there are several episodes in American journalistic history concerning voluntary restraints under stress conditions. I have always been struck by the fact that this country was able to build the atom bomb, which included the vast installation at Oak Ridge. This covered a very large area and was known to a great many people, yet without the Government saying a word, not a single word of this development appeared in any form of communication in the country.

Whenever the country has been at war, the press has been quick to accept intelligent rules of procedure. I think that basically, the record is very good on this score. When the country's security has been at stake, the press has not been found wanting. But on other issues, such as these we have been discussing, the amount of classification is tremendous. Clearly, as Mr. Justice Stewart pointed out, when everything is classified, then nothing is classified. And we have the call of——

Senator **Ervin**. In other words, if I interpret your position correctly, you believe, from a legal standpoint, there should be no prior restraint on the publication of news. You feel that the record of the past shows that the press has accepted the responsibility, and has imposed voluntary restraints on itself in the interest of the Nation. And it is also your opinion that this is a better safeguard than trying to impose prior restraint.

Mr. ISAACS. Yes, sir, I do feel this way.

Senator ERVIN. And you do take the position that the Nation has never suffered any ill consequences of any importance, as a result of leaving this matter to be handled by the press itself, and that the press has taken a responsible position.

Mr. ISAACS. Well, as you well know, the press is always cantankerous, and is sometimes wrong.

Senator ERVIN. I take it that you accept and entertain the view that with every freedom, including the freedom of the press, there are errors made, and——

Mr. ISAACS. Yes, sir, I accept the press with all its flaws, and it has many.

Senator ERVIN. Now, on page 6, you state—"I frankly prefer the days when we felt free to publish and accept the consequences." Now, there are two ways that the Government could intimidate the press, one by the imposition of prior restraints, and secondly, by punishment. What is your opinion as to the punishment?

Mr. ISAACS. I take a broader viewpoint, Senator. I doubt these hearings would be taking place were it not for the extraordinary amount of pressure put upon the press through constant accusation and public complaint. It is worth noting that Vice President Agnew's role in this drumfire of criticism goes on and on. Only last month at the conclusion of his trip, he complained personally to a *Christian Science Monitor* reporter about the coverage and his press secretary made charges of sloppy, rotten reporting about the tour, singling out *Life* and *Newsweek*. Reading this morning's *Times* I am struck anew by the Vice President's attack on the news coverage of Attica. The Vice President's remarks on the Attica tragedy overlook the fact that those covering the news were entirely dependent on official sources for factual information. That this information proved to be false in many instances seems to me to indicate a need for the examination of official conduct rather than a simplistic, onesided attack on a press corps misinformed and misled—or let me use a less polite word, Mr. Chairman—lied to. I can only consider this another broadside from an administration determined to lower the public regard for the press and to seek to create a public mood by which the news media can be forced into a subservient role. I would point out that the great escalation in the issuance of subpenas came under this administration, and it took some little time and widespread protest before Mr. Mitchell issued his guidelines. Most important, it seems to me, is the fact that this is the first administration in the Nation's history to challenge through the courts what we have always considered the constitutional protection against prior restraint. I have not yet seen the text of the report, but only yesterday the latest issue of the *Editor & Publisher* carried a digest of a report prepared by the Washington news committee of the Associated Press managing editors that asserts "no President in modern times has so consciously isolated himself from the press" as President Nixon. There is, I fear, a deep hostility on the President's part toward the press and I do not consider it healthy either for the political life of the country or for a sanguine period ahead for the Nation's news media.

Senator **Ervin**. Would it be too extreme to say that the history of the relationship between government and the press shows that the government has, on many occasions, used the press for the purpose of manufacturing news, and presenting its opinions in the best possible light; and second, that on some occasions the government manifests a threat to the freedom of the press.

Mr. **Isaacs** I think that is fair—I think that is correct.

Senator **Ervin**. The Chief Justice, in the 17th century, stated that it was absolutely necessary for government to enjoy a good relationship with its subjects, and the press was punished if they did anything, even tell the truth, which would have the effect of embarrassing the government.

Mr. **Isaacs**. Everyone, you know, believes in truth in the news, factual presentation, if you will. This is, of course, until that moment that the news seems to attack his role as union leader, corporation executive, political leader, doctor, lawyer, butcher, baker. At that point, we are adjudged to have ceased to be objective and we are under pressure. Our role in the society is to resist this kind of pressure—to try to assemble the facts as honestly as we can, and write them as honestly as we can.

Senator **Ervin**. But it is a layman's instinct, that when a man says something we don't like, we all try to find some way to keep him from saying it.

Mr. **Isaacs**. I am not trying to prevent the vice president from saying what he wishes. I agree with you that he has every right to say what he will. What I object to are the constant references from such a high public official to the elite press of the east coast, references seeming to suggest that we band together at the Algonquin and try to lead the Nation astray. I repeat that the vast majoriy of reporters cover the news as fairly as they can and I hate——

Senator **Ervin**. The First Amendment secures freedom of press and freedom of speech. Thereby we may say whatever we want.

Mr. **Isaacs**. That is correct.

Senator **Ervin**. And what is said may not be pleasing to the government or not pleasing to a majority of our citizens, but we can't limit ourselves to a specific group.

Mr. **Isaacs**. That is correct.

Senator **Ervin**. And so, to paraphrase Thomas Jefferson, the reason that the First Amendment was given to our country, was to insure that all people would have the freedom of speech, freedom of press—and so forth. Jefferson said that we must tolerate the freedom of everybody so that we all could enjoy it.

Mr. **Isaacs**. I subscribe to that all the way.

Senator **Ervin**. I would just like to thank you once again for appearing before this committee and giving us a very fine statement.

Mr. **Isaacs**. Thank you, Senator.

Senator **Ervin**. I would like to place the prepared statement of

Senator Pearson and the Justice Department's memorandum "Guidelines for Subpenas to the News Media" at this point in the record.

STATEMENT OF SENATOR JAMES B. PEARSON, REPRESENTATIVE OF KANSAS

Mr. Chairman, Members of the Subcommittee: I am honored and pleased to have this opportunity to discuss the condition of Freedom of the Press in modern America. After some introductory remarks on the significance of the First Amendment's "Free Press" guarantee, I will devote the balance of my statement to an advocacy of the Newsmen's Privilege Act of 1971, which I introduced on March 23rd. This legislation, I am proud to report has been cosponsored by Senators Anderson, Brooke, Church, Cranston, Eagleton, Fulbright, Griffin, Humphrey, Mansfield, McIntyre, Moss, Pell, Percy, and more than fifty Members of the other body.

I believe that enactment of the Newsmen's Privilege is a precondition to the unfettered dissemination of the news. Thus, I believe this legislation is required by the First Amendment to the Constitution.

Before proceeding with my statement, let me observe respectfully that these hearings are convened as the nation mourns the passing of one of the greatest defenders of free expression to live in this century.

Mr. Justice Hugo Black had a resolute faith in the good sense of the people. This faith reinforced the strong conviction that full and free discussion is an essential element of democracy. Mr. Justice Black observed, "Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk."

The press must be free—wholly free— to report on the human condition in America, on the conduct of public officials, on the strengths and weaknesses of this society. Mr. Justice Black recognized that "freedom of the press," as it is understood in the light of the First Amendment, is a liberty *required* by *all* the people. The term does not connote a privilege of a particular occupational group. Because democracy itself depends upon uninhibited public discussion of public events, Mr. Justice Black defended press freedom with a vigor seldom witnessed in this vigorous country. We are all deeply in his debt.

I. Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

The papers of James Madison reveal that on September 12, 1787, the State delegations to the Federal Constitutional Convention rejected unanimously a motion to draft a Bill of Rights. The several State Declarations of Human Rights were not to be repealed, it was argued; and moreover, Congress could be trusted to respect the liberties of the people.

Two days later, Charles Pinckney moved to insert the declaration that "the liberty of the press shall be inviolable." Those opposing this language contended that the State Bills of Rights were adequate to protect the press, that the power of Congress did *not* extend to the press, and that Congress could be trusted. The proposition failed, seven votes to four. The precedent thus established, however, failed even to survive the First Congress.

The Federal Constitution was ratified in due time, but not without serious reservations. The Virginia Assembly, for example, recommended as necessary to the proposed Charter "a Declaration or Bill of Rights asserting and securing from encroachment the essential and unalienable Rights of the People." Representatives in the First Congress assembled with a mandate from three million constituents: the rights, liberties and immunities of free men had to be made more secure. Nothing less than a Federal Bill of Rights would be acceptable.

Representative James Madison, not yet thirty years of age, served as floor manager in the House. Under his leadership, a Bill of Rights—based upon the Virginia Declaration of 1776—was approved by Congress and, ultimately, by the several States.

There is no question that the Founding Fathers appreciated the significance and fundamental importance of the First Amendment "free press" guarantee. The Virginia Declaration of Rights, in Article XII, stated "That the Freedom of the Press is one of the greatest Bulwarks of Liberty, and can never be restrained but by despotic Governments." Madison wrote that "popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both."

Dr. Ben Franklin could hardly forget that his brother, James, had been summarily jailed for a month after suggesting editorially, that the Massachusetts Assembly was soft on crime.

Perhaps Thomas Jefferson captured the contemporary passion for press freedom when he remarked, "Were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate to prefer the latter."

The framers of the First Amendment had the benefit of the recently published work. Blackstone's *Commentaries on the Law of England.* Sir William had set forth the following common law definition of press freedom:

"The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publication, and *not* in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press; but if he publishes what is *improper, mischievous*, or *illegal*, he must take the consequences of his own temerity."

Blackstone's attitude toward press freedom, reflecting the English common law, was embraced as United States law by those who secured passage of the Sedition Act of 1798. This Act made it a Federal crime to engage in "false, scandalous and malicious" criticism of public officials.

Madison wrote a scathing denunciation of the Sedition Act, basing his attack on First Amendment grounds: "This idea of the freedom of the press can *never* be admitted to be the American idea of it: since a law inflicting penalties on printed publications, would have a familiar effect with a law authorizing previous restraint on them. It would be a mockery to say, that no law should be passed, preventing publications from being made, but that laws might be passed for punishing them in case they should be made."

Thus Madison articulated, for the first time, a doctrine that is hornbook law today: the First Amendment cannot tolerate governmental action which has a "chilling effect" on the unfettered communication of ideas. Only in the most compelling circumstances, involving the survival of life or the State itself, is a competing State interest permitted to override First Amendment liberties.

The most naked form of press censorship—the licensing of books and other publications—was declared illegal by Parliament in 1694 as an unacceptable "prior restraint" on the dissemination of the news. Public nuisance laws which would restrain publication of "offensive" material were declared unconstitutional in *Near* v. *Minnesota.* The Supreme Court, however, withheld authoritative comment on the Sedition Act until 1964. In *New York Time Co.* v. *Sullivan*, the Court said, "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional."

For decades the Supreme Court has asserted—and reasserted—the preemptive position of the First Amendment. Statements such as the following, from *Bridges* v. *California*, are characteristic: "The First Amendment does not speak equivocally. It prohibits *any* law 'abridging freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving people, will allow."

Mr. Justice Brennan acknowledged the special protection which must be accorded First Amendment freedoms to assure their survival: "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The *threat* of sanctions may deter the exercise almost as potently as the actual application of sanctions."

In my view, Mr. Chairman, freedom of the press continues to be the *sine qua non* of men who would govern themselves. And never have the demands for a truly free press, or the demands upon newsmen themselves, been more compelling than at this time of increasing social awareness and alienation of large segments of the population. In its statement to the American people, the President's Commission on Campus Unrest observed:

"The crisis on American campuses has no parallel in the history of the nation. This crisis has roots in divisions of American society as deep as any since the Civil War. The divisions are reflected in violent acts and harsh rhetoric, and in the enmity of those Americans who see themselves as occupying opposing camps. Campus unrest reflects and increases a more profound crisis in the nation as a whole."

No American can fail to view this commentary as profoundly troubling. Viable bridges of communication must span the gulf of fear and distrust which has separated too many for too long. The press, of course, is the primary medium of communication. Its contacts with those elements of society must jealously be guarded as the "last best hope" for peaceful resolution of the crisis which pervades the nation.

II. The First Amendment requires a reporter-informant privilege

Because the lines of communication between dissident elements of society must be kept open to preserve domestic tranquillity, the Congress and the courts must be vigilant to insure that vestiges of governmental action which have a "chilling effect" on Freedom of the Press are eradicated. The dissemination of news is the primary obligation of newsmen. But newsmen cannot meet this obligation without full opportunity to *gather* newsworthy information from confidential sources. The gathering of pertinent information prior to publication constitutes an inseparable and indispensable phase of the overall news effort. It is axiomatic that there can be no *dissemination* of information without *collection* of information. Therefore, unreasonable governmental interference with the *collection* of newsworthy information is inimical to a free press.

There is ample authority to support this basic premise. The courts have recognized that all legitimate activities incidental to dissemination of the news must be protected if freedom of the press is to remain inviolate. These activities include, specifically, the gathering of the news.

In order to gather information effectively, the reporter must seek out sources to provide information for publication. The importance of these sources cannot be overemphasized. As the Supreme Court has suggested, the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, (and) that a free press is a condition of a free society."

For reasons which are entirely personal, citizens often wish to convey information to the public while maintaining anonymity. The informant's motivation for disclosure, be it avarice or a high sense of civic duty, is usually unimportant to the public which generally has an overriding interest in acquiring an informant's information, not his identity. The press has played an historic role as an intermediary for confidential news sources, and that role is central to the First Amendment concept of a free press.

Newsmen, famous and obscure, skilled and inexperienced, maintain that confidential courses are important contributors of worthwhile information and that most confidential sources will refuse to contribute further if exposed. Walter Cronkite, News Correspondent with CBS News, has made the following statement:

"The material that I obtain in privacy and on a confidential basis is given to me on that basis because my news sources have learned to trust me and can confide in me without fear of exposure . . . I certainly could not work effectively if I had to say to each person with whom I talk that any information he gave me might be used against him."

Mr. Chairman, the statement of Mr. Cronkite reflects the collective judgment of the press. Recognizing that informants need assurance that their identities will not be compromised, the American Newspaper Guild adopted a Code of Ethics which, in Canon 5 states: "That newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before judicial or investigating bodies . . ."

The Newsmen's Privilege Act of 1971 should be enacted to resolve a conflict among the United States Courts of Appeals in a manner consistent with the fundamental and supremely important free press guarantee of the First Amendment.

This legislation provides that newsmen shall not be required by any court, grand jury, agency, department, or commission of the United States, or by either House of Congress, to disclose any confidential information obtained by them in their capacity as newsmen. The bill further provides that newsmen shall not be required to disclose the source of any information received in a professional capacity.

Under this proposal, the newsmen's privilege to maintain the confidentiality of his news sources is subject to reasonable qualifications: First, the privilege does not apply to the source of any allegedly defamatory information in a case where the defendant, in a civil action for defamation, asserts a defense based upon the source of such information. Second, the privilege shall not apply to the source of any information concerning the details of any grand jury or other proceeding which was required to be secret under the laws of the United States. Finally, the bill establishes procedures for divesting the privilege when there is substantial evidence that disclosure of information held confidential by the newsman is required to prevent a threat to human life, of espionage, or of foreign aggression.

Mr. Chairman, the Newsmen's Privilege Act is of special significance to me, because it was first introduced in Congress by one of my distinguished predecessors, the late Senator Arthur Capper. Senator Capper served Kansas and the Nation for 40 years in the seat which I now have the honor to occupy. As owner and publisher of the *Topeka Daily Capital, Capper's Farmer, Capper's Weekly, Household Magazine*, and other publications, as well as owner of two radio stations, Mr. Capper understood as few men do the particular requirements of the press and the reading public.

Senator Capper's bill, introduced as S. 2175 on October 30, 1929, exempted newspapermen from testifying with respect to the sources of confidential information obtained in the course of newsgathering. The only exception to the privilege involved information held by newsmen on acts of treason.

The issue presented by the Newsmen's Privilege Act was an important one in 1733, when John Peter Zenger began publication of the *New York Weekly Journal*. Zenger was charged with making "false, scandalous, malicious and seditious publication" of information critical of the Governor of the Province. He chose jail rather than reveal his confidential sources.

The issue remains an important one today. Dozens of cases have been collected, both reported and unreported, in which newsmen have been cited for contempt because they have insisted that the identity of their sources is privileged information.

Mr. Chairman, I am convinced that newsmen have a constitutional right to keep confidential their sources of information. It is a curious state of affairs when newsmen, in exercising their right to be a part of a "free press," must, from time to time, serve terms in prison for contempt of court. I believe the exercise of a constitutional right *cannot* be contemptuous of Federal courts, or any other arm of the Federal Government. The Newsmen's Privilege Act of 1971 will serve to perfect the promise our Founding Fathers made, that men cannot be free without a free and uninhibited press to serve them.

III. Department of Justice guidelines, recent Federal court decisions, and State action to create a newsmen's privilege.

The Honorable John N. Mitchell, Attorney General of the United States, delivered a major address on freedom of the press before the House of Delegates, American Bar Association, on August 10, 1970, the Attorney General discussed "the current controversy involving subpoenas to the press media for information that may be of some use in court proceedings."

"This is one of the most difficult issues I have faced as Attorney General," Mr. Mitchell admitted. "It is difficult constitutionally and it is difficult administratively." The Attorney General correctly stated that the Supreme Court has never held newsmen to have a First Amendment right to protect their confidential sources of the news. Nevertheless, he took the opportunity to announce "Department of Justice Guidelines for Subpoenas to the News Media," which I am submitting as an Appendix to these remarks.

The First Guideline states, "*The Department of Justice recognizes that compulsory process in some circumstances may have a limited effect on the exercise of first amendment rights.*"

The Guidelines are considered by the Department as an "interim measure." Attorney General Mitchell called for an "immediate and comprehensive study of the fair trial-free press issue as it affects the controversy over subpoenas to the press."

And the Attorney General concluded, saying he "would not oppose legislation granting some form of reporter-informant privilege." That legislation, Mr. Chairman, is before your Subcommittee at this time. Because the Congress is equipped to balance the interests of the First Amendment against the interests of the United States in the administration of justice, no less than the courts, I urge that the Newsmen's Privilege Act be considered carefully for favorable Congressional action.

The United States District Court for the Northern District of California, and the United States Court of Appeals for the Ninth Circuit, held recently in the case of *Earl Caldwell* that newsmen have a First Amendment right to protect from grand jury inquiry their confidential sources of the news. This holding has *not* been appealed by the Government to the United States Supreme Court. *Writ of Certiorari* was granted by the Supreme Court to decide whether Caldwell—a newsman who has contacts in the Black Panther Party—may be compelled constitutionally to appear before the grand jury at all.

Finally, Mr. Chairman, it cannot go unnoticed that seventeen States have adopted, by statute, a newsmen's privilege to protect from forced disclosure confidential sources and—in some instances—confidentially-held information. There is ample precedent for such legislation, therefore, and in those States where the privilege has been effective for a number of years, there is no evidence to indicate that law enforcement officials and prosecutors have been hamstrung in ferreting out crime.

Attorney General Mitchell's second Guideline asserts, "The Department of Justice does not consider the press 'an investigative arm of the government.'" This is an entirely appropriate expression of policy, but its enforcement depends upon discretion within the Department. Freedom of the press to gather news cannot rest upon the discretion of transitory public officials, regardless of good faith efforts to restrain more zealous subordinates. In seventeen States, Mr. Chairman, legislation has been adopted to insure that the press does not, in fact, become an unwilling "investigative arm" of the Government.

The press cannot serve as an investigative organization for two masters: the Government and the public. Government has the means to hire its own investigators and informers. The public, in the final analysis, must depend upon the press.

For 180 years under the First Amendment mandate, the public has been served tolerably well. We have an opportunity, in this Congress, to perfect First Amendment press freedom. I believe it is our duty to grasp that opportunity.

Thank you.

DEPARTMENT OF JUSTICE,
Washington, D.C., September 2, 1970.

Subject: Guidelines for Subpoenas to the News Media.
To All United States Attorneys,

The following guidelines for subpoenas to the news media are quoted from the address "Free Press and Fair Trial: The Subpoena Controversy" by the Honorable John N. Mitchell, Attorney General of the United States, before the House of Delegates, American Bar Association, at St. Louis, Missouri, on August 10, 1970.

WILL WILSON,
Assistant Attorney General,
Criminal Division.

First: The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weigh that limiting effect against the public interest to be served in the fair administration of justice.

Second: The Department of Justice does not consider the press "an investigative arm of government." Therefore, all reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press.

Third: It is the policy of the Department to insist that negotiations with the press be attempted in all cases in which a subpoena is contemplated. These negotiations should attempt to accommodate the interests of the grand jury with the interests of the news media.

In these negotiations, where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the news media.

Fourth: If negotiations fail, no Justice Department official should request, or make any arrangements for, a subpoena to the press without the express authorization of the Attorney General.

If a subpoena is obtained under such circumstances without this authorization, the Department will—as a matter of course—move to quash the subpoena without prejudice to its rights subsequently to request the subpoena upon the proper authorization.

Fifth: In requesting the Attorney General's authorization for a subpoena, the following principles will apply:

A. There should be sufficient reason to believe that a crime has occurred, from disclosures by non-press sources. The Department does not approve of utilizing the press as a spring board for investigations.

B. There should be sufficient reason to believe that the information sought is essential to a successful investigation—particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, non-essential or speculative information.

C. The Government should have unsuccessfully attempted to obtain the information from alternative non-press sources.

D. Authorization requests for subpoenas should normally be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.

E. Great caution should be observed in requesting subpoena authorization by the Attorney General for unpublished information, or where an orthodox First Amendment defense is raised or where a serious claim of confidentiality is alleged.

F. Even subpoena authorization requests for publicly disclosed information should be treated with care because, for example, cameramen have recently been subjected to harassment on the grounds that their photographs will become available to the government.

G. In any event, subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents.

These are general rules designed to cover the great majority of cases. It must always be remembered that emergencies and other unusual situations may develop where a subpoena request to the Attorney General may be submitted which does not exactly conform to these guidelines.

Senator ERVIN. The subcommittee will meet tomorrow in room 1202, New Senate Office Building, at 10 a.m. This committee stands in recess until that time.

(The hearing was then concluded at 12:34 o'clock p.m.)

FREEDOM OF THE PRESS

WEDNESDAY, SEPTEMBER 29, 1971

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 1202, New Senate Office Building, Senator Sam J. Ervin, Jr., presiding.

Present: Senator Ervin and Senator Kennedy.

Also present: Lawrence M. Baskir, Chief Counsel, and Bill Pursley, Counsel.

Senator ERVIN. The subcommittee will come to order.

Today the Senate Subcommittee on Constitutional Rights continues its hearings on the subject of freedom of the press.

One of the important purposes of these hearings is an examination of the first amendment implications of government regulation of the broadcast media. Great confusion surrounds the Federal statutes, regulations, and the few court decisions which affect broadcasting. In the course of these hearings, we will consider the rationale, the operation and the impact of this system of government regulation of broadcasting. One of our witnesses today is uniquely qualified to assist us in this effort.

In view of the suspicion and fear which surrounds the relationship between the executive branch and the press, it is also the purpose of these hearings to examine the reasons underlying this suspicion and fear and the consequences of such a situation to the gathering and reporting of news.

For these reasons, it was thought desirable to invite Mr. Herb Klein, Director of Communications for the executive branch, to testify. In my judgment, Mr. Klein would be able to assist greatly the subcommittee in examining the reasons for the antagonism and hostility which have developed between the present administration and the press, and also to remove some of the misunderstandings that have fostered this situation.

Unfortunately, Mr. Klein has informed me that he will not be able to testify. Mr. Klein wrote "as a member of the immediate staff of the President, I must respectfully decline the invitation to testify." His decision not to appear seems to reflect a tendency on the part of the executive branch to assert a form of executive privilege even when it is not necessary, and even when it is detrimental to the interests of the administration. We invited Mr. Klein to testify because many questions have been raised about the administration's attitude toward the press. We wish to give the administration an opportunity to respond to the charges that have been made against it, and to provide the administration with a forum to present its side of the controversy. A dialogue requires both points of view, and a major purpose of these hearings—to try to eliminate the distrust and animosity that exists between the administration and the press—will not be accomplished if one side refuses to present its views. I am mindful of the importance the administration attaches to executive privilege, but I do not think it requires that all invitations to testify—even friendly invitations—be turned down. It should not preclude a voluntary appearance before a Senate committee.

I hope Mr. Klein or another representative of the administration will take advantage of this opportunity to improve the country's understanding of the administration's attitudes and policies in the area of public information and freedom of the press.

Counsel, call the first witness.

Mr. **Baskir**. The Honorable Ogden R. Reid, a representative in Congress from the 26th Congressional District of New York.

STATEMENT OF HON. OGDEN R. REID, A REPRESENTATIVE IN CONGRESS FROM THE 26TH CONGRESSIONAL DISTRICT OF THE STATE OF NEW YORK

Senator **Ervin**. Congressman Reid, I am delighted to welcome you to the subcommittee. We appreciate your willingness to appear and to express your views on this subject.

Mr. **Reid**. Thank you.

Mr. Chairman, may I say that I am honored and delighted to have this opportunity to appear before your distinguished subcommittee this morning to share with you briefly my thoughts on the vitally important subject of freedom of the press. There is hardly a more relevant or timely inquiry before any committee of the Congress, and I commend you, Mr. Chairman, for your strong leadership in calling these hearings. I noted a speech of yours recently before the Association of American Publishers, and one paragraph of which sums up the Founding Fathers as saying that we must have a freedom of the press. I would like to commend you for your constant concern with civil liberties in this country; we all owe you a debt of gratitude for this service.

Senator **Ervin**. Thank you very much.

Mr. **Reid**. Mr. Chairman, as events in recent months have forcefully demonstrated, the press today is under the most serious attack upon it in our history. Aside from a great volume of rhetoric on the part of certain well-known government figures, the press has faced and is facing a number of specific legal actions in which its right to function without restriction is being challenged. These include the suit by the Government to enjoin the *New York Times* and the *Washington Post* from publishing the Pentagon Papers, the CBS subpena matter in the House of Representatives, the FCC notice to broadcasters last March warning against the indiscriminate airing of songs with drug-related lyrics, and several cases involving the subpenaing of news reporters' notes.

I am delighted also, Mr. Chairman, that you will hear testimony this morning from Dr. Frank Stanton, who I think should, as president of Columbia Broadcasting System, have considerable knowledge of the Constitution, and who by his standing up to what I consider a nonconstitutional subpena by the House, has made our liberty more secure. I think his actions reaffirmed that which has been clear from the outset, that TV outtakes enjoy the same protection as reporters' notes and that both are covered by the first amendment. The fact that they were not mentioned specifically in the first amendment is merely an accident that they were not invented at that time. But I am delighted that Mr. Stanton is here this morning.

Of all the great constitutional questions raised by these actions, none is more fundamental than that of prior restraint upon publication. And in my judgment, no conceivable restriction upon the press is more dangerous than prior restraint. The gravity of its invocation in the Pentagon Papers case is underscored by the fact that this was the first time in nearly 200 years of history that the Federal Government sought to restrain a newspaper in advance from publishing, and only once, in the case of *Near* v. *Minnesota*, has a state obtained such an injunction. In the Pentagon papers case, this precensorship was claimed to be justified because of "immediate grave threat to national security."

In ordering the injunction against the newspapers lifted, the Supreme Court held that the Government failed to meet its "heavy burden of showing justification for the enforcement of such a restraint." Reading the opinions of the Justices, it would appear unlikely that the Government will soon, if ever, successfully invoke prior restraint.

There are others who have a different view. But whatever effect the Supreme Court decision will have, it is unfortunate the chilling effect that continues over the press of our country, resulting from the possibility that this Government, or any other government, may threaten or in fact seek to utilize prior restraint.

Despite this ultimate victory for a free press in the Pentagon papers case, the fact remains that for a period of 15 days two great newspapers were legally barred from publishing. It is anomalous that while the Supreme Court ruled prior restraint to have been unjustified, such restraint nevertheless existed with legal sanction for more than 2 weeks. The right to publish was denied while the courts were in the process of deciding that such right to publish could not be denied.

The viability of a free press requires, in my judgment, that it not be subject to prior restraint upon publication, even during the pendency of judicial proceedings. If there be exceptions to this rule, they should be only in cases touching upon the very survival of the Nation, and under circumstances far more dire than those presented in the Pentagon Papers case. Certainly the press may be held accountable after publication for what it has published. If a newspaper defames an individual for example, it will properly be subject to a libel action. But to permit temporary injunctions in advance of publication in any but the most extreme cases does violence to constitutional protections which I believe the press does—and must—enjoy. Accordingly, I believe that legislation should be considered and enacted to prohibit the issuance by the courts of injunctions against publication, thereby removing prior restraint from the reach of the executive. Such legislation would affirm the principles of the first amendment and make the press even more secure from attack than it is today.

I might say Mr. Chairman, that we had some 6 days of hearings before the freedom of the press committee of the House, and we had a number of distinguished witnesses, starting with Arthur Goldberg, and Philip Kurland, University of Chicago Law School, who I think is to testify tomorrow, and I might say that I listened with growing concern, because witness after witness stated that the Government had no right to invoke prior restraint. This would set a precedent, which would be very dangerous. The press in the last 200 years has served us well. I think the press also have been responsible. I can't imagine a case where the subject would be so grave that the press would not be responsive to discussion. And I can see no real need ever, for the Government to have any involvement in their right to publish.

If we need examples—if we went to another administration I suppose, that there was some feeling in the Kennedy administration, that matters concerning the Bay of Pigs should not see the light of day, yet Kennedy stated that maybe if it had been published, the country might have avoided a serious mistake. And I think we must conclude that the Government does not work well in secret, and it is only when decisions are broadly shared by the American people, and on the basis of their reading, and due to the efforts of the press, will we make decisions that both enjoy national satisfaction and public support. And certainly the record, and the history of the Pentagon Papers is not reassuring. I might also add parenthetically that the Assistant Secretary of State, Mr. MacComber, testified before the committee, that 85 percent of the classified material should not or should never have been classified in the first place. And yet, in a case pending in the courts here on Moss—they should have that knowledge. And in the Pentagon case, they received a preliminary act again, on the grounds they of national security.

Protections are also needed against other less direct, but nevertheless dangerous, forms of assault on the free functioning of the press. Recently several cases have arisen involving the supenaing of news reporters' notes in criminal cases before the grand juries. The Supreme Court is scheduled to hear the most prominent of these, the *Caldwell* case, and two companion cases this term. In my opinion reporters must be allowed to preserve the confidentiality of their sources if the public is to be served with the free flow of information necessary in a democracy. Should the Court deny newsmen this protection, or fail to define its parameters sufficiently broadly, it will be necessary for Congress, I believe, to enact a national Newsmen's Privilege Act—now law in 17 states—to preserve the confidentiality of sources, except in cases of threat to human life, espionage, or foreign aggression. I might note that I have introduced such legislation in the House. Consideration should also be given to a New York State statute, that provides an absolute ban against the subpenaing of reporters' notes.

Basically, in my judgment, having a little experience in the newspaper business, it is my conclusion that a reporter's confidential sources should be treated precisely the same way as the lawyer-client relationship, or doctor-patient relationship. If the Government is going on a fishing expedition, such as in the case of the grand juries, if information is given, the sources would dry up.

Reporters, at times, are subpenaed, and their freedom of the press will be endangered, and I think the pending determination of the Supreme Court—we should watch this matter very closely, and it may be that we need legislation. I know there is an inclination on the part of some to leave this question to judicial determination. I think that is fine if judicial determination clearly holds that the reporters' sources should remain a privilege—but if they go in the opposite direction, I hope appropriate legislation would be forthcoming.

The press has often been called the "fourth estate," serving in many respects as a coordinate branch of our democracy, especially when a breakdown occurs among the other three. In this vital role of informing the people, the press has encountered many of the same difficulties vis-a-vis the executive branch as we in the Congress have. Time after time the roadblock of security classification has stood between the people and the information which the people and the Congress need to make democracy work, executive privilege is another roadblock faced by the Congress in its attempts to obtain information needed in the performance of its constitutional duties. Both the unwarranted assertion of executive privilege and the indiscriminate use of security classification seriously infringe on the people's right to know, a right which a free press was intended to guarantee.

I might say that I have asked the GAO—Mr. Staats—to put together a list, which he has agreed to do, of all the instances where the Executive has claimed executive privilege, despite Congress' paramount need for the information which was withheld. I am told that it is quite a long list, and I will forward it as soon as I receive it.

Senator Ervin. I might state that the executive branch of Government withholds a lot of information that Congress needs in order to perform its functions, and they give their reasons as either it is classified or that it comes within the purview of executive privilege. I ran into that when I was investigating the surveillance activities of the Department of the Army. During this investigation, they sought to use the executive privilege doctrine, and I was flatly told by the Department of Defense that they didn't think I had any need for the information I requested. Furthermore, when I sought testimony from witnesses that had firsthand knowledge of what was being investigated, I was told that the Department of the Army selects its own witnesses. They selected some very fine gentlemen, however who weren't even connected with the Department of the Army at the time the surveillance activities took place and who knew nothing about the personnel whom they were testifying about.

The qualifications of a witness in a court of law is of primary importance.

Mr. REID. Certainly helps.

Senator ERVIN. The witnesses supplied by the Army could only read a document to the committee—a document which conceals far more than it reveals.

Mr. REID. Well, I might add, that we have a series of letters, Mr. Chairman, between Senator Fulbright, and Secretary of Defense Laird, wherein Senator Fulbright requested some information, and it was denied, and it in no way cited an executive privilege. In my judgment, this didn't fall within executive privilege. They have no inherent right just to say that they are sorry, but they don't wish to furnish the information. I don't think they have that power.

Senator ERVIN. I would have to agree with you on your views. The Executive branch not only claims executive privilege, and the right to classify documents, but they also claim a right to withhold any information they choose for reasons of their own.

Mr. REID. Well, unfortunately, I put it a little stronger. I think the Executive has no overall right, and more than that, no right whatsoever to withhold from the Congress any information which is vital to Congress' performance of its constitutional duties, and I don't think that has gotten through the executive branch as yet.

The Pentagon papers illustrate the breakdown of our constitutional system of checks and balances resulting from the fetish for secrecy on the part of those in high places. The dimensions of this problem were analyzed in hearings before the House Subcommittee on Foreign Operations and Government Information in June, and certain remedies are clearly called for if the Congress and the press are to reassert their proper role.

First, in view of the overzealousness exhibited by the FCC in its drug-lyric notice to broadcasters, the Congress should clearly reaffirm and make more explicit the mandate of the Communication Act of 1934 prohibiting the FCC from exercising the power of censorship over the radio communications transmitted by any radio station or from interfering with the right of free speech by means of radio communication.

I have here the first such notice of the FCC of March 5, 1971, and in one paragraph they talk about the dangers of drug abuse, and go on to raise the serious questions of licensee responsibility. Broadcasting licensees—before broadcasting the words or lyrics of a selection played on their station must know the content of the song just as in the case of the foreign language broadcast. This may entail reasonable efforts to ascertain the meaning of the words used in the lyrics.

While this duty may deal with the responsibilities of the licensee, he remains fully responsible for its fulfillment. But nowhere in our history—the Government has no right to threaten a loss of license if he puts on the air certain matters which the FCC doesn't like. I think they have no right, and I might say that the House has no more right to make an investigation of CBS than to check and edit what goes on in the composing room of a newspaper. If these two documents of the FCC are any examples of what is going to happen in the future, I think that Congress should making amendments to the Communication Act of 1934.

Second, the Congress must enact a new statute governing classified documents. This law must sharply limit that which should be labeled secret, and it must provide for automatic declassification and congressional oversight. If a matter should remain secret after a stated period, there should be an affirmative, positive finding as to why continued secrecy is necessary. Sanctions should be imposed for improper classification by the Executive, and Congress should explicitly reserve the right to make public material improperly classified by the executive contrary to statute when classification is not a matter of national security and is simply to avoid governmental embarrassment.

I might say that the witnesses we had before our committee, estimated the amount of improperly classified material, but one witness stated that it was as high as 90 percent. I suspect there are some of General Washington's papers still there, and still classified. Interestingly enough, Executive Order No. 10501 does provide for some declassification, yet I can find no Executive willing to testify that there was in practice any meaningful or any large scale declassification going on. The witnesses said that when in doubt you classify it, and if you are still in doubt, classify it higher. When I was in the Department of State it was a standing joke, that if you really wanted it to be well read, make it top secret, and to protect it, give it a very low classification.

The truth of the matter is that there has been massive overclassification, and the fundamental factor is that the Government withheld from Congress information which it needs to carry on its functions properly. I have seen a fair amount of classified material, and in my judgment, most of it should never have been classified, and that which should have, should have been protected. We have to look at this as a very definite oversight, but every executive seems to feel that they have an unwritten right to dictate to the Congress on classified material, as to whether or not it should be released or made available to a Congressional committee. But I am not overly impressed with those arguments, and I think we have the right to declassify that which the executive branch has classified improperly.

Further, the Congress must come to grips with executive privilege. I do not believe the President has an absolute right or an overall inrerent right to deny information from the Congress, and thereby from the press and the American people. As the Supreme Court indicated in *Reynolds* v. *United States*, 345, U.S. 1(1953), it is the courts, and not the Executive, which should properly decide controversies between the Congress and the executive branch over the withholding of information. I would add most emphatically that the executive has no right whatsoever, as I mentioned earlier, to deny Congress information which is essential to the latter's performance of its constitutional duties. The executive does not have the right to make war on its own, it does not have the right to invade Cambodia or some other area of the world, or deny any documents to the Congress. And I believe what we must seek with the executive is an accommodation, and make it abundantly clear that these decisions do not lie totally with the executive branch. If we are to have accountability, then the Congress has the right to look at any classification.

If an executive is no longer accountable to the Congress of the American people, then it seems to me that we are in a very dangerous situation, one which the American people would not tolerate. I am very concerned that any major action by the executive, in the area of war and peace, must be as a result of constitutional decisions made by the Congress, prior to said action. I cannot imagine President Eisenhower losing sight of this, for the very simple reason that he had overriding respect for the Constitution and the balance of power.

The Freedom of Information Act, which became law 4 years ago, as you know Mr. Chairman, has been a significant vehicle for the American people to obtain information from the executive branch. Yet experience with its implementation suggests that it would be tightened in two respects. The types of information now permitted to be withheld must be sharply limited, and the time permitted for Government response to a court suit must be reduced from the present 60 days to 20 days so that information can be furnished as a matter of high priority. I might say again that Congressman John Moss and I filed suit under this act on June 23rd to compel the Government to make public the Pentagon Papers. In its preliminary answer to our complaint, the Government denied that it had a legal obligation to furnish the documents. We do not consider yesterday's publication by the Government of a portion of the documents an adequate response to our suit, and we will continue to demand in the court that the Government release all the documents to the public or justify its refusal to release them. I would hope that the press would use the Freedom of Information Act more and more as a means of serving the people's right to know.

Our democracy does not work well in secret. The principle of accountability is fundamental to our system, and both the Congress and the people must be informed for accountability to be meaningful.

The historic, and indeed constitutional, role of the press in holding government accountable to the people must never be allowed to diminish. To the extent that the American people permit encroachments upon the freedom of the press, we will have failed really to understand democracy, and I believe that Congress, working with the press, can restore that balance.

So again, if I may, permit me to compliment you and your committee on what you are doing. Failure in this area may lead to nothing less than the failure of our country.

Senator ERVIN. I want to commend you on the excellence of your statement, it certainly reflects the fact that you have broad and profound experience in this field. Your committee has conducted most illuminating hearings on this subject, and you have had some of the most knowledgeable men before you.

I agree completely with you that the most perilous of conditions have been brought on the press, and that there should be no prior restraints, except in the most narrow instances where the publication would pose a great threat to the national security. I also agree with you that there should be some restraint on the dissemination of information concerning negotiations with foreign nations. Some foreign nations would be reluctant to discuss things of importance in open society like we do.

Do you not agree with the position that if we would have had publications concerning the Bay of Pigs, that that situation would never have occurred?

Mr. Reid. That is my conviction, and I have 20–20 hindsight. It would have been far better if we had had publication on the Bay of Pigs. And indeed, there are many others, because I cannot believe that in the long agony of the Vietnam war, that the number of actions taken or that our involvement would become so deep had the facts not been hidden from the American people. I might add further that I question whether some members of the House and Senate would not have voted the Gulf of Tonkin resolution if we would have had the documents that now exist. In effect, the Congress without being told the truth passed the resolution, but if we had had all the facts, it would have been different.

Senator Ervin. I think it is very unfortunate in the long run that there is so much secrecy about the Vietnam war. Generally, I think the members of the Senate and the House are divided into two groups, one group is calling for a halt in the war, and the other is calling for a military victory. Personally, I think we could have won it 5 years ago with much less loss of life. One group of Congressmen have the very strong feeling that we should not pull out of the war at all. In effect, those issues remain unresolved—but if some form of policy would have been established, we probably could have avoided most of the disastrous consequences which surround our involvement in Vietnam.

Mr. Reid. I agree with you, but what disturbs me particularly was apparent dereliction in office. Because there is a lack of policy, we don't know how high this went. Some subordinates developed a policy, and discussed the actions of the major escalation I do not think the executive has that right, I think the executive must inform the Congress. Here was a case where I think relations broke down between Congress and the executive, and the excutive was not sufficiently aware of the entire situation.

Senator Ervin. I would certainly agree. I think what the Executive has inaugurated with regard to security classification was never intended to justify such classifications. I believe that Executive order was issued in good faith for the purpose of classifying documents which pertain to national security, but the scope of that order is growing and growing. The executive branch has gone to great extremes, surpassing the intent of the order, as was brought out before your committee when one witness expressed the opinion 85 or 95 percent of all classified documents need not be classified at all.

Mr. Reid. That is correct, it was more than just a little percentage.

Senator Ervin. The fact is that there is no uniformity among the different departments. Some years ago, I requested a specific report on American imports from Japan from the State Department as well as the Department of Commerce. Both gave me a copy of the report. The copy from the Department of Commerce was not classified in any respect, while the Department of State copy was classified and it was turned over to me on the condition that I wouldn't make any part of it public, under any circumstances.

Mr. **Reid.** In my judgment, they have no authority to send that stipulation with the report. I think we have to make it plain in one or two letters that Congress has every right to these reports, and that they have no right to say how we should handle it.

Senator **Ervin.** The classification of the report I received sometime ago, didn't have anything to do with protecting national security, but it did conceal a lot of individual and official policies of the executive department.

The first amendment as I see it has certain explicit freedoms, freedom of the press, freedom of speech, freedom of religion, and it seems to me that in your statement, and I agree with this, that it is the right of the people to know, and that is really the purpose of the first amendment insofar as government is concerned.

Mr. **Reid.** I think so, and it was the late Justice Black who said that the first amendment was to serve the governed, not the governor, and they·have no power to censor, rather the press would remain forever free to censor the Government. We have had some come in the Government fairly recently who feel patriotic, and that censorship can become binding, and the Government could say what the American people should or should not know, to prevent the truth from getting to the American people. I think the executive has no right to do this and I think our Founding Fathers knew what they were doing.

Senator **Ervin.** Your statement correctly emphasizes the fact that there is just as great a need for prohibition upon censorship of the broadcasting media as there is with respect to the printed word.

Mr. **Reid.** I think that radio and TV need precisely the same protection, and I think it is terribly important that this be given some consideration. I also think that there are some in the administration who think they can make a distinction between radio and TV and the press. I cannot make any distinction between these modes of communication. Therefore, I was very disturbed when I saw it deteriorating that way.

Senator **Ervin.** Don't you agree that if there are prior restraints, a very serious threat to the freedom of the press would exist even though the Government may never take action. The effect would be that the people in the newspaper media would be fearful that they would be prosecuted by the Government for publishing information and for that reason they would be very careful not to publish things that the Government does not like, thus avoiding a confrontation with the Government.

Mr. **Reid.** I think that is exactly correct, and I think there are very clear dangers that you touched on, but I don't think they would be afraid of a confrontation with the Government. The interesting thing to me when I served a little on the press, was that the Executive in the past and in the present administration, are very free to leak confidential and top secret information when it will serve their purpose, but the minute there is something not put their way, it is considered almost treason. You cannot have a double standard of this kind, and I would like to see the time when the administration would say that we should not have any fear of prior restraint. And until such time, the press will be very careful with how they deal with material.

The newspaper was established to present a clear picture for the American public, and yet if a reporter is subpenaed before the grand jury and does not testify, the newspaper is faced with a shutdown. The other danger that I was concerned about is what are the courts to think? Can the courts issue temporary restraining orders while they consider these matters? If so, then for however long it may take them to make a decision, you have lost the right that we have had for over 200 years. It puts the courts in a very difficult situation.

Senator ERVIN. Years ago, the Attorney General of the United States testified before a committee I was serving on and gave us his interpretation of some FBI data to justify his conclusions. When I asked him to produce the FBI document he cited, he said that he couldn't because it was "confidential." I said that I was not going to accept his interpretation of those documents as being correct. and since he had used them for his purposes, I insist that he give them to the committee so that we could make an objective determination. I was never able to establish whether the information that the Attorney General had put in the record was correct. So the use of confidential material for the purpose of the——

Mr. REID. Mr. Chairman, I would look with favor if the Congress would subpena some members of the executive branch, be they in the cabinet or in the White House, and take that issue to court to see in the judgment of the courts whether it was proper or improper to withhold information. I think if we did that once or twice. it would serve the purpose, and the Executive would not have a lively sense of doing this every time you turn around.

Senator ERVIN. We had the testimony of a very knowledgeable witness sometime ago who pointed out that in the trial of Aaron Burr Chief Justice Marshall stated that the courts could even subpena the President of the United States. If the courts can, I think a congressional committee could.

Mr. REID. I would think so, and frankly to the extent of alarm, I am concerned about this. Certainly there would be enough reasons to be in this posture. They have the power; but they don't execute it. I would hate to see a flat out confrontation to get accommodation. But if it comes to that, we have the power. But we fail to execute it.

Senator ERVIN. I have just one other observation to make. Yesterday, Mr. Norman Isaacs, who has profound experience as a publisher as well as an editor, and who is now a professor of journalism at Columbia University, testified that we should have an absolute freedom from all prior restraints. He took the position that the press should be responsible to hold from publication information which affects national security. I have been trying to find evidence which would indicate that the press has not always been responsible in this way. There is only one occasion of which I am aware. That is when a Chicago newspaper published that the Japanese code had been broken. In your study of this subject, have you found any instances where you were convinced that the press had acted irresponsibly in printing information that really affected national security?

Mr. **Reid.** The Japanese code is the only instance that I know of. But I have one illustration. At one point, the *Herald Tribune* had an item which the Government raised some questions about. We looked at it very carefully, and discussed it, and we agreed in this instance that perhaps the column should not be syndicated. It had to do with a radar tracking installation in Turkey that had something to do with the range and character of these missiles, and for that reason—if it had been published, we would have lost that important facility.

I thought that made sense, and for that reason, we decided not to publish it. I don't know of any other than the Japanese code. And I think the Government should be very thankful that the press realizes its responsibilities. I have had the opportunity to live in other countries where the facts are very hard to get—but rather than hassling the press, we ought to be thankful for the press we have, for the group of men and women who serve as reporters—and radio and TV and editors, who really give up their life so that the public may know.

Mr. **Baskir.** Do you know what the consequences of the publishing that the Japanese code had been broken were?

Mr. **Reid.** I haven't seen any Government documents related to what the consequences were, but I merely know that the codes were changed.

Mr. **Baskir.** Were the changes the result of that story.

Mr. **Reid.** I can't say for sure, but from my own knowledge, I would presume so.

Mr. **Baskir.** The reason I ask is that it would seem to me that there would be some concern.

Mr. **Reid.** I understand while there is or was concern, this would have a great security impact. In fact, the Japanese and nobody else really realized it until sometime long afterwards, and it didn't really have an impact at all.

Mr. **Baskir.** You may correct me if I am wrong on this point, but it was alleged that the publication of the Penatgon papers might affect communications and our codes, and the answer to that is negative, that the publication would not affect our communications and so forth.

Mr. **Reid.** Without going into technical detail, there was no real reason for concern on that. Certainly diplomatic relations in Canada could have been affected.

Mr. **Baskir.** Do you think if the press would have published the information that Mr. Kissinger was going to visit China, that it would have had any impact on his meeting with the Chinese officials, and perhaps could have discouraged the meeting between the two governments?

Mr. **Reid.** My answer to this would be very simple, and it has two parts. One, the Government has the capacity in a very sophisticated way to keep secrets and move people around, and if they don't, they should. Secondly, it is a question of weighing what is important, and in my judgment, there is nothing that justifies undermining the right to publish, and in the long run this would average itself out. And so, if you weigh this case against undermining the rights of the free press, there is no question in my mind that the press must be upheld and the right to publish must be upheld.

Mr. BASKIR. I don't know if it was an American or foreign newspaper that presented enough information—somebody might have written a story, and——

Mr. REID. I think that was possible, and I think Mr. Kissinger was reported as having a stomach ache.

Mr. BASKIR. These two cases might suggest that when stories—would be damaging—they are not read, and therefore don't cause damage.

Mr. REID. I don't think you have a case there. I don't know a case serious enough to justify prior restraint that the press wouldn't recognize.

Senator ERVIN. Isn't it always the case that with every freedom there will always be abuses?

Mr. REID. I think that is the nature of the definition.

Senator ERVIN. And if we attempt to adopt laws and regulation of practices, that we eventually destroy the freedom itself.

Mr. REID. I think that is precisely correct.

Senator ERVIN. I want to thank you for making a most significant contribution to this hearing.

Mr. REID. Thank you very much for permitting me to be here.

Senator ERVIN. Counsel, call the next witness.

Mr. BASKIR. Doctor Frank Stanton, president, Columbia Broadcasting System.

Senator ERVIN. Dr. Stanton, I wish to welcome you to the subcommittee, and express our deep appreciation for your willingness to appear and to give us the benefit of your views in an area in which you are certainly highly competent to speak.

STATEMENT OF FRANK STANTON, PRESIDENT, CBS

Mr. STANTON. Thank you Mr. Chairman. I appreciate very much this opportunity to associate myself with the concern that this subcommittee, by conducting these hearings, has expressed in the effective application of the principles of the first amendment. In your address to the Association of American Publishers last week, Mr. Chairman, you stated, with clarity and eloquence, that the whole basis and rationale of the first amendment consist in an abiding faith that our country has nothing to fear from the exercise of its freedom as long as it leaves the truth free to combat error.

I agree wholeheartedly with the sense of urgency implicit in the subcommittee's announced intention of seeking to create a better appreciation of the first amendment's purpose and its crucial importance to a free society. It seems to me essential to the viability of our institutions that the Congress from time to time reassert, through such proceedings as these, the nature and extent of our basic freedoms in order that those freedoms continue to have life and meaning in the face of changes and complexities—whether they be social, economic, technical, or political—that might otherwise erode them through public fears or apathy or cynicism. The Congress, of all our three branches of Government, is closest to the people and most specifically charged and empowered to declare and illumine, on its own initiative, public policy.

In the case of the provisions for freedom of speech and of the press in the first amendment, such initiative on the part of the Congress becomes the more essential when new means of communications enlarge the capacity of the people to know, to question and to criticize. When after Gutenberg's contrivance of movable type, human communications underwent their first great revolution, a major preoccupation of Tudor civil strife was the extension to the press of the same freedom which applied to speech. And it is of pivotal significance that the First Session of the First Congress of the United States incorporated in the language of the first amendment prohibiting the abridgment of free speech, the words, "or of the press." There is no doubt whatsoever in my mind that in referring to the press those prescient authors of the Bill of Rights intended to describe all means of communicating ideas. For their point, as the Supreme Court has now made clear, was not to protect any specific medium but to assure forever the right of the people to the full and free interchange of information and opinion—and to put that right beyond the power of government to inhibit or hamper.

I am, therefore, greatly heartened, Mr. Chairman, that your subcommittee recognizes, as the courts have repeatedly declared, the applicability of the first amendment alike to both the "printed and broadcast press." For the roles of the broadcast and print media are identical: to provide the public with news and information and to stimulate public inquiry and criticism by themselves inquiring and being critical. In carrying out their vital mission, they reach for the same audience, which expects both media to perform independently and vigorously, free from governmental pressures.

In view of the essential purposes shared by the broadcast and press media, their dissimilarities pale into total insignificance. The differences are likely in any case to prove temporary. Many of the physical distinctions between the broadcast press and today's printed press, for example, will diminish when technological advances make possible the transmission of newspapers directly into the home by facsimile printout—through cable or over the air. If the same criterion now applied to the broadcast press—the numerical limitation of channels of distribution—obtains, the printed press, now readily available on every street corner, would be subject to regulation. Would this confer upon the government the power to subject the contents and the methods of such a traditionally free press to official scrutiny? Such a rationale would be wholly repugnant to the spirit of the first amendment and clearly defiant of its intent.

And yet some contend, that because broadcasting is licensed and print is not, that fact, springing wholly from technological factors, justifies governmental surveillance of broadcast journalism. We reject that view. The true test of government devotion to the first amendment is the sensitivity with which it exercises its licensing power and declines to take advantage of technical factors to impose controls that would otherwise be clearly against public policy.

Yet today, more than at any time in the history of radio and television, broadcast journalism is jeopardized by attempts to regulate its content or its methods, including unreasonable application of the FCC's fairness doctrine to the coverage of controversial public issues. In the past, CBS has had no difficulty with that doctrine because it reflected our basic journalistic goal—to present public issues fairly. Recently, however, in considering fairness doctrine complaints, the Commission has engaged in microscopic examination of a licensee's coverage of an issue, going to such extremes as counting of lines in a broadcast transcript.

In one instance, to determine whether a broadcast involved a controversial issue, the Commission considered 28 pages of correspondence, over a 5-month period, before it was able to affirm CBS's judgment that a 9-minute feature on bullfighting did not constitute a presentation of a controversial issue of public importance and did not justify a request for "equal time." This type of detailed examination by a government body is wholly incompatible with effective broadcast treatment of public issues.

Other instances abound.

In finding a Miami Beach station in violation of the fairness doctrine in its coverage of a proposal for legalization of casino gambling, the Commission actually counted the lines of copy devoted to both sides of the issue and apparently relied on the line count in making its decision that the station should have presented more progambling material.

The practical consequences of official interference in broadcast journalism are well-illustrated by the frustration of CBS's effort to periodically present a series of loyal opposition broadcasts. The loyal opposition concept was an effort to give to the major party out of power—whether Republican or Democratic—some opportunity for access to balance that so easily achieved by an incumbent President. In July 1970, following a number of prime time Presidential broadcast appearances, CBS made a single broadcast available to the Democratic National Committee to respond to the President. Whatever may be said about our decision, it surely was within the reasonable scope of journalistic judgment. On the complaint of the Republican National Committee, however, the FCC held that the Republicans were entitled to reply to the Democratic broadcast—a reply, in other words, to a reply—and 14 months later that issue is still in the courts and was argued last Friday before the court of appeals here in the District. As a direct result, CBS has not further developed its loyal opposition format, and the public is the loser.

As Commission scrutiny over our judgments intensifies, prolonged administrative and judicial proceedings are inevitable, if only to untangle the factual morass which inevitably results from overclose analysis of these highly subjective matters. Although some on the Commission fully agree that deep involvement in day-to-day journalistic practices is an inappropriate function of government, the trend unfortunately continues in the opposite direction.

A number of other matters involving the fairness doctrine are now in the courts. Some of the rulings in this area, if they are upheld will adversely affect broadcasters' ability to provide fair, balanced and meaningful coverage of public issues.

One held that a broadcaster may not have a policy which excludes all "editorial advertisements"—paid spot announcements setting forth partisan viewpoints on public issues—and directed the FCC to develop a regulatory scheme applicable to such "advertisements." Since broadcast time is limited, this decision means at the very least that the FCC, and inevitably the courts, will be arbitrating licensee judgments regarding on what issues and to whom time must be sold to enable partisans to present their views. This constitutes a real threat to a free broadcast press because it empowers a government agency to decide what issues a journalist must cover—whether or not, as a matter of substance, they meet journalistic standards of relevance and urgency.

We recognize that we and other journalists make mistakes, that all news editing involves judgments as to which reasonable men can differ, and that all of us are open to criticism. Nevertheless, self-examination by each of this nation's diverse journalistic enterprises is infinitely preferable to government inquiries, conducted to determine whether a particular news or public affairs broadcast meets government standards.

This leads me to another subject touched on in your letter inviting me to testify. I refer to the increasing tendency of governmental agencies to make print and broadcast journalists de facto investigave arms of the government through the use of subpenas—a particularly insidious threat to the ability of newsmen to carry out their responsibilities effectively. Not only is the burden of compliance with such subpenas extreme and in itself punitive; but compelling journalists to reveal their sources or nonpublished materials such as notes, films, tapes, has a chilling effect on and obviously seriously impeded their future access to such sources.

Special first amendment concerns are, of course, presented by subpenas issued for the purpose of editorial surveillance. CBS, as you know, recently contested the right of a House subcommittee to subpena nonbroadcast material—"outtakes"—in order to determine whether a broadcast produced by CBS News complied with the subcommittee's conception of correct journalistic standards. Our chief concern was the chilling effect that such legislative review would have not only on our own newsmen but on all other broadcast journalists as well. Whether a particular subpena requires the actual divulging of confidential material or the production of material which the journalist did not choose to broadcast for any number of reasons is beside the point. The gravity of this threat to the free press stems from efforts to subject professional news judgments to government scrutiny. The dark shadow of surveillance can do nothing but inhibit the free flow of information, without which we believe a robust press is an impossibility.

As noticed in our amicus brief filed in the U.S. Supreme Court in the *Caldwell* case, NBC and CBS alone have received 121 subpenas in the last 30 months. The cumulative effect of these subpenas has placed substantial burdens on personnel, most of whose primary function should be gathering and publishing the news.

More important, however, is the effect of a climate of "subpenability" on the ability of broadcast newsmen to obtain film interviews. Apropos is the following excerpt from an affidavit of CBS

News Correspondent David Culhane, recently filed in a New York court, which quashed a subpena for outtakes on first amendment and other grounds. Said Mr. Culhane:

> If those consulted or interviewed by me in my news gathering efforts had reasons to believe, or even suspect, that all of what they disclosed would be subject to subpoena, it is my firm belief that gathering significant news on film would be, at best, much more difficult and less effective and at worst, nearly impossible.

The U.S. Supreme Court will soon be hearing oral argument in the *Caldwell* case and two other related cases, and it is our hope that the Court will recognize a first amendment newsman's right on the facts of these cases. Regardless of their outcome, however, legislation clearly defining a newsman's right is, we believe, necessary to provide generally applicable guidance in the area.

We support S. 1311, introduced by Senator Pearson, which goes a long way toward the kind of definition of a newsman's rights which we believe would insure his ability to function effectively. We do have some suggestions for improvement of the bill, which include a revision that would protect not just that which is explicitly confidential but all information which has not been broadcast or published. Our lawyers are prepared to provide suggested language to the subcommittee's staff.

Senator ERVIN. I might interrupt you at this point, and say that we would be glad to receive that information.

Mr. STANTON. Thank you, we will submit it.

In conclusion, Mr. Chairman, I would like to commend this subcommittee for taking up this vital matter at a time when all our institutions are under great stress.

As William Allen White wisely noted some years ago in a Pulitzer Prize-winning editorial:

> You say that freedom of utterance is not for time of stress, and I reply with the sad truth that only in time of stress is freedom of utterance in danger. No one questions it in calm days because it is not needed. And the reverse is true also; only when free utterance is suppressed is it needed, and when it is needed, it is most vital to justice.

The fact that the responsibility of the press to report events without fear or favor—reports that often sear official sensibilities—has never been carried out to everyone's satisfaction is perhaps the strongest guaranty that it has at least maintained its independence. Thus, while Thomas Jefferson could not in 1803 attribute the shortcomings of the press to the "Eastern Establishment" he could write:

> Indeed the abuses of the freedom of the press here have been carried to a length never before known or borne by any civilized nation.

Yet he went on to write:

> But it is so difficult to draw a clear line of separation between the abuse and the wholesome use of the press, that as yet we have found it better to trust the public judgment, rather than the magistrate, with the disrcimination between truth and falsehood. And hitherto the public judgment has performed that office with wonderful correctness.

Mr. Chairman, I would like to think that it is our mutual confidence in the public rather than the magistrate that has brought us together here this morning.

Senator ERVIN. Is it not true that the over all purpose of the First

Amendment is to enable people to know the truth and to exercise freedom of thought, insofar as government is concerned, for the adoption of wise governmental policies?

Mr. STANTON. Absolutely.

Senator ERVIN. In other words, freedom of the press and freedom of speech were primarily adopted for the benefit of the people, not for the benefit of those who might be engaged in commercial activities respecting communications.

Mr. STANTON. No question about that, and if our democracy is to survive we need the full application of the first amendment because the people's right to know is the most cherished thing we have.

Senator ERVIN. In a Nation founded on the free enterprise system, we recognize the necessity to have incentives to encourage men and organizations to provide media of communication.

Mr. STANTON. Yes, sir.

Senator ERVIN. Now, as you pointed out, of course at the time the first amendment was written, no one imagined that we would ever have such a media of communications as we have today.

Mr. STANTON. That is my opinion, and certainly I think it would be stretching imagination to think they could have thought of it at that time.

Senator ERVIN. But as far as the principles of the first amendment are concerned, they attach themselves to any new conditions which fall within the compass of its spirit.

Mr. STANTON. Yes, sir.

Senator ERVIN. Now, it is true, of course, that broadcast frequencies are, in a sense, in scarce supply. To prevent the destruction of the potentialities of broadcasting it is necessary for the Government to regulate the broadcast media to some extent.

Mr. STANTON. Yes, sir, there has to be a traffic officer to keep the user of one frequency from impinging upon the user of another frequency.

Senator ERVIN. In the absence of some Government regulation, the broadcasting media would fail in its effort to inform the people. There would be such a conflict of broadcasts that none of them could be heard.

Mr. STANTON. Mr. Chairman, there was a time in our history in this country when that condition did exist, in the early days of radio. You may recall that there were a number of stations that operated on the same frequencies, and sometimes the operators of stations didn't respect another man's frequency, and would go on that frequency. In a sense, you have that condition happening at times in international broadcasting today, where some governments don't observe the rights of other governments in the use of specific frequencies. But back in the twenties, when that condition existed in this country, is when you had the Federal Radio Commission set up for the purpose of allocating and policing the use of those frequencies so that they were not denied to the public use, because if you—if more than one broadcaster operates on the same frequency, you can't very well serve much of the people. You can serve only the people immediately around the transmitter. But the vast area in between would get two signals and would be hash.

Senator ERVIN. So the broadcast media recognize the necessity of having Government licensing in the sense that the Government must restrict such media to such numbers as can actually take advantage of the airways for the service of the people.

Mr. STANTON. That is correct.

Senator ERVIN. Your position, I take it, is this: That when the Government issues a license, the licensee is entitled under the first amendment to freedom of speech; and also, in essence, the press has the same rights to freedom of speech. This freedom extends to any person speaking with his voice, or any person of the press.

Mr. STANTON. Mr. Chairman, I make no distinction between the rights that broadcasting has under the first amendment and the rights that the print media have under the first amendment.

Senator ERVIN. You concede that something in the nature of the fairness doctrine is desirable and necessary.

Mr. STANTON. Historically, I didn't think so, and indeed, the fairness doctrine as outlined in 1949, by the FCC, was completely consistent with the policies under which we operated in the news and public affairs area. We have been able to live with the fairness doctrine up to this particular time because in a sense it was the doctrine under which we began our news and public affairs operations back in the early thirties. It is only now that we're beginning to feel the detailed—microscopic, if you will, investigations by the Commission that we are beginning to feel the negative effect of the application of the fairness doctrine. As long as the doctrine was a statement of principle and we were given some discretion in how we applied the doctrine, we had no difficulty with it, but just as soon as you begin counting words, getting into the details that the Commission has gotten into—on issues that we felt had been dealt with properly on the air, you begin to impede the free flow of information, in my opinion.

The case I cited in my statement regarding the bullfight, and the ridiculous extremes to which the Commission went in that case I think is typical of the kind of condition we now face, and I want to make it clear that this hasn't always been the case at the Commission, nor is it the case today that all Commissioners share this point of view. But the prevailing direction today is getting more and more into the areas that I think the Commission should stay out of under the first amendment.

Senator ERVIN. Isn't that one of the unfortunate facts about government, that government seems to have an insatiable thirst for more and more power. If you do not have safeguards like the constitutional provisions that can thwart the Government, the Government will never stop short in its thirst for acquiring more power. That is the reason I think the Constitution was drawn. That is the reason we have the first amendment.

Mr. STANTON. Absolutely. You are in a better position than I to judge the bureaucracy's thrust and thirst for power. But sitting where I do, over the span of years I've been in the job that I now how, I have seen an increasing involvement on the part of the bureaucracy of the FCC into things that I think we're protected from under the first amendment.

Senator ERVIN. As you pointed out in the quotation from William Allen White, we do not have any trouble with the First Amendment freedoms when everything is harmonious and there are no troubles, no stresses and no strains. It is in the times when we do have stresses and strains, and added governmental pressures to control the media of communications that we need these freedoms the most.

Mr. STANTON. I couldn't agree with you more, sir.

Senator ERVIN. And there is another danger, that when we do have any kind of Government regulations, the Government tends to overregulate. When the Government undertakes to overregulate the media of communications we have a danger that the Government regulation will ultimately destroy the very objectives which the first amendment was created to achieve.

Mr. STANTON. Yes, sir. It is my belief that overregulation in any field is undesirable but overregulation in the field of ideas I think is dangerous to the future of the Republic.

Senator ERVIN. There would be no question about that in my judgment. I certainly agree with you in the observation that the first amendment was designed to cover all methods of communicating ideas. It seems to me, that what distinguishes America from all the totalitarian states is the fact that we do have these first amendment rights, and we are allowed to say things whether the Government likes them or not, or even whether a majority of the public may like them or not.

Mr. STANTON. Yes, sir.

Senator ERVIN. Now, unfortunately, a lot of the people—and all of us may at times share this inclination—don't like what's being said. They want to suppress the saying of it. This is a constant threat which is posed by society to the first amendment and first amendment rights.

Mr. STANTON. Yes, I think we have all had our moments when we wanted to suppress something, and it's good that we don't have that right.

Senator ERVIN. I must confess that sometimes I don't like to hear a Senator get up and express ideas not in harmony with the sound views I entertain, but I think I have schooled myself sufficiently to be tolerant, and recognize that every viewpoint has the right to express itself, whether it's pleasing to government or whether it's pleasing to any substantial portion of society. Isn't that what makes our institutions work, really?

Mr. STANTON. I believe it is, and I think it's the great thing about our society.

Senator ERVIN. In other words, if it be a free interchange of ideas, persons can exercise freedom of speech uninhibited by Government. The chances are that if we find things in our society that need correcting, they will be corrected ultimately. As long as first amendment freedoms are preserved and maintained, there is no rational and no rightful place in our land for such things as violent revolution.

Mr. STANTON. That is correct.

Senator ERVIN. I think that the closing quotation from Thomas Jefferson which you gave in your statement indicates why we ought to be very reluctant to attempt to regulate strictly any exercise of first amendment freedoms. We have the danger we mentioned a while ago of destroying the freedom if you overregulate. If you attempt to prevent all abuses of the freedom, you wind up with no freedom at all.

Thomas Jefferson, who was a great champion of freedom of speech—didn't always like it himself, when he got in political office. Some of the people didn't approve of some of his policies, but he recognized that the greatest danger to our Republic was to try to place restrictions on freedom of speech, which protects the expression of ideas which we don't like. Thomas Jefferson also said to a group of students in 1799 " . . . to preserve the freedom of the mind, and the freedom of the press, every spirit should be ready to devote himself to martyrdom. For as long as we may think as we will, and speak as we think, the condition of man will proceed in improvement." I think that you exhibited this spirit when you declined to produce the data that had been collected by CBS in the preparation of the documentary called "The Selling of the Pentagon." I couldn't see any purpose that the committee could possibly have in view in that connection, except the purpose of taking the data which was not published, and then coming up with a pronouncement that CBS had not handled the truth in the way that the committee thought it ought to have handled it.

Mr. STANTON. I share your opinion of the objective.

Senator ERVIN. And for that reason, I think you struck a great blow for the preservation of freedom of the press when you declined to produce those documents, and I rejoiced in the House vote which upheld that action.

Mr. STANTON. Thank you.

Mr. BASKIR. Dr. Stanton, in your testimony, you refer to future technological development which might substantially change the assumptions upon which regulation of broadcasting is now based. I have seen reports to the effect that with the use of cable television and perhaps inexpensive videotape recordings, that perhaps individual citizens can actually broadcast on television to their neighbors. I do not know if that is science fiction or not. I wonder if you have any view on that as a possibility.

Dr. STANTON. Well, that's—that's certainly within the state of the art, but for practical reasons I'm not so sure that it would take place quite that way. You are correct in your statement about the future and what it holds for opening up the channels. I think that there are a number of things that are here today which, when they're expanded fully, will change the availability of channels in this country markedly. It's not inconceivable to think in terms of 20 and 30, as high perhaps as 40 or 50 channels into every home in a city by cable. Once you get that kind of access in terms of all those channels you open up a whole different set of conditions than you have today with the more limited spectrum use that we have under the FCC regulations. It's also true, of course, that there will be other forms of transmission of video material, but—and here I refer to the subject that you mentioned in cassettes, video cassettes—but those will not have the simultaneity or the instantaneous quality that we had this morning, for example, when you could sit in your hotel room here in the District and watch a program coming live from Peking. Now, that's part of the magic of television, and when that's taken away from the medium, I think something will be lost

It'll become a reference machine rather than a—the kind of purveyor of current affairs. So I think that there'll always be need and public appetite for the live broadcast, whether it's done by cable or whether it's done over the air. But you're quite right that there is going to be a tremendous use of that black box in your living room with the picture tube in it by the advent or the addition of the prerecorded tape which you can circulate or acquire and look at your leisure.

Actually—and we're a little off, I think, the subject of the first amendment here, but let me just make the point, that until the video cassette came along, the viewer was at the mercy of the broadcaster in terms of when programs came on. This is not true in any other field. If you want to read, you can go to your library shelf and take down a book and read it at 3 o'clock in the morning or 3 o'clock in the afternoon. It's at your selection. You can pick the subject area and you can pick the time. In sound transmission, if you want to listen to Beethoven's Fifth in the middle of the night, or Blood, Sweat and Tears, you can get the record out of your library or the tape out of your library and you can, at your convenience, pick the material and pick the time. But until the video cassette came along, you couldn't do that, and now you've opened up a whole new field of information. But this is really, I hope, not in the area of first amendment at this point.

Mr. **Baskir**. The reason I asked you the question is because it might have some consequences for some of the assumptions upon which the more than traffic cop regulation performed by Government is based. It's based, as I understand it, on the fact that because there are limited channels for dispensing of news and opinion and other kinds of materials electronically, according to some remarks I've seen in Supreme Court cases, the Government regulation has to be more than that of a traffic cop, it has to go a little bit further. If in fact it turns out that there are no limitations in terms of access as a practical matter, 30 or 40 channels, it may be that those assumptions no longer will hold true.

Dr. **Stanton**. I would hope that would be the case. If you look at the population of daily newspapers in this country today as against the radio and television station count, there is a great difference in the two numbers. I think it's of the order of four or five to one —more television and radio stations than newspapers, daily newspapers. It's true that there are under a thousand television stations, but if you take all of the electronic means of distribution—of distributing information, and take that number of stations and set that against the number of daily newspapers, there's much more competition in the marketplace on the electronic side than there is on the print side, even today, and if you look down the road, as you're pointing out, I think it really dissolves the need for the kind of regulation that we've had, are having at the present time or have had.

Mr. **Baskir**. We might be coming to a somewhat absurd situation where in theory the printed press is accessible to all and everybody can enter into it through their mimeograph machine but in practice we don't have it, and yet in theory—maybe inherited theory—

broadcasting press is very limited, yet in practice many, many people can get into it, and yet the one is regulated and the other is not.

Mr. STANTON. There's no question that the numbers and circulation are now on the side of the electronic media as against the print media.

Mr. BASKIR. I'd like to ask you about the fairness doctrine's application to one particular subject. It seems to me that I recall not so many years ago that persons who were unhappy about cigarette smoking tried to use the fairness doctrine to get their case on radio and television and had a great deal of difficulty before they were successful. Is my recollection correct?

Mr. STANTON. Yes, you are referring to the case brought before Mr. Banzhaf, and the Commission ruled that we have to give time to the opposing voices on the subject of cigarette smoking. And then of course, as you know, it became a matter for Congress, and then there was legislation prohibiting—I think fairly, the use of cigarette and tobacco advertising on television and not applying the same relationship to other media. It seems to me that if it is wrong and that Congress in its wisdom had decided that it was wrong for one medium, it seems to me it was wrong for all media. But that started, that had its roots at the FCC in the fairness doctrine.

Mr. BASKIR. Did Mr. Banzhaf have some trouble with the FCC in convincing them that this was a controversial issue, or other people, prior to his experience?

Mr. STANTON. I am not intimately associated with the history on that to give a satisfactory answer in detail. I don't know what his difficulties were in the early days. Obviously, there was a marked change from the initial protest to the ultimate application of legislation.

Mr. BASKIR. The reason I ask is because I understand that a court just very recently has now determined that smoking is no longer controversial, so it no longer falls under the fairness doctrine. It seems to me in a short period of years, truth has gone from one end of the spectrum to the other.

Mr. STANTON. That is why I don't think we ought to have an official agency deciding on what is truth.

Mr. BASKIR. If the FCC and the court together decide that smoking is not controversial and therefore the fairness doctrine doesn't apply, it seems to me that the power to determine what's a controversy determines whether you can hear an argument or not hear an argument, and that goes to the very heart of the first amendment. Implicit in the fairness doctrine is deciding when things are not controversy. And if you have that power, the Government has that power, they can keep views off the air.

Mr. STANTON. Well, I would much rather have that responsibility fixed with professional journalists in the multitude of stations and newspapers in this country than I would to have it set by four men out of seven as a minimum on the FCC.

Senator ERVIN. I think that illustrates one of the reasons why the first amendment was adopted—so that everybody would have a right to speak, and so neither the Surgeon General of the United States or any other agency of the Government could claim that he had possession of all the truth on the subject, and those who disagreed with him had none. I think it illustrates a growing tendency on the part of a lot of people in the Government to exercise the privilege of brainwashing the American people. I think the first amendment was adopted to keep the American people from being brainwashed by the Government.

Mr. STANTON. Every time I come up to the question of the history of the first amendment, I am more impressed by the wisdom of our Founding Fathers in establishing the first amendment.

Senator ERVIN. Because there is no doubt of the fact that if the history of the world proves anything, it proves that there are a lot of people—and some get in positions of a high governmental authority, that would not allow anybody to think anything unless their thoughts coincided with the thoughts that they entertained. They would not allow anybody to say anything unless their speech coincided with what they thought they ought to say. And that is the very reason the first amendment was adopted—to make Americans politically, intellectually and spiritually free.

Mr. STANTON. Yes, sir.

Senator ERVIN. Thank you very much Mr. Stanton.

Senator KENNEDY. I regret very much not being here earlier. I wanted to be here at the outset of these hearings, and I would congratulate our distinguished chairman for holding them. He has been a champion of civil liberties, and I know that he has been using his efforts to extend the civil liberties. So I want to commend our chairman for the work he has done in holding these hearings.

I regret, Mr. Stanton, not hearing you read your statement, but I will read it with great interest. I was really interested in your views about the general impact of the method used by those in high positions within the administration, and I am speaking specifically of the Vice President, and the general efforts which have been made by the administration, to use the grand jury process to obtain reporters' files, and the insulting remarks to the integrity of TV, and the brazen attempt to try to suppress the facts about the South East Asia conflict. Talking about the attacks on the news media, I am just wondering what has been the effect upon the media, on the manner in which they fill their responsibilities what is the morale in news media today?

Mr. STANTON. In the first place, Senator Kennedy, I think a witness who is closer to the news beat and to the working press would probably give you a more telling response to your question about morale. As I have seen it, it hasn't suffered. The things that have happened are more in the nature of taking a lot more time to handle problems that arise out of the attacks, and the subpenas and so forth. It has not changed our dedication to getting on with the main job of letting the people know as best we can to what is happening in the world today.

I must say to you, so that the record from my side of the table reflects this, that since the Attorney General established guidelines for subpenas, the number of subpenas from our shop coming from that quarter have fallen off markedly. That doesn't reduce the numbers that we get from other jurisdictions or other parts of Government, but from the Attorney General's side there was a marked change about a year ago. But this all puts an enormous burden on the news personnel and news management, and the time that we spend on these subpenas and so forth should be spent on investigative reporting.

From my personal point of view, I have to spend a lot more time on handling mail as a result of some of these attacks. But that is a small price to pay if we continue to have freedom under the first amendment. I am not overly sensitive, I hope, to criticism, although some of my colleagues have said that I am. But——

Senator **Kennedy**. We are all used to a little criticism.

Mr. **Stanton**. Yes, some are more skillful in handling it than others. But it hasn't been—these attacks have not been overly burdensome, and I don't believe they have affected the public's right to know up to this point. But this is not a curve that's turning down: this is a curve that's going up. And where that critical point passes when things begin to happen that are against the interest of the public is my concern, and one of the reasons I'm so delighted that these hearings are being held because I think it focuses attention on this problem.

Senator **Kennedy**. In the newspapers and the TV, for example—do you find that media people are less inclined to pursue vigorous inquiries because of the danger of compromising the sources from which they receive information?

Is this a possible implication of this kind of a broad scale attack? Is this a concern to those trying to meet their responsibilities and to make the public aware of the attempted intimidation of sources of information? Do you understand—do you find newsmen more reluctant to jeopardize their sources without this kind of legislation?

Mr. **Stanton**. Well, you say is it possible, and is it a logical spin-off, and I would have to give you an affirmative answer on that.

Senator **Kennedy**. And obviously, that reflects, I suppose to some extent, the type of news department.

Mr. **Stanton**. It could. Whether it has happened up to this point I'm not in a position to state. It certainly has not come to my attention that we have avoided any stories because of that particular point. There may be—stories may be more difficult to come by, but there has always been, and I think there always should be, something approaching an adversary relationship between Government and the press. I get very nervous when I see Government and press getting close together. I think they have a role to play, and each should play it, and if the fourth estate is really going to be the fourth estate, then I think it has to keep an arm's length relationship, and it has to dig for stories and not expect to get handouts.

Senator **Kennedy**. But the news media are there to fulfill that function, and if I understand the thrust of your testimony, there is a heavy hand in terms of the Government's steps to intervene in the pursuit of those stories.

Mr. **Stanton**. Well, there is a distinction, it seems to me, that applied in the case of the early attacks from the Vice President, a distinction between attacks on print and attacks on the broadcast media. First, let me go back and say something that I said before, and that is that we all make mistakes, and we make our share of them, and we are not alleging to criticism. But when a man in the position of the Vice President makes the attacks on the broadcasting media, and when you recognize that the FCC is the controller of our licenses, and it is human nature to believe that men serving on that Commission will look to the second highest office in the land, if you will, to get a clue as to, perhaps, how they should conduct themselves.

Senator KENNEDY. Or perhaps how the man in the top office thinks.

Mr. STANTON. Perhaps, but I'll stop at the second one, for the moment. It's that kind of situation that makes our position a little different than the position of the print media. And the print media have had hundreds of years of building up their position in society in this country. And perhaps when we've lived as long with some of the problems that the print media have lived with we'll be stronger in our relations with Government. But this goes back to a question that was raised by counsel, and that it that when the day comes when you have more channels that will ease the logical reason for it. But right now I think that the Commission should ease off in its minute application of the fairness doctrine. I have no fault to find with the doctrine of fairness, but I don't like to see the kind of application made and the way that's going to lead into what I think will be the control, ultimately, of a lot of the news that's on the air.

Senator KENNEDY. We're just getting back to a point that was made somewhat earlier about newspaper subpenas. What can you tell us about them from your own experience?

Mr. STANTON. Well, I have given you in the text of my statement, I believe, the figure of 121 subpenas that NBC and we've had in the last 30 months.

Senator KENNEDY. You have indicated in later responses, that that figure has gone down in the past months, is that correct?

Mr. STANTON. The figure I referred to, Senator Kennedy, was the figure of a falloff subsequent to the Department of Justice guidelines or the Attorney General's guidelines, which were I think issued in August of 1970. We have resisted subpenas. We have a different, perhaps a stronger policy on that today than we had historically, because the problem has become more acute in recent times and we have taken a strong stand against the subpena procedure, as you know from the position I took in the House subcommittee's efforts to subpena our outtakes.

I don't know specifically what you are interested in. I would be glad to try to answer any questions you have, but I think these are the general facts that I would set forth.

Senator KENNEDY. The number of subpenas that you receive now, compared with earlier years—how do they compare.

Mr. STANTON. In total, much higher.

Senator KENNEDY. Can you give us any rough dimensions?

Mr. STANTON. No, but I would be glad to supply the information for you.

Senator KENNEDY. I want to thank you for coming here, Mr. Stanton, there is one other area—the newsman's privilege legislation. You have some reference to it on page eight. Could you tell us how helpful that would be with reference to comparing the several States that have such legislation.

Mr. **Stanton**. We think it would be very helpful. As I indicated in my statement, I would amend or modify S. 1311 to apply to all information, not just confidential information.

I think that if we had such legislation a year ago, or earlier this year, I wouldn't have spent 5 months in the problem that I was having with the House subcommittee. If we could get a ringing decision from the Supreme Court on this issue, perhaps that legislation wouldn't be required. But absent the certainty of a ringing decision I think this would be a step in the right direction.

Senator **Kennedy**. I want to extend my appreciation to you for appearing before the subcommittee. Your comments and testimony are very excellent, and I will make sure that I have a chance to go all through your statement. Thank you.

Senator **Ervin**. Dr. Stanton, on this last point, you are undoubtedly familiar with the decision of the U.S. court of appeals in the *Caldwell* case.

Mr. **Stanton**. Yes, sir.

Senator **Ervin**. They held that it would not be compatible with the first amendment to require him to make even an appearance befort the grand jury on the particular facts of the case. That case, as I construe it, lays down the general doctrine—which I think is quite sound—that government has no right—not a court nor the executive branch of the Government nor the legislative branch—to require testimony from a newsman unless government has an overriding governmental purpose to be served by the obtaining of that information, and that the information cannot be obtained by government from any other source. I think that is a rough statement of the essence of that opinion. If the Supreme Court were to review this case, and hand down a decision in substance like that of the appeals court, there would probably be no need for specific legislation would there?

Mr. **Stanton**. Not in the specific instance, but that would not protect—that would not have protected us in the case I had with the House, and that is one reason I have suggested the expansion of S. 1311 so it includes all information, and not just confidential information.

Senator **Ervin**. I agree with you on that point. Is this not fundamentally a statement of your position: While there is, owing to the scarcity of broadcast channels at the present time, some necessity for government regulations, they should be kept at a minimum. No regulation should be adopted which would enable the Government to control the content of the ideas broadcast by the media, or which would enable government to coerce the media so that the media would feel that it might be penalized if it did not broadcast in a manner pleasing to government.

Mr. **Stanton**. I would agree with that 100 percent.

Senator **Ervin**. We are sincerely indebted to you for your appearance this morning, and I want to thank you for a very fine contribution.

Mr. **Stanton**. Thank you.

Senator **Ervin**. Counsel will call the next witness.

Mr. **Baskir**. The next witness is Richard J. Barnet, author and political scientist.

STATEMENT OF RICHARD J. BARNET, AUTHOR AND POLITICAL SCIENTIST

Senator Ervin. Mr. Barnet, I want to welcome you to the subcommittee, and express our deep appreciation for your willingness to give us the benefit of your views on the matter that we have been considering.

Mr. Barnet. Mr. Chairman, I am very grateful for the opportunity to appear before your committee. First of all, I would like to introduce Mr. Tom Mathews, counsel for Institute for Policy Studies.

Senator Ervin. We are very delighted to have you also.

Mr. Barnet. I am very pleased to talk on a very important aspect of the people's right to know, that is, the work of the public scholar, the man who is trained to observe the operations of the Government. It is unfortunately true, that the operations and activities of the public scholar have come in recent months under increased attack. The Institute for Policy Studies, of which I am codirector, was established in 1963 out of the belief that the public had a right to know. This belief was shared by a number of us who had been in government that an institution was needed that would be totally independent financially from government but close enough to government to undertake informed critical analysis of government policies.

We have studied the performance of the television stations and networks and how they might be improved. We have studied the prison system, health education, the military budget and the foreign aid program.

Perhaps most relevant to these hearings is the study recently concluded by three fellows of the institute on decisionmaking in the Vietnam war. It draws upon confidential information obtained in the course of more than 300 interviews with the officials involved in planning and executing the war. Much of the information concerning the decisionmaking on the war was made available only on a confidential basis.

The public scholar unlike the contractor, has a constituent far beyond the Government itself. It is the public. Unlike the pure academic, the public scholar does not gather information or make analyses primarily to educate specialists or other scholars but to make available to all citizens information helpful to them in making up their own minds on critical public questions.

The public scholar has emerged in research institutions, universities and foundations in response to a pressing social need. The framers of the Constitution understood that democracy was impossible without a free press in which journalists constantly searched out the truth and publishers printed it for the citizens in pamphlets, books, newspapers and other media. Without a free press to inform him as to what government was doing, what problems were facing it, how well they were being faced, and what alternative policies there might be, the citizen was in no position to pass judgment on what elected officials were doing. The framers of the Constitution understood that if government controls information it will effectively control elections too. This crucial political function of a free press has been the principal reason the Congress and the courts have sought to protect the rights of journalists to collect and disseminate information for the public for almost 200 years.

But today, however, modern society has become so complex and the pace of events so swift that the crucial task of keeping the public informed on vital public issues cannot be performed by journalists alone. The operations of government have become so vast, the issues so intertwined that the investigative reporter with the daily deadline cannot adequately serve the public's right to know. Any member of the working press will tell you that the man who must file four stories a day will give the public a less complete and less accurate picture than the reporter who files once a day. The reporter who can work on a story for a week will give a still better picture of what is going on. Digging out the facts, checking them against other facts, putting them into a broader context takes time. Newspapers are not usually in a position to give their reporters the time to investigate complicated public questions, particularly where government agencies seek to shroud their activities in secrecy. Only a small number of newspapers or broadcasting units maintain full-time investigative or research news staff. Even the number of part-time investigative assignments has shrunk to the point where the professional journalism associations have expressed concern. Daily, weekly, and even monthly journals cannot usually afford to support investigative reporters on assignments that take many weeks or months, particularly when they do not know whether anything newsworthy will result.

Investigations by public scholars published in the form of books, pamphlets, television reports, monographs and studies are filling the gap left by the decline of daily investigative journalism. For example, the investigative report which sparked much of the original interest in antipoverty programs was based on a report by Michael Harrington which first appeared in the *New Yorker* magazine. The first investigative report regarding dangers of pesticides was prepared by Rachel Carson as a long article and then as a book. The My Lai massacre story was the result of investigative reports by a free-lance author, Seymour Hersh, who did not work for a daily newspaper at the time. The work of Ralph Nader, done at an independent research group, is treated as news regularly by the media throughout the world. An independent research group, the American Enterprise Institute developed the computer-based survey of prices that provided the first statistical account of the effect of the national steel strike on consumer prices. The work of that group in assembling the figures from a myriad of corporate records was exactly similar to what the financial department of a newspaper could be expected to do if it had the resources. A recent survey of the economy of an economically depressed neighborhod in Washingington, D.C. conducted by a public scholar at the Institute for Policy Studies revealed that its tax expenditures greatly exceeded its tax returns in the form of welfare payments, services, and so forth. This piece of information was of considerable public importance because it challenged popular notions regarding tax-benefit ratios. There are a few examples of the public's dependence upon independent researchers for vital information which in simpler days might have been provided by the daily press.

Senator KENNEDY. May I ask a question, and for the matter of the record, it will appear at the end of the testimony.

As I understand, various court decisions have applied a different standard to organizations such as yours, in comparison with broadcasting and newspapers. Is that right?

Mr. BARNET. That is correct, Senator Kennedy.

Senator KENNEDY. Would you talk a little about how this has developed in recent time, and what the impact is.

Mr. BARNET. This has become of immediate concern to us, Senator Kennedy. Three persons associated with the institute study of decision-making in the Vietnam war have received subpenas from a grand jury in connection with work done on that study. The decision of some courts has been to make a distinction between those who work full time for a daily press, and those who work as scholars, authors, commentators—doing precisely the same thing—the same kind of investigation, but not with a full-time employment, as in the newspaper or TV.

It seems to us, Senator Kennedy, that this is a distinction that could not be reached under the first amendment, and my point in outlining the important development of the public scholar, is that the work of such investigative scholars and analysts, fullfils an essential function in serving the people's right to know, which cannot be adequately fulfilled by the daily news media. And the effort of this grand jury to subpena such scholars' work, has a very chilling effect on academic freedom and on the right of the people to get at the facts and to understand them.

Senator KENNEDY. Am I to understand that it is your feeling that public scholar organizations such as yours, shouldn't be distinguished from newspapers or magazines for newsmen's privilege purposes? In terms of the free society and the first amendment, certainly public availability of information and access to information are affected very similarly.

Mr. BARNET. That is exactly right.

Senator KENNEDY. And you have felt adverse effects from court decisions drawing such a distinction as they apply to individuals at the institute itself.

Mr. BARNET. Some of these questions are still under consideration, but there have been cases in the past where courts have sought to make a distinction between those who work for the daily press and those who investigate with a different form of publication in mind. And this is a distinction which interferes with rights under the first amendment, and could have, I think, a very serious impact on the free flow of ideas.

Senator KENNEDY. Does the newsmen's privilege bill that is before the committee cover the policy group studies?

Mr. BARNET. Yes, the language refers to commentators and authors, and I believe it would cover it.

Senator KENNEDY. Do you have any specific—I don't know if you would have any with you right now, but might your counsel have any specific recommendations or observations?

Mr. BARNET. Well, we will give that consideration.

Senator KENNEDY. We are open on that, if you would care to comment later.

Mr. **Barnet.** I appreciate that very much, because we feel that this same problem faces the public scholar, or the man who is writing a book or an article instead of a daily news story. It is particularly chilling in view of the sharp increase of classification laws and secrecy in the last generation.

Recently William G. Florence, a retired Air Force security officer, testified before the House Government Operations Subcommittee that there were—there are about 20 million classified documents and only one-half of 1 percent of them were really sensitive. He said that classification was becoming a way of life, a coverup for all sorts of governmental inadequacies and failure. But this happens because the system wants to give us the kind of information that they want us to have.

It is in the nature of controversial public issues, the very issues on which citizens most need to be informed—that important information is not readily available in libraries. Usually the only easily available information is what government agencies choose to release. The reporter or scholar who relies on handouts does a disservice to his profession and to the public. The conscientious investigator seeks to develop sources of information within the government in order to report to the public on how decisions are made and the implications of such decisions for the future. If he is forced to disclose his sources, those sources will disappear.

It is our policy at the institute to disclose every source we have consulted in our investigations, wherever possible, because we believe the public has a right to check the information communicated by public scholars. It would be our preference that Government officials be directed to deal directly, honestly, and openly with reporters and scholars and to take responsibility for what they say. But the reality is otherwise. An official who in good faith provides information which he believes is important for the public to know runs risks ranging from judicial prosecution to a transfer or reprimand. The most recent use of lie detectors in the State Department to establish the source of published stories is an example of the risks public officials run when they seek to deal candidly with reporters and public scholars.

In an ideal government dedicated to full disclosure consistent with national security there might not be a need for social policy which protects confidential sources. But in the age of overclassification, the calculated leak and the elaborate programs for misleading the public revealed by the Pentagon papers, it is essential to protect the independent investigative activities of reporters and public scholars.

If public scholars are denied the rights widely accorded newsmen to protect enough only to do a superficial investigation will continue to have access to essential sources but scholars with the time and background to probe the meaning and check the accuracy of the newspaper story will be cut off from sources of information. No public official will risk giving information if he fears that the scholar will be compelled to expose him before a grand jury or in court. Unless first amendment privileges apply as well to the public scholar, he will be effectively precluded from studying the very sensitive areas of public policy which the public most crucially needs to be informed.

Senator ERVIN. You define the public scholar quite well on page two of your statement as a trained observer and analyst of the operations of government who communicates his findings to the public. This was a simpler function when society was not as complex. As you point out, since society has become so much more complex, those who gather public news are in a rush to meet deadlines and do not always consider the meaning and the implication of the policies of government. For that reason, the public scholar renders a real service in furthering the purpose of the first amendment. That is the objective of your institution, is it not?

Mr. BARNET. Yes, Mr. Chairman, I agree with that completely. But I do want you to understand that in no way am I downgrading the daily press, because in many ways, they are doing an impressive job of investigating. But the fact is that they are covering many, many areas, where it is simply impossible to do the kind of investigation that is necessary given their pressures.

Senator ERVIN. You recognize do you not, that government has an interest in manufacturing the news, so as to make it appear that its policies and activities are the most desirable for the Nation. In an effort to do this, government supplies many persons—who in essence are public relations people—with many handouts. The temptation is great for a news gatherer to use one of these handouts even though he had not investigated the matter.

Mr. BARNET. That is right, Mr. Chairman, and of course the Vietnam war has had an absolutely disastrous effect. I know that very often in the early days of the Vietnam war, it was a common thing for the press to accept a handout that told us that such and such villages were secure. It was a good deal easier, and safer, to take their word for it, rather than to go out and visit the village.

Senator ERVIN. And so, some of these handouts were absolutely untrue, and did not reveal all the truths.

Mr. BARNET. That is true in the case of the handouts that I just referred to.

Senator ERVIN. Even concerning existing policies, after the Government had formulated and carried out a given policy, it would endeavor to present that activity in the most favorable light and suppress anything about it they did not want known.

Mr. BARNET. That is correct, sir. My example in the statement, the State Department, was that the administration seemed interested in concealing the maximum amount possible.

Senator ERVIN. I think there is one other thing—Government is very reluctant to release information that puts it in a bad light.

Mr. BARNET. Yes, sir, that is absolutely correct. We have seen many examples of this, particularly in connection with the Defense budget. It is very common, as you know, around the time of the budget hearings to receive reports of new secret weapons, and great increases in Soviet arms, which allegedly come from secret documents.

Senator ERVIN. That is something which those of us who are here on the Washington level—something that we feel very strongly about, that a man who Government employs, who hears things about his department—from which information comes, is——

Mr. BARNET. Yes.

Senator **Ervin**. You say in an ideal world or in an ideal society, Government officials or Government employees converse freely with public scholars who are conducting investigations. The public scholars would receive information freely from the employee. The employee could also discuss matters on a confidential basis with the assurance that his identity will not be disclosed.

Mr. **Barnet**. That is right.

Senator **Ervin**. So in your quest for information regarding a particular document or Government policy, you receive much information from sources which would cease to be available to you, if you were compelled to reveal their identity.

Mr. **Barnet**. That is right.

Senator **Ervin**. It is your position that any proposal or legislation concerning sources of information of the public scholar should be under the first amendment.

Mr. **Barnet**. Mr. Chairman, it is my opinion that the first amendment does now, and of course should cover confidential sources of information, for both news media and all persons who are in the business of investigating and communicating information to the public.

Senator **Ervin**. As you see it—as the late Justice Black stated—the first amendment is absolute in nature. I believe the current interpretation is that the only time it is not absolute is when the Government can demonstrate an overriding public interest or when a criminal prosecution is involved. There is undoubtedly a first amendment interest in the gathering of information and in the dissemination of truth. Government has an interest in enforcing laws which are necessary to protect society, including the first amendment. People often must seek some way to reconcile, as far as possible, both these interests. So we must consider that problem also.

Mr. **Barnet**. Yes, sir, that is true, and I can certainly see a number of situations where the conflicts occur. But I think in the area that we're talking about—the protection of confidential sources of newsmen and public scholars serves the best interest of the public.

Senator **Ervin**. I want to thank you for your very fine contribution to this hearing.

Mr. **Barnet**. Thank you very much.

Senator **Ervin**. This hearing is recessed, and will reconvene tomorrow, at 10 o'clock in room 318, Old Senate Office Building.

(The hearing was then duly closed at 12:50 p.m.)

FREEDOM OF THE PRESS

THURSDAY, SEPTEMBER 30, 1971

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:05 a.m., in room 318, Old Senate Office Building, Senator Sam J. Ervin, Jr., presiding.

Present: Senators Ervin, Kennedy, Hruska, and Scott.

Also Present: Lawrence M. Baskir, chief counsel, and Bill Pursley, counsel.

Senator ERVIN. The subcommittee continues today to focus upon the relationship between Government and the broadcast media. Assisting us in this connection is one of America's most outstanding broadcast journalists, Mr. Walter Cronkite.

In addition, the subcommittee is indebted to Professor Jerome Barron of the George Washington Law School, and Mr. Lawrence Leamer, former associate editor of *Newsweek* magazine, for appearing before the subcommittee today upon very short notice.

I regret that Professor Philip Kurland and Mr. James J. Kilpatrick could not be with us today because of personal considerations. Both of these gentlemen have asked to be rescheduled in the hope they can appear before the subcommittee during these hearings.

At the conclusion of today's testimony, this series of hearings of freedom of the press will recess until October 12. At that time, we will resume our consideration of this important subject and continue on October 13, 14, and on October 19 and 20.

I understand that Senator Hruska would like to make a statement at this point. Senator Hruska.

Senator HRUSKA. These hearings on "Freedom of the Press" come at a time when there are more critical issues facing the Nation than at any other. The rights and responsibilities of the press are near the top of that list.

Today, as never before, the American people dote on the news. More people want to know more of what is going on, and more are willing to take the time to find out. To satisfy this urge people must naturally rely on the news media. The freedom which our Founding Fathers properly gave to the press thus takes on dimensions inconceivable to the drafters of the first amendment. Radio, television, satellites, the mails, and mass distribution of the printed word have combined to give the news media awesome power and authority in the affairs of the Nation.

This Senator would be among the first to praise the media for the general way in which they have accepted and met the responsibility which goes with this power. As Mr. Isaacs stated on the opening day of these hearings, the press has its faults and makes mistakes. I would agree, however, that these are primarily due to limitations in time and space as well as just plain human error.

Nevertheless, the subject at hand is most deserving of the kind of study the chairman has laid out. The Government's attitude toward the press should be clarified, and the need for legislation such as Senator Pearson's bill (S. 1311) must be carefully analyzed. At the same time, the responsibility of the press should be examined very closely. It is not alone for the media to tell the people how and what it is doing. I believe this type of inquiry by public officials who are directly responsible to the people through the ballot box is essential.

While it is understood that one of the news media's most important functions, as conceived by the first amendment, is to provide a check on government, less understood are the controls on the checkers. How absolute is the first amendment? Must we indeed tolerate abuses in the name of freedom? Is prior restraint of the press ever permissible or desirable? Is there a need for a reporter-confidant relationship? Is there a way to eliminate bias in the press without circumscribing its freedom?

The sensitivity of this subject should not deter us from exploring it fully, and on every side. I am sure the people would like to be educated in the various levels of judgment brought to bear on a news article before it reaches publication. Undoubtedly there are many who would like to go behind the scenes to watch a television network's activities as it puts together its daily news program which will be watched and, in many cases, taken as gospel by millions of Americans. This has been done in other ways and at other times, but I believe some further exploration by this subcommittee would be highly valuable.

The chairman is to be commended for scheduling these hearings, and for his usual forthright approach to the subject. This list of witnesses is impressive. Their contribution to our goal will be most helpful, I am sure. As elected officials, we of the Subcommittee must make our contribution as well. Our interest is manyfold. The majority of my constituent mail is motivated by articles in the press or by news reports on radio and television. These accounts make it plain that often we see the news one way and the media another. But this Senator happens to be a subscriber to the views of a former President who observed that one in public life should depart from the kitchen when the temperature rises too high for his comfort.

I would like to finally observe at this time that a critical examination of the press and its responsibilities does not constitute an attack on the first amendment. This bulwark against oppression should not be used as a shield against valid criticism. I am confident that the Chairman shares this view—his opening statement for these hearings makes it plain that he agrees.

There are 90 million television sets in 95 percent of American homes, and countless radios. In 1969 some 62 million newspapers were sold daily. As we say in the legal profession, *res ipsa loquitur*—the thing speaks for itself.

Senator Ervin. Mr. Cronkite, I want to welcome you to the subcommittee and express our deep appreciation for your willingness to appear and give us the benefit of your observations on what I consider to be one of the most important of the problems which confront our country.

STATEMENT OF WALTER CRONKITE, NEWS CORRESPONDENT, COLUMBIA BROADCASTING SYSTEM

Mr. CRONKITE. Thank you. Senator. I would like to express my appreciation to this committee for going into this subject with the view to drawing up whatever corrective legislation it finds necessary to bring up to date our guarantees of free press and free speech.

I would like to make it clear that I am speaking here only for myself today, and do not represent the Columbia Broadcasting System as such, and my association with CBS news staff is that of contract talent. That is a euphemism, I am sure.

The testimony I give today is completely my own, it has not been approved by CBS. I would hope that the executives thereof agree with most of it, but am not sure they agree with all of it.

Most of us in journalism are deeply concerned over such issues as right-of-access to news sources, Government secrecy, harassment by subpena, and the protection of news sources. These are concerns common to all communications media.

I know you are going to hear a lot about that from other media, and I would restrict my presentation, therefore, if I may, to the special problem inhibiting the freedom of broadcast journalism.

It is assumed, of course, that we do want a free press. Such is synonomous with democracy. There are a few who would argue otherwise. However, I daresay there is scarcely a public figure anywhere who has not at one time or another, perhaps more frequently than not, railed at his treatment by the press. And, of course, right here I am referring to the press as a generic term to include all media.

Senator ERVIN. As I stated at the opening of these hearings, I guess I am one of the few men in political life who doesn't complain much about his treatment at the hands of the press. The press takes me to task every once in awhile, but they have always been very kind, not attributing my hypocrisy to bad motives. They have always attributed it to a lack of mental capacity.

Mr. CRONKITE. I know from time to time, sir, and not always without reason, we are considered untrustworthy, disloyal, unkind, disobedient, sullen, cowardly, dirty, and irrelevant. And this is as it should be. To be trustworthy in one man's eye may not be to warrant trust in another's. While individual reporters or journalists may at one time or another place their loyalty at the feet of one man, or ideology, it is the very strength of a free press that not all reporters and journalists will do so. In this diversity, is the strength of the free press.

Down through our history, particularly at times of national stress, there have been calls for bringing the press to heel. Now, again, much is being made of that. Much is being made of the alleged prejudices and bias of newsmen, particularly those of us in this powerful new medium of television. These charges, I submit, are not unique to television.

So strident, we might be reminded, did they become that following the 1962 election that there were congressional demands then for investigation of newspaper bias. As late as the forties and fifties, there were demands for licensing of journalists. This was before television drew the attention of those who feel threatened by freedom of expression.

We newsmen are biased and we are prejudiced. We are human beings.

There is not a man who can truthfully say that he does not harbor in his breast some strong sentiments pro and con on most, if not all, of the issues of the day. Yet if there is any single hallmark of this professionalism we claim—indeed that distinguishing characteristic that makes us professionals and not mere craftsmen—is that we have learned in our journalism schools and in practice, to recognize the symptoms of personal opinions and to seek to avoid them in reporting the day's news. None of us succeeds in this difficult task in all instances, but we know the assignment and the pitfalls and, I submit, we succeed far far more often than we fail or that our critics would acknowledge.

We are far from perfect. There is a fair portion of what we do that is not done well. There are things that we are not doing, which we ought to do. There are challenges we have not fully met. We are a long way from perfection.

But that is not the point. How could we be improved by outside monitors without destroying the independence which is so essential to a free press.

Vice President Agnew was right in asserting that a handful of us determine what will be on the evening news broadcasts or, for that matter, which he didn't specify, in *The New York Times*, or *The Chicago Tribune*, or *The Christian Science Monitor*, or *The Wall Street Journal*, or anywhere else.

Indeed, it is a handful of us with this immense power, power that not one of us underestimates or takes lightly. It is a strongly editorial power.

With each item we report, we can and do seek factual honesty, fairness and balance, but we must also decide which news items out of hundreds available we are going to expose that day. And those available to us already have been culled and reculled by persons far outside our control.

The local newspaper, let us say the *Kansas City Star*, decides each day which of the events of its area will be covered. The local press service representative in Kansas City, AP or UP, decides which of those items will go onto his wire. A regional relay editor decides which of the items on the regional wire shall go on to New York, or Washington, or Los Angeles. And we decide which of these items remaining are to go on the air.

In the case of television, the decision frequently involves which items will be illustrated by film, which we freely acknowledge gives the item far greater impact than the paragraph recited by the broadcaster. And film choice, in a sense, also may be taken out of our hands by technical considerations—fogged film, unintelligible sound tracks, and a dozen things can go wrong. I don't mean to impugn my friends the cameramen, the most gallant and brave of our craft.

Many factors go into the decisions we make, so many and so complex that it would be hopeless to attempt to detail them here.

With the difficulty of proving a negative, I cannot in any way produce evidence to support the next statement. I can only give you my personal assurance—and what that is worth is only as much as you judge my veracity—but I assure you that I have never heard nor guessed nor felt that the news judgment in making any one of those decisions was based on a political or ideological consideration. Not one. I believe, I trust, that my colleagues at the other networks can say the same.

Yes, only a handful of professional journalists make the significant judgments on the news of the day, and it is a lot of power for a few men. But what would be the alternative? We would never get on the air or go to press if we attempted to submit each judgment to a committee of Congressmen, bureaucrats, sociologists, teachers, policemen, union leaders, or women liberationists, nor can we go to a plebiscite for each decision.

No one is suggesting, as far as I know, that ludicrous thought; but there are those who propose ex post facto examination of the journalist's copy's judgment, and this, on the surface, may seem innocuous enough. Far from it. It would be as effective a clamp on press freedom as direct censorship.

Any Government panel that presumes to call a news organization to account for its actions must be presumed to be hostile and scarcely would seek to investigate the reporting with which it agrees.

To place the licensed broadcast medium under the threat of such investigation, is to place it permanently under the fear of accountability to unfriendly antagonists wielding the power of legal restraint.

The effect would be more than chilling in broadcast reporting. It would put journalistic enterprise in the deep freeze with the rigidity and heart and compassion of a block of ice.

Rare, indeed, would be the station or network management willing to commit unlimited resources of its legal and executive staff to defend a documentary or daily reportage when it would be far more confortable simply to forego mention of the item or the subject.

Impossible would be the position of the journalist working under such understandably timid management. For each piece of potentially controversial reporting, and there is scarcely any copy, as my mail would prove, and that includes the weather, that is not controversial. He would, presumably, have to go to management for approval of every item.

Or, since this would be impractical, he would ignore the item and fill his broadcast with something less likely to involve his company and himself in lengthy review by nonprofessional and frequently politically biased critics.

It is not as if there were no monitoring on our performance in broadcast journalism. The newspapers have served this function very well. They have proved to be, and will continue to be, severe critics of the broadcast medium. There is adequate check and balance here between competing media to assure sound performance without the interference of Government.

To deny the free play of these forces by putting one of them under the surveillance of Government would be to deny the people a balance between media that can assure a free press we want.

News and dissemination cannot be accomplished without fear of failure, that is the only way that counts, and if the reporter or editor constantly must be looking over his shoulder for those who would have this product reflect their standard of right and wrong, of fairness and bias, that can't be achieved.

If broadcast journalism is brought to that state by the courts, or Congress, or anybody else exercising a right to question the judgment of its practitioners, then it ceases to be a virile seeker of the truth and becomes a pallid conduit for that propaganda which is palatable to the majority of the people, or the Congress, or the administration of the moment.

Let me go on to say, to point out, that the greatest threat to freedom of information, therefore, it seems to me, is the Government licensing of broadcasting.

Broadcast news today is not free. Because it is operated by an industry that is beholden to the Government for its right to exist, its freedom has been curtailed by fiat, by assumption, and by imtimidation and harassment.

That fiat comes through the Supreme Court. It has stated that as long as we are licensed by the Government, we are not as free as the printed press and, therefore, not eligible in the same manner for its first amendment guarantees.

Astride of this constitutional protection, broadcast news stands, before those in power, now or in the future who, for whatever motive, would like to see its freedom restrained. Some do this by assumption—assuming that a Government-licensed industry is fair game for legislative inquiry. The House Interstate Commerce Committee's attempt to investigate the CBS news broadcast, Selling of the Pentagon, is the most recent case in point and a perfect one.

Whatever the gentlemen of the committee thought of the broadcast, none alleged that any crime had been committed in the reporting, editing, or broadcasting of it. What they were examining was a matter of news judgment.

In the debate over the contempt action against CBS President Stanton that ensued, several members of the House expressed the belief that there was a need for legislation to control broadcast news. We do know that there have been bills introduced in this session of Congress, to "provide for more responsible news and public affairs programs," and "prohibit the broadcasting of deceptive news and public affairs programs."

Besides the restrictions that would be imposed by this assumption of power over broadcast news by Congress, our freedoms also are curtailed or endangered by intimidation and harassment.

There are the pressures exerted by high Government officials who suggest that if we don't put our whole house in order, that is, report the news the way they would like it reported, then "perhaps it is time that the networks were made more responsive to the views of the Nation, and more responsive to the people they serve."

The speaker might, indeed, disclaim any intention of censoring broadcast journalists, but when the speaker is a high official of the administration that appoints the Commission that holds life or death power over the broadcast industry, a broadcast journalist and his employer might be excused for thinking that it sounds like a threat. A timid broadcaster might very well feel constrained to avoid offending an administration whose spokesman openly carries such a club, whether he disclaims intention to use it or not.

This sort of executive department pressure inspires ancillary pressure—the stone in the pond and ripples thereform. Goverment bureaucrats, friends of the administration, Congressmen, and the general public, pick up the cue, and threaten local stations with Federal Communications Commission complaints if they do not make their news conform.

The FCC has a procedure, as you know, to handle such complaints, and it, in itself, provides a legal channel for harassment of broadcast journalism.

As you know, if the FCC thinks any complaint to it is worthy of answer, it can request an explanation from the station or network within 20, sometimes 10, days. If dissatisfied with the answer, the FCC may charge the network or station with violating the fairness doctrine and court action can ensue.

Any influential person or group can, with the most capricious complaint, fire a 20-day letter. To answer it, stations must strain their limited reserve of executive talent and time. Newsmen are diverted from their jobs to provide documentation to support the station's answer. It is only natural that station management should become timid, and newsmen should sidestep controversial subjects rather than face the annoyance of such harassment.

The ultimate intimidation is to attempt, or even threaten to attempt, through the licensing procedure, to take a station away from its owner.

Minority groups have used this practice to try to force broadcasters to pay greater attention to their aspirations. And when, shortly after Vice President Agnew's attack on *The Washington Post*, among others, that newspaper's recent acquisition of a station in Miami was challenged. *Broadcasting* magazine felt it important to note that "several persons importantly involved, in the competing application, were friends, supporters or former business associates of President Nixon."

We certainly would not want to inpugn the motives of any such group, but the *Post* management might have had some cause to wonder whether this action constituted a subtle warning. In any case, one would not expect such tactics to influence the editorial position of so powerful and financially substantial a paper as *The Washington Post* and its television station manager. But can we be sure?

What about a station placed in a similar position with the resources, or, for that matter, the tradition of independence of *The Washington Post?* And, even on the *Post*, might there not be a tendency—just a tendency, ephemeral, unspoken—to "avoid offending" until this thing blows over?

Over news broadcasting then hangs perpetually this cloud of Government license.

Licensing came about because in the early days of radio, and then, again, in the first days of television, there were only a few frequencies or channels available and clearly some authority had to assign them. But even in the conception of the Federal Communications Commission Act, there was recognized a need to protect the freedom of broadcasts. The law specifically forbade censorship by the regulating agency. The law only gave the new authority the right to determine that the licensee operate it in the "public interest, convenience, and necessity."

The FCC has interpreted that right to examine a station's programing, to require a certain portion of time to be allotted to so-called public affairs programing, to provide rebuttal under the fairness and equal time doctrines.

Tribute should be paid to the wisdom of Federal Communications Commission members, past and present, that the regulatory body has not gone further. But the power to make us conform is too great to forever lie dormant. The axe lies there temptingly for the use of any enraged administration—Republican, Democrat, Wallaceite or McCarthyite. We are at the mercy of the whim of politicians and bureaucrats and whether they choose to chop us down or not, the mere existence of their power is an intimidating and constraining threat in being.

And yet the situation that caused this power to be vested in Government largely has been dissipated by technological progress. Since the law's inception the ultrahigh frequencies in television and frequency modulation (FM) band in radio have been developed and scores of additional channels have become available.

A little recognized fact is that, today, in many markets it is not the availability of channels but the capability of economic survival that limits the number of radio and television stations.

Let me repeat: In a great many cities today, including major markets, there are unused radio frequencies and television channels and the number of broadcasting stations is not limited as much by technical considerations as by a market that will support only a maximum number of stations, the same rule of the marketplace that determines the number of newspapers in a community.

Putting it more simply: The doctrine that the air belongs to the people because broadcast channels are a rare resource is today largely myth.

The myth is further exploded by the advent of cable television. The wired cities of tomorrow—not using the "people's air" at all—will have an almost unlimited number of channels available.

In passing may I note that one might be excused a certain sadness in observing the hope with which special-interest groups seek access to the airwaves. They somehow have deluded themselves into believing that access to an audience assures an audience. Nothing, obviously, could be further from the truth. If these groups were given a half hour in the middle of a network's evening prime time broadcast schedule, there is nothing to assure that a single viewer would still be with them at the end. The same is true whether they owned their own station or had unlimited access to a cable television channel. The fight to get on the air may seem like a great and heroic battle against insurmountable odds to those who so desperately seek and need a voice, but more access could prove to be a tragically hollow victory for them.

But already without the cable and without the maximum use of all the available radio frequencies and television channels, there is no monopoly in broadcasting. That myth, too, should be exposed.

Already there are more radio and television stations than there are daily newspapers in the United States. There are 1,766 daily newspapers, but there are 6,976 radio stations and 892 television stations.

It is the rare city today that is not served by more television stations and radio stations than by newspapers.

There are more television networks serving radio and television stations than there are general news agencies serving the newspapers.

The monopoly today is in publishing, not broadcasting. Broadcasting has brought this about, so splitting the advertising dollar that only one newspaper can exist in most American cities.

Unfortunately, too, broadcast news is not an adequate substitute for the newspapers it has driven out of business. I happen to believe that we do what we do rather well, but our time limitations and the transient nature of what we do will forever prevent us from taking fully the place of the printed page with its greater bulk of news and its permanent, timeless accessability. We cannot supply the wealth of detail that the informed citizen needs to judge the performance of his city, county, state or nation.

If we do our jobs thoroughly, however, we can be a superb monitor—perhaps the only one—on the monopoly newspaper to assure that it does not by plot, caprice, conspiracy, or inadvertence miss a significant story.

We can do that, gentlemen, if we are left alone to perform that essential journalistic function. The trouble is, of course, that we are not free, we are Government licensed.

So we have on the side a monopoly press that may or may not choose to present views other than those of the dominant majority. On the other side, a vigorously competitive but federally regulated broadcast industry beholden to the favor of the powerful for its existence.

This scarcely could be called a healthy situation. There is a real danger that the free flow of ideas, that the vitality of minority views, that even the dissent of recognized authorities, could be stifled in such an atmosphere.

The untrammeled, uncontrolled flow of information betweeen our people, and our people and our Government and the essential confidence of the people that they have access to the truth could reach a perilous state in this Nation if broadcasting is not set free, as free as the printed word.

The least that must be done, and really it is only a minimal remedy, is to legislate assurances that the restrictive laws or Government decrees do not interfere with broadcast journalism's full exercise of those freedoms of press and speech guaranteed by the first amendment.

That would be a restraining influence on those who would contro us, even as it has proved to be the unbreachable barrier protectin the printed press.

Even this easiest and smallest step is flawed. For even with suc legal assurances, the law cannot protect a licensed broadcast statio against oblique pressure from the politically powerful who may tak offense at the station's news reporting. Motivation is difficult t prove, and as long as broadcasting is under Government license, har assment is possible through many means that ostensibly would hav no direct relation to news operations.

The cleanest and perfect solution—clearly much harder to obtai than the first amendment guarantee would be to eliminate all Gov ernment control of broadcasting. Clearly a Federal authority woul have to assign channels and monitor the station's technical perform ance to assure that it remained on its frequency with the prope power. But, as I have suggested here before, the time is past whe here can be any legal justification for controlling broadcasting's pro gram content. There is no monopoly today. The open competition o the market place, the laissez faire economy in which we are sup posed to believe, does pertain in broadcasting. There is no reason t believe that broadcasting, set free, would not act with the same vari ety of motives, principles, and performance that have worked prett well in publishing. There would be horrid stations and good, even a there are today under license. There would be some that rendere excellent journalistic service, and some that belied the trust in the —even as there are newspapers with such marks today.

As for the fairness doctrine, and equal time and the people' access to the people's air—the Nation has done rather well withou imposing these artificial standards on the newspapers.

The difference between publishing and broadcasting today ar mostly myth. They are perpetuated by a set of endless reflections i opposing mirrors. Broadcasting is different because it is Governmen licensed. Broadcasting needs to be licensed because it is different. I there is any chain of reason that binds this theory together it ha rusted through time and technological development and today it weaker links have the strength of wet tissue paper. It exists becaus no one of authority, until perhaps now, has dared to undertake clos examination of it.

This may not be the proper body to do that. But I would urg you to give the matter some consideration as you ponder means o protecting our freedoms of press and speech. It may prove an ulti mate solution. Meanwhile, the most immediate need and the strong est interim measure would be to grant us broadcast journalists imperfect as we may be but as eager and dedicated as we are, th protection of the First Amendment as surely the Founding Father would have intended. To fail to do so. would be to deny the people powerful tool in their attempt to exercise their right to know and t perpetuate a system that cannot assure the freedoms fundamental t the maintenance of our democratic form of life.

Senator **Ervin**. It always seemed to me that the Foundin Fathers put the First Amendment in the Constitution for two rea ons: As philosophers they believed that free and full discussion of all public questions would make certain that the American people would not be subjected to the worst kind of tyranny, which is tyranny of the mind; and as pragmatists they recognized that full and frank discussion of all public issues was necessary to the proper function of the institutions, which they established. They proceeded upon the theory that, if you left truth free to combat error, truth would ultimately prevail.

It seems to me they were actuated by the principle that Christ once expressed: "You shall know the truth and the truth shall make you free." As I infer from your statement, you take the position that the First Amendment applies, or at least should be recognized as applying, to all medias by which ideas are communicated, and that the broadcasting media is entitled to the same rights and same protection as the print media is entitled to.

Mr. CRONKITE. I feel that is absolutely essential, sir, absolutely essential.

Senator ERVIN. The Supreme Court in interpreting the Radio Act of 1927 and the Communications Act of 1934 has held in substance that there is an obligation resting upon the broadcasting media. It has proceeded upon the theory that owing to limited broadcast frequencies it is necessary for the Government to make an allocation of those frequencies among those who wish to engage in broadcasting. In interpreting these acts the court has said that the Congress has established three obligations on the part of the broadcast media. Briefly stated, they are, first, an obligation to present both sides of a public issue; second, an obligation to give equal time where political editorializing or political broadcasting is done; and third, an obligation to give an individual who is subject to personal attack an opportunity to reply.

I would like to have any comments you might make on that in addition to those that you set forth in your written statement.

Mr. CRONKITE. Senator Ervin, I believe I can only repeat, reenforce perhaps what I said here. I feel that all of these regulations were set down and the rulings were based upon early interpretations of the limited number of stations available. This doesn't really apply any more.

Yes, there is a limitation, a technical limitation, although that can be opened up by certain technical developments and even an assignment of some frequencies that are withheld for various Government reasons and not used, but that is still beyond the point.

We have found in this country, in the publishing business, that without any controls over publishing, the most powerful newspapers may be charged by some with denying them access to answer, with denying them fair treatment, with denying them those guarantees that legislation and these FCC doctrines are attempting to guarantee in broadcasting, but there are other papers that will print their side. We don't have a one-party press in this country. Oddly enough, in every political election there are charges of "one-party press" but they come from both parties, and so clearly I don't think it really applies and we know that it is not so.

The *New York Times* might be considered by some a radical, left-wing, Democratic-oriented newspaper, but certainly the *Chicago*

Tribune could be looked at by some as a right-wing, conservati Republican newspaper. There is a balance through the laissez fai operation of publishing in this country. Now the situation is getti more difficult in small cities and large in this country where on one newspaper exists. Those monopoly newspapers in almost cases across the country so far have proved to be responsible. T old-line publishers have proved to be good men, they know t responsibilities of monopoly publishing, they try to make their ne columns fair, they try to give everybody equal access and chance those pages. But sometime, somewhere (maybe it is happening tod and we don't know it), the monopoly newspaper changes publish and the next publisher may be evil in his intent to control the ne in his town. Already today the news in the minority paper might happening today through inadvertance. When there is only o newspaper there is no monitor.

In my younger days as a young man on a competing newspap the first thing we did when the opposition paper came out, was fl it on the desk to see what stories we missed and what actions missed on the stories we had covered to be sure we couldn't accused or charged with having missed the news and also to kee our circulation up. That doesn't happen today. And monopoly new papers can sit there and unless somebody calls them on the sp could eventually almost quit covering the town or a single report might fail to report something he thinks is unfair to his friend the county court building or city hall. But what we have now in t city are three or five or sometimes eight or nine or ten radio st tions, perhaps two or three television stations. They are the monito on the monopoly publisher to be sure that this does not happ by inadvertence or, as I have said, by plot or conspiracy.

Throughout the country there are all of these stations availab Now, one of those may indeed be unfair but if you get one that unfair you will find another that is going to see the same opport nity that we used to see in competitive publishing to capitalize the unfairness of the other. He will come back and show how fair is and thus win the audience that the other fellow is going to lose continued unfairness. Competition is there and as long as it is the then any of these restrictions are inhibitive.

These restrictions might quite conceivably be necessary if it we true that broadcasting were a monopoly. Put only one newspaper a city or town and only one television station, and mutual ownersh would be another problem. But that is not the case. We have go technologically beyond that stage and I think these are old-fas ioned rules and regulations and they no longer pertain.

Senator ERVIN. There is no doubt that people have a somewh friendly idea toward freedom of speech and press. We all welcom the expressions of opinion of those with whom we agree and praise them, but we have some difficulty in being ready to extend t same freedom to people whose ideas are hateful to us. Doesn't hi tory teach the fact that Government is always fearful of the pre or any other media of communication expressing ideas that do n project the Government in the light in which Government thinks ought to be presented?

Mr. Cronkite. Always, sir, and it applies to every administration and every political party, every ideology.

Senator Ervin. The history of expression and the press shows that in all generations, at least since the invention of movable type, Government has tried in one way or another to intimidate the press and make it say what the Government wants it to say. Isn't that true?

Mr. Cronkite. It goes down through history.

Senator Ervin. Shortly after the printing press was invented, the English Government instituted licensing for the printing of books or pamphlets or the operation of newspapers. Of course this system of licensing was finally abolished.

Do you have any doubt in your mind that the Supreme Court would hold an act of Congress which undertook to require the newspapers to be licensed by the Federal Government, before they could operate as a violation of the first amendment?

Mr. Cronkite. Not a chance in the world, that the Court would not do so.

Senator Ervin. Now, your contention, which you present most ably, is that——

Mr. Cronkite. Senator Ervin, could I address myself to that last question? Not only is it a question of the Supreme Court not accepting such an act of Congress but I think it is so generally accepted in this country, particularly by those of any authority, and wisdom in these matters, that bills to do so never get anywhere here. They have been introduced from time to time. I don't know what the frequency of them is. But in the 1952 days, there was all this indignation about the biased press among Democrats and they were coming in and bringing in bills to license the press or bring it under control. They don't get anywhere because it is just fundamental that you can't do that and maintain this bastion of democracy which is the free press in the country, and they know futhermore they are not going to get past the Supreme Court.

Senator Ervin. You point out that there is no longer a monopoly on the part of any broadcast media as there was—I don't think there ever really was—but it is very interesting in connection with the figures you give in your statement to note that in Washington, the Capital, we have 19 FM radio stations, 20 AM radio stations, seven TV stations and only three daily newspapers. This indicates the absence of monopoly of the broadcast media as far as the Nation's Capital is concerned.

Now, I think that the legislation we have on this subject arose out of a realization that the broadcast media, particularly the television stations which operate on VFH frequencies, are undoubtedly the most powerful means of communicating ideas, and a fear that they might present one political side of a controversy and thus control the elections in the country. Also the legislation grew out of a fear that there may be a personal attack and no way of redressing it.

Now, there is no doubt that the broadcast media like the printed page would be held responsible under the law of libel and slander in cases of unjustified personal attacks.

Mr. Cronkite. Not at all. That has worked pretty well in restraining the press in this country.

Senator **Ervin**. You take the position that the FCC is like a sword that hangs perpetually over the broadcast media.

Mr. **Cronkite**. Yes, sir, I do. I think that what you have is this: Perhaps we have reached at the moment a pinnacle of this pressure against television and the news media generally; We might find we get into a valley later when the pressure is off for a while. It usually works that way in these matters. But it can come back again at any time. At any time an administration is offended this threat can be raised again and it is a constant threat in being that is certainly deleterious to full operation of a free broadcasting medium.

Senator **Ervin**. Is there any law placing any obligation upon the newspaper with respect to what opportunities exist for a person who feels that he has been subject to personal attack, so far as you know?

Mr. **Cronkite**. No; except I do get back to this. Except the journalist's sense of fairness and his responsibility and this operates pretty well.

There are evil publishers, there are always going to be evil publishers even as there are going to be evil Senators and evil Congressmen and evil industrialists and evil consumer advocates and evil everything else. There are bad eggs occasionally. But generally through the publishing history of this country, the proof has been that the big papers, the good papers, the powerful papers, are also fair for the most part.

Senator **Ervin**. From my own experience, on three occasions I felt the necessity to reply to what I considered personal attacks. I didn't think the newspaper publishers were evil, but I thought they were considerably misguided. They attacked positions I had taken and while I normally never explain, your enemies won't believe you anyway, I did on these three occasions feel I ought to reply. Twice the publishers were from North Carolina newspapers, and one was *The Washington Post*. I replied and explained my side of the issue and they freely gave me space, and I think *The Washington Post* on that occasion gave me three-quarters of a full page.

Is it your view that anyone who feels that he has suffered a personal attack will ordinarily be given an opportunity by the broadcast media, just as they are given by the press, to present his side of the case?

Mr. **Cronkite**. Absolutely, sir, absolutely. It has proved to be so up to now and I see no reason why that should change.

Senator **Ervin**. I have frequently said that I think the First Amendment was drafted not only for the brave but also for the timid. One of the dangers that arises out of governmental regulation is that the timid will cease from printing anything which Government doesn't like.

Mr. **Cronkite**. This is the very heart of the matter, Senator.

Senator **Ervin**. It is just as easy to destroy freedom of speech and freedom of the press by intimidation and implanting fear as it is by an absolute ban of this kind.

Mr. **Cronkite**. Absolutely. The great danger is silence through timidity. I would rather have the newspapers and the broadcasting medium make all of the errors in the world than be quiet and silent on issues of importance to the people. We can get through the errors eventually but if silence is the case there is no hope.

Senator ERVIN. I am not knowledgeable enough in the field of technology, but you pointed out as far as UHF stations are concerned that there has been a development which permits the use of many more channels than there were available originally. What about VHF stations?

Mr. CRONKITE. VHF, I think, I don't have those facts immediately in front of me. I didn't come equipped with all of the technical details, but in VHF my assumption is that most of those channels are occupied and in full use, they are not available.

It is interesting, sir, that on UHF, and this is becoming more and more popular thanks to the wisdom of FCC Commissioner Minow who pushed through putting UHF on all sets, 56 percent of the 625 UHF channels in the country, 350 of them are currently available for prospective applicants, and they are located in 277 cities, 68 percent of the total number of cities covered by UHF. The channels are available in major markets: Albany, Schenectady, Troy, Birmingham, Boston, Buffalo, Charleston, Huntington, Cincinnati, Dallas, and Forth Worth. You can go on. It is a long list. Miami, Kansas City. A long list where UHF television channels are available and people are not applying for them. It is an economic circumstance that makes it difficult. They probably couldn't survive in the community.

Senator ERVIN. And that same circumstance is what controls the newspaper industry also, is it not?

Mr. CRONKITE. Precisely.

Senator ERVIN. Your solution to the problem, I think, is stated very succinctly on page 20 of your statement. You say: "Clearly a Federal authority would have to assign channels and monitor the station's technical performance to assure that it remained on the frequency with the proper power".

That would be the limit of Government regulation, would it not, under your view of the matter?

Mr. CRONKITE. Absolutely.

Senator ERVIN. And the broadcast media in all other respects would be granted the same freedom to report news and to express ideas that are granted to the newspaper industry.

Mr. CRONKITE. Without exception. I think that some stronger laws are needed to protect press freedoms generally, the subpena problem and right of access and a few things like that, but what I am saying here primarily is that television and radio journalism, should be put under exactly the same blanket guarantees of freedom as the press.

Senator ERVIN. To be sure there are some people in all media of communication who succumb to the temptations to slant the news, and my observation for different media of communication leads me to the belief that in the great majority of instances that they make a distinction between what is news, which they report normally, very objectively, when they are opinions which they rather editorialize, just as the press man operates in the best fashion.

Mr. CRONKITE. I believe there are sins committed, of course, in news slanting, bias and prejudice shown, but I think these are far fewer than some of the accusations would indicate, and against broadcasting particularly. I think that we can safely say that most broadcast journalists are observing the same high standards of objectivity—which, in contrast to some of my friends I believe is perfectly possible to achieve—that the newspapers do.

I might note that a lot of criticism, as you have suggested yourself, sir, is in the eye of the beholder.

On the same broadcast we frequently get letters of complaint from two opposing sides and I had it just the other day. I had an interview with the commissioner of corrections in New York, Mr. Oswald, on the matter of the Atticca tragedy. I had letters that came back to me. I would like to cite a couple. Here is a case which I wouldn't have thought was basically a major political matter, it was a straight interview with him. But one letter says:

> Interrogating Commissioner Oswald did more to uphold the lawless in the prison than the law-abiding citizens of New York. The reporters for years have started more trouble with your slanted questions than any comments.

On the other hand—

> The last thing our country needs right now is for the network to give free time to public officials who defend official murder without at least presenting the minority opinion.

These are pro and con on the same broadcast. Some accuse me of showing bias toward Mr. Oswald, others claim I show bias against him for the "lawlessness" on the other side.

I think this is inevitable, every newspaper publisher knows this, every broadcaster knows it. This we are willing to face. That is part of the game. It's not part of the game, however, when those who have political power say you are slanted because you do not agree with my particular view and my ideology and, therefore, you must be brought under even stricter controls or lose your license to operate.

Senator ERVIN. To corroborate your statement, I served on the Watkins Committee which recommended the censorship of Senator McCarthy. I immediately got about 4,000 telegrams and letters telling me what a miserable wretch I was and I got about 4,000 letters and telegrams telling me what a great patriotic service I had rendered and I had to make a talk to the eastern North Carolina press a few days later and I didn't have time to get up a speech and I talked out of some of the most emphatic of those letters and read them to the press meeting and all of the editors assured me that reminded them of the kind of mail they received.

I have always liked an expression, I can't quote it exactly, of Justice Oliver Wendell Holmes in which he said, "The validity of any idea lies in its ability" or rather "The validity of an idea lies in its ability to get itself accepted in the market place of ideas," and I take it your position is that there should be a freedom of speech for all media of communications and that in the long run the people will be able to determine which are valid and which are not?

Mr. CRONKITE. Yes, sir. E. W. Scripps said it and I think it is carried in the masthead of his newspapers, "Give people light and they shall find their own way."

Senator ERVIN. Senator Hruska.

Senator HRUSKA. Thank you, Mr. Chairman. Your statement was very helpful. It seems to me to reflect your philosophy very well and we appreciate your presence here this morning.

In the course of your statement you say, among other things, "it is not as if there were no monitor on our performance and broadcasting journalism. The newspapers have served this function well. They have proved to be and will continue to be severe critics of broadcast medium."

Is the converse true, Mr. Cronkite?

Mr. CRONKITE. That we are monitors of the newspapers?

Senator HRUSKA. Severe critics of them when the occasion arises for such a position?

Mr. CRONKITE. I don't think that we do nearly enough of this. There have been from time to time programs and there may be in local markets programs of viewing the press on the part of the broadcast media. We had one at CBS that has been on from time to time. It has not been a highly popular program as far as ratings go and I suppose that is why it is not on the air today. But at any rate, we don't do enough of that, I would agree with you, Senator Hruska. But I don't think that is the important aspect of our monitoring of the press. We monitor them by doing our own coverage, by competing with them in reaching news sources, in attempting to assure that all aspects of a story are covered where they might have missed—one aspect or another. This is the area of monitoring where we are most effective and are the only available means.

Senator HRUSKA. Well, we have known of newspapers that criticize each other, both editorially and otherwise. Sometimes it is a feud that lasts for generations within a community. And it is said of some newspapers that they wait for the other newspaper to take a position and when it does they take the other side of the position as if by knee jerk reaction.

Is there any comparable situation within your world as a commentator. of the CBS and NBC and so on?

Mr. CRONKITE. Well, sir, I think that probably there is not on the air so much. There certainly is in print when others interview us. We occasionally write articles and so forth. There has been considerable debate between us as to objectivity, slanting, all that sort of thing. There are different views. Not everybody holds mine. I didn't come here representing broadcast journalists as a group, only my own views. That is certainly true. But I don't know, on a network level, which is what you asked, of any feud that has been set up similar to those which have racked publishing in some cities over the years. I don't think that that, however, is a very important consideration. If we did more editorializing, did more commentary on television, I think that probably would ensue eventually. It would come about, because certainly network newsmen do not view every issue in the same manner. So that it could undoubtedly come about. But there isn't that commentary, that editorializing on network television today and I don't think there is likely to be. There isn't the opportunity for it.

Senator HRUSKA. There would be general agreement that feuding after all probably is not the most correct basis nor the most desirable.

Let us remove from this discussion the matter of feuding and say difference of opinion and criticism. Certainly occasions must arise when one network pursues either a given slant or a given comment to a point where it is not in agreement with those views which you or CBS officials hold. Is there any disposition under those circumstances to criticize the other network or the viewpoint they take or is there some sort of a professional courtesy which is extended within your fraternity so that one doesn't hit the other if the other won't hit him?

Mr. CRONKITE. Senator Hruska, if I thought the other network slanted its news or injected editorial opinion into its news broadcast I think I would find some occasion to make clear that what they were doing was wrong. I think I would in some way find a way to emphasize the fairness of our broadcasting, hold us up against what I thought was wrong about their reporting. But that hasn't happened yet, sir, in my opinion. I don't have any reason to have that attitude toward their broadcasting. Now I think we should differentiate here between straight news broadcasting and commentary. Straight news broadcasting is laying out the facts as clearly as you can and as honestly as you can with the problems and limitations which I point to here, but done as objectively as your principles tell you it must be done. But then if you want to take time on your news broadcast period, you can put in a special feature, an individual who will have comments beyond those of straight news. It can be analysis which is simply taking the news and breaking it down and trying to point out the various aspects which have fed into that particular story and influenced that story. It can be commentary which is the individual's opinion of that story or it can be editorial which would urge action on that story in one direction or another. It can be one of those three things.

Now, we at CBS believe that Eric Sevareid on "The Evening News" is an analyst. He borders upon commentary at times. This is a very thin line at times and we would be the first to acknowledge, that he gets into personal opinion occasionally. He swings over that line because it is very hard to hue to strict analysis, and even there, you are picking out the things you are going to analyze and throw into the mix.

On the other hand, at ABC, Howard K. Smith and Harry Reasoner do a commentary which they frankly label as a commentary and it is a commentary. It is their opinion on a story of the day in the news.

On NBC now David Brinkley is doing a piece, David Brinkley's Journal, which is uniquely his and it is analysis sometimes and commentary a great deal of the time. It almost borders, I would say, on editorial in suggesting a course of action. It seems to me that getting into that is perfectly all right, it is fine. I wish we all had more time to do that sort of thing. I think it is a use of the medium which should be explored and we don't under our present time limitation for the news. I have a strong feeling we can't nearly get all of the news in a half hour we need to and, therefore, commentary and analysis maybe should take a back seat.

All right, given all of this, I don't necessarily agree with what

Howard K. Smith or Harry Reasoner say. I don't know what percentage of the time but perhaps a fairly substantial amount of time I don't agree with what David Brinkley says. I don't agree with what Eric Severeid says a portion of the time. But I don't have the access nor should I, nor do I wish the access, (I probably could have it if I begged and pleaded and asked and screamed and hollered and kicked my feet) to do a commentary of my own. I don't do that. Therefore, I am not answering Eric Sevareid or answering David Brinkley or answering Harry Reasoner or Howard K. Smith nor are they answering me because I am doing news, nor are they, to get more direct to your question, answering each other except in the implications of the things they say.

It may be that we are being a little more dignified than the press in the past that carried these battles into their own news pages and on to their front pages. At any rate, that, I think, is the way we are operating.

Senator HRUSKA. Of course, there is a very, very thin line, isn't there between commentary and editorial? After all, if an editorial is defined, we conceive of its essence as being an urge to action. What difference is there between an editorial and a comment if the comment says political figure No. 2 is a very undesirable rapscallion coupled with a bill of particulars that will be very damning. They don't have to go the step further that would make it an editorial and say, therefore, do not vote for him, vote for his opponent.

Now, at the same time implied in it is that he is such a bad character he shouldn't receive any further consideration for your support. Now, where is the line? Would you have to use the last words in order to make it an editorial?

Mr. CRONKITE. I think it is sort of unnecessary argument but the point might be made, sir, that you are not urging people to not vote for the fellow; maybe people want that kind of fellow to represent them.

Senator HRUSKA. It could be. [Laughter.]

Mr. CRONKITE. So actually I do agree with what you say, between all of these things there is a thin line. The analysis is way over on one side and editorial way over on the other. As they move from one category to another the line is indeed quite thin, I agree with you there.

Senator HRUSKA. Now, in your statement you also suggest that the time has passed where there can be any legal justification for controlling broadcasting program content.

Would you consider that there is an element of controlling program content in the so-called fairness doctrine?

Mr. CRONKITE. Yes, in a sense, although I think that is something of a stretch to call it controlling content, but the case can be made, I believe, Senator Hruska. The case can be made in that it controls content through this intimidation of which I speak, through the thought in every news man's mind that somebody is looking over his shoulder and that if he is not performing in conformance with their standards, which may be based purely on political ideology and bias, that he is going to have to spend a great deal of time documenting what he has done, answering inquiries about what he has done, explaining to his management what he has done, because the management lawyers are the ones who have to answer the FCC and so forth.

Yes, sir, I think in this sense it is an influence on a program.

Senator **Hruska**. Certainly it would result in some sense of inhibition, wouldn't it, leading some broadcast stations to avoid topics that would call for the application of the fairness doctrine by allowing somebody of opposite viewpoint to be heard and to be seen in opposition thereto?

Mr. **Cronkite**. If you mean it is an inhibition, yes, I think I understand you. It is inhibition of a station to not put on only one side of an issue. Is that what you are saying?

Senator **Hruska**. Yes.

Mr. **Cronkite**. I think that is probably so. It is inhibition in this case. But I am saying that there are enough stations available for that other viewpoint that you will get this very thing you were talking about in the publishing trade, you will get two stations locked into a debate here with one giving one side and the other the other.

Senator **Hruska**. Unfortunately those who clamor for the application of the fairness doctrine do not go to the other station, they insist on the one station that expressed a view in the first place be required to entertain their viewpoint and so that principle of competition doesn't apply.

Mr. **Cronkite**. Well, I think that is again in the view of the beholder. It could apply if they go to the other station. I don't see where they are being denied a voice simply because they are not given time and place exactly where the other broadcaster may. That is like saying that somehow or other you have to be able to roll back the clock and, because a newspaper on a certain date, with a newsstand sale that day was 100,000, printed a piece that was objected to, the next day you have to be sure that all 100,000 people who bought the paper the first day bought it the next day. There is no assurance of that in publishing, there is no assurance of that in broadcasting. Access is not an answer.

Senator **Hruska**. Now, you undertake to suggest that as a minimal remedy legislative assurances should be made that no restrictive laws or Government decrees interfere with broadcast journalism's full exercise of those freedoms of speech and press guaranteed by the first amendment.

Just how would you cast such legislation, what language would you suggest for that purpose?

Mr. **Cronkite**. Senator Hruska, if I were as skilled in that I suppose I would be on the other side of the table here. I don't know what specifically should be said in the legislation. I am not a lawyer. All I know is that it should be as clearly stated as the legal profession can state it to make it perfectly understandable to one and all that we are guaranteed exactly the same freedoms as the press.

Senator **Hruska**. Well, of course, you have suggested that there have been some proposals in this field to the contrary, for example, the licensing of the press, and they haven't even received any consideration because the fundamental proposition of the First Amendment is so paramount and so plain. I just wondered if that situation and that thinking should not apply to this?

Mr. Cronkite. I wish that that were so. As a matter of fact, this is a matter that has been discussed among us about this thing in a sense of legislation: that if you say that Congress has the right to say that we are under the first amendment guarantees, then presumably it has the right to say we are not under the first amendment guarantees. That we don't believe is so because the Constitution itself does say it, but I think clarifying legislation would be possible to make it clear that the intent is to leave broadcasting as free as the press. How specifically that is done in legal phrasing, I am just not qualified to say.

Senator Hruska. What is the line where criticism of the press, including the broadcast press, leaves off? Where is the line where such criticism leaves off and an attack on the First Amendment begins. Could you tell us?

Mr. Cronkite. Yes, I think so. I think so. There is no reason at all that the press should not be criticized, that broadcasting should not be criticized. Attack begins when a high official of Government that holds the power to appoint the Federal Communication Commission says that unless we put our house in order, the broadcast media must be examined; when a rather high official says that unless we put our house in order we must be called to account. Account to whom? "We must be brought down from our ivory tower." By whom; under what circumstances?

That to me is a clear intimidation and it has been interpreted as such by most of us in the press.

Now, the claim that this is not an attempt to censor the press may be a perfectly honest assertion by individuals making such a charge but the fact is that such oft-repeated statements certainly spread a state of alarm among us and the attitude on our part is one of repression. Whether it is meant that way or not it certainly is accepted that way and it certainly seems to me the evidence is there.

I have papers here (I thought it might come up) citing several instances, episodes of repression. They have been rather widely publicized but they all add up to this atmosphere of intimidation.

Senator Hruska. I wasn't speaking of intimidation as much as I was of criticism.

After all, one need not criticize but he can still try to intimidate. I mean real criticism. Because after all most of the commentary I have heard consists almost entirely of criticism of somebody. Once in a while they praise and they should be praised for praise, but primarily broadcast remarks consist of criticism and sometimes it is quite severe, sometimes it is considered fair and sometimes it isn't.

Now, in view of that fact I just wondered where is there ground for suggesting that such criticism is really an attack upon the rights that are guaranteed by the First Amendment on free speech and free press?

Mr. Cronkite. Well, I thought I said, sir, in regard to the fact that we are licensed. We are licensed, can be removed, our license can be taken away, the station management knows that is the fact, they live under this sword at all times. Those who are politically powerful, who can influence the TV Commission that has this power of execution says, "You are not performing up to your standards and if you don't we are going to take a stronger look at what you are doing."

What do they mean by that if that is not intimidation? What do they mean by it? If they say simple "You are not doing your job, we think you are not fair, you are biased, you are prejudiced, here is a bill of particulars on the way you are doing this." That is fair criticism. But the minute they say, "And if you don't perform" then that is intimidation.

Senator **Hruska**. Then it depends on who is making the criticism and the nature of the criticism, doesn't it?

Mr. **Cronkite** Yes, indeed.

Senator **Hruska**. Well, thank you very much.

Mr. **Cronkite**. Thank you, Senator.

Senator **Hruska**. I would like to have inserted in the record at this time an article published in *The Wall Street Journal* by Michael Gardner entitled, "When Fairness Gets Out Of Hand." It appeared in the *Journal* for September 8, 1971 and it bears on some of the aspects of the fairness doctrine to which reference was made a little bit ago.

Senator **Ervin**. I think we have an illustration of the suppression of freedom of speech by the Government in respect to North Carolina's principal agricultural product, tobacco, and with respect to one of the chief manufacturing industries, the manufacture of cigarettes.

The Surgeon General of the United States takes the position that he has absolute possession of all of the truth on the subject of cigarette smoking and those who disagree with him have none and he has persuaded Congress to pass a very curious law that outlaws advertising of cigarettes on the broadcast media but permits it in the printed media. And this business of tyranny is sort of contagious, like smallpox and other things, because the FCC now takes the position that you can attack cigarette smoking on the air but that cigarette smoking is no longer a controversial subject and, therefore, the cigarette people cannot reply to the attacks made by Government on cigarette smoking.

I won't ask for any comment from you on that but as a North Carolina Senator I say there is a great deal of controversy about this because it is illustrated by the story of this man who had been very prominent and on his 96th birthday anniversary all the newspapers send out a reporter to interview him and one of them asked him to what did he attribute his long life and he had some of the instinct of the Surgeon General and he said he attributed it to the fact he had never taken a drink of alcoholic beverage or smoked a cigarette in his life. Just that moment they heard a tremendous noise coming from the next room, it sounded like an earthquake and a cyclone rolling in together, and one of the newspaper men said, "Oh, Lord, what is that?" He said, "Nothing except my old dad in one of his chronic drunks."

Isn't this the fundamental parallel in respect to freedom of the press and freedom of speech? There is no freedom which cannot be abused. In other words, if a man has a freedom and can exercise the freedom. he can exercise it wisely or foolishly. And when you undertake to let Government regulate freedom to prevent abuses, you are in great danger of winding up stifling freedom and destroying freedom.

Mr. CRONKITE. Absolutely, sir. There is no way of exercising control without it becoming a political control really under politics of the street of the moment or politics of establishment or politics of what not. Whoever is in control controls and the news will, therefore, be cast in the light of those who are in power at the moment.

Senator ERVIN. The tobacco case indicates the power the FCC has assumed over the life of an industry. It says the Surgeon General has possession of all of the truth on the subject and those who disagree with him have none and, therefore, since the truth has been established to his satisfaction and ours you can't have equal time to reply.

Mr. CRONKITE. Right.

(The article referred to by Senator Hruska follows:)

[From The Wall Street Journal, Wednesday, Sept. 8, 1971]

WHEN "FAIRNESS" GETS OUT OF HAND

(By Michael Gartner)

It would be a perfect question for a law school examination. Here are the facts:

Fact No. 1: An independent government regulatory agency has certain powers over the television industry. It has promulgated a "policy statement" that on "controversial public issues" both sides must be aired. For purposes here, we shall assume that the policy is legal.

Fact No. 2: Some years ago, this policy was expanded to include commercials for cigarets because there was persuasive medical evidence linking cigaret smoking to various illnesses. As a result, broadcasters airing cigaret commercials were required to show a significant (but not necessarily equal) number of anti-smoking commercials.

Fact No. 3: Later, because of the grave danger of smoking cigarets (or perhaps because of a political compromise), all commercials for cigarets were banned from television. For purposes here, we shall assume that the ban is legal.

Query: If a station continues to show anti-smoking commercials, is it required to present the prosmoking side, too? Expound and expand.

It seems easy. If you are stating one side of an argument and are required to give time to the second side, logic dictates that if you are espousing the second side of the argument you should be required to take notice of the first side. This exam is a snap.

Logic dictates that—but the law is not always logical. And a few days ago, this very question was decided in the illogical way. The U.S. Court of Appeals for the Fourth Circuit in Richmond, Va., upheld a Federal Communications Commission ruling that this fairness issue was up to the corporate consciences of the individual stations. In other words, stations that were required to air antismoking commercials and that have continued to do so on their own since the ban are not required to tell the other side of the story.

"It is reasonable for a licensee to assume that the detrimental effects of cigaret smoking on health are beyond controversy," the court ruled. Such an assumption, of course, is one that certain people—cigaret manufacturers, say, and perhaps millions of smokers—aren't willing to make.

A SECOND CHANCE

All right, you flunked Question One, but you have a second chance. Here is Question Two, based on the same fact pattern plus your new knowledge of the court's answer to Question One. Query: If a television station runs an advertisement urging the viewer to buy a certain kind of an automobile, is that such a "controverisal issue of public importance" that the station is required to present the arguments of people who contend that you shouldn't buy any car.

Well, you say, this one really is easy. If smoking is no longer a controversial issue, then driving certainly can't be, either.

Wrong again. Again, recently, a U.S. Court of Appeals—this one in Washington, D.C.—held in a two-to-one decision that the advertising of cars and leaded gasolines is a controversial issue and that antipollution forces must be given their say, in free ads or in documentaries or what have you. (This decision incidentally, ran counter to the position of the Federal Communications Commission.)

These two examples point up the complexities of the FCC's so-called fairness doctrine, a well-intentioned policy that lately, at least, seems to have gotten out of hand. The anti-smoking case is merely absurd. ("An utter joke," is the way one broadcaster terms it.) But the automobile case, in which the court seems to greatly extend the doctrine, raises an issue far broader than the pollution question before the bench.

The issue is simply, "Where do you draw the line?"

"Dentists are quite reasonably concerned about the effect of sugar-laden confections upon dental health, particularly among children. Should candy, gum and soft-beverage commercials be embraced by the fairness doctrine?" a staff report prepared for the Senate subcommittee on communications asked in 1968.

It went on: "Another minority . . . is determined that a substantial number of society's problems would be obviated if all consumed only 'natural foods.' Saturated fats are linked with heart disease. Firearms and ammunition arouse the passion of others, both pro and con. Among those lawfully licensed to practice the medical arts are some who oppose ingestion of medications of any sort, while their opposites may fervently believe them to be 'cultists' whose very existence constitutes a threat to public health. Religious beliefs militate against other products and services. . . . Just how far may the fairness doctrine be extended to embrace broadcast announcements favoring commercial products and services?"

The staff answered its own question. The fairness doctrine, it said, should not apply to "broadcast advertisements primarily soliciting or encouraging the purchase or use of a lawful specific product or service."

But even that answer, ignored by Congress, doesn't avoid the problem. What about issues and ideologies and concepts? The Army is spending millions for commercials to entice youths to sign up. Should antiwar groups be given time to shoot down the armed forces? Assume that a struck store is advertising its wares on television. Should the strikers be given time to say "Don't shop there, the store is unfair to its workers"? Suppose a woman is made to look like a scatterbrain in a promotional ad for a TV series. Should women's lib advocates be given time for rebuttal? Suppose the cancer fighters have an ad saying "give to cancer." Should the heart-attack fighters be given time to say their cause is worthier?

"There is almost nothing advertised that might not be deemed controversial by some group," maintains Grover Cobb, an executive vice president of the National Association of Broadcasters in Washington. If the fairness doctrine continued to be expanded, he says, "stations would be at the mercy of all types of fringe groups representing an infinite number of various opinions."

A man at a network in New York puts it another way. "If a station shows a spot for *The Wall Street Journal*," he says, "should we then have to give time to *The New York Times*?" And he answer himself. "Of course not. This is getting to be absolutely stupid. They're tearing us to pieces."

Thus, the nation's 625 or so television stations are in a dilemma. One way out, of course, would be for them not to accept ads that they know to be controversial—ads relating to the ecology arguments, for instance. But that is not a way out at all.

Earlier this summer, the Court of Appeals in Washington ruled that commercial television stations can't arbitrarily deny the purchase of time to espousers of controversial issues. That is, if you want to buy an ad urging peace in Vietnam (which, in fact, was the ad at issue), a station must sell it to you. But then, of course, with the fairness doctrine in operation the station must be prepared to *give* time to the opposing view.

"The only answer," says a network official in New York, "is to go noncommercial—then you would have no problems." Of course, you also would have no revenues and no profits, which could upset the stockholders.

THE FCC TO BLAME

The Federal Communications Commission itself opposed that decision, as it opposed the court's ruling on the antipollution issue. But the agency has only itself to blame. It is the agency, not the courts, that promulgated the vague policy in its ceaseless efforts to expand control into the nontechnical areas of broadcasting. (Control over the technical aspects is a necessity, of course; without it, anyone could compete for the same frequencies and chaos would result.) If no such doctrine had been laid down in 1949, no such court decisions would have been handed down in 1971.

In June, the seven-man agency announced that it would undertake a broad-ranging inquiry into the effectiveness of the doctrine. It is asking now for broadcaster suggestions, and it probably will report its recommendations and conclusions to Congress by mid-1972. Clearly, some changes are needed. "There are so many gray areas in the current doctrine," complains Mr. Cobb of the National Association of Broadcasters. "The fairness doctrine as it now stands is nebulous, hazy and unworkable."

It is indeed unworkable, as the spate of court decisions this summer has shown. And there seem to be just two workable conclusions that the FCC could logically reach: Keep the policy but simply take over the industry, parceling out time to whatever causes government czars might deem worthy; a private industry, concerned about making money, cannot afford this luxury. Or else abandon the policy and let the industry get back to running itself.

Anything in between these poles seems illogical and impractical. But, then, agencies, like courts, aren't always logical and practical.

Senator HRUSKA. If the chairman will yield, this article to which I referred and which has been inserted, gives us a further example. It discusses for example, the dentists, the dental viewpoint that eating of sweets by children is harmful to their teeth and so on.

Would that enable the candy manufacturers association to come in and rebut that sort of a viewpoint? Or the case, where the automobile association says, "Well, you can buy automobiles, especially in these days of economic difficulties, and get employment going again," and then there will be those who say don't buy automobiles because they emit poisonous gases and pollute the air.

Are these groups entitled to make their point and then is it up to the FCC to say whether rebuttal should be heard. Or should these views be banned outright. Sometimes it results in an incongruous situation.

Senator ERVIN. It results in the fairness doctrine becoming very unfair.

Senator SCOTT. Thank you, Mr. Chairman. I will try not to say anything important, Walter, until the cameras come back on. [Laughter.]

Mr. CRONKITE. I was wondering how you fellows stand these lights.

Senator SCOTT. We can stand the lights in view of what they connote because they help us find our way.

Senator ERVIN. Maybe we are like our old partner, a reconstruction judge in North Carolina. A lawyer lost a point of law arguing before him and he said that the more lights you shed upon him the louder he got. Maybe that is our condition.

Senator SCOTT. I think that when I attend some of the executive sessions of the Judiciary Committee.

In part of your comment you say that any government panel that presumes to call a news organization to account for its action must be presumed to be hostile. I want you to clarify that because is that to be read the Federal Communication Commission with the power granted under the law is automatically presumed to be hostile by the networks and, if so, does that mean that the networks would respond defensively automatically to FCC regulations?

Mr. CRONKITE. I don't think so, Senator, and that wasn't quite my intent in there. I wasn't directing that at the FCC. As a matter of fact, the FCC has been quite good about the 20-day letters. As a matter of fact, I don't think it has relayed the more capricious requests they have for investigations. It has relayed those which are more important, and in most cases it has accepted network and local station explanations.

I was thinking more of the type of congressional investigation, well, as an example, the recent one in the House of the "Selling of the Pentagon" and others which could ensue if we are not protected from that sort of pressure or even if an independent group were set up as monitors on broadcasting, not the FCC charge as it is. As I say, I would like to see that gotten rid of, too, but a new panel of any kind, a committee action is even more dangerous. It is not likely to call anyone before the bar to explain reporting that it hasn't already decided is in some way unfair. We are going to be, we will be in front of the bar explaining every item on the program every night, which is impossible.

Senator SCOTT. I would think that would follow. I am simply asking a couple of questions here to clarify statements in your statement which left alone could be misleading. The other one is that the Government limits freedom of information through secrecy, their almost uncontrolled use of the document classification privilege. That is the end of the quote. And I would agree with those who say that we are overclassified and that it should release a vast amount of its classified material.

In that statement you would not mean to imply, I am sure, that Government should not retain certain essential secrets to the operation of the Government or the national defense or its intelligence operation? There is no such implication there is there?

Mr. CRONKITE. No, sir, Senator Scott. There is not. Clearly some secrets must be kept. I would like to think, though, that they were kept to the absolute minimum of those necessary for the function of Government and not used for political purposes.

Senator SCOTT. I would like to see that, too, because far too many papers are sent up here marked classified that everybody knows about already.

You had spoken of the bias implicit in silence and that to me is the theory of the dog that did not bark and I am wondering why there hasn't been more coverage on television and by the networks of the fact that, if it is a fact, that this was a long, cool summer, for example. I have seen very little. I know I am walking in the dangerous area where I say why don't you cover good news, there is no use you covering things that are routine and the fact people got up in the morning and did not have a fight with their wife and did not get fired from the job and did not murder anybody. I know that. But it seems to me it was essentially newsworthy, if it is true, that there was indeed a long, cool summer contrary to the predictions, many of them on television, that we could have expected a much more riotous and disruptive summer, and I will give you one other illustration and ask you to comment, and that is the better coverage, and there has been some good coverage, better coverage, for example, of the life of nonmilitant in the cities surrounded often by situations which might create a militant and which don't.

Why don't we have coverage of the things that do not happen and the nonhappening, is it news?

Mr. CRONKITE. Well, sir, I think it does get back to the good news syndrome in a way. The difficulty; what it really amounts to, is the bad news crowding out the good.

Senator SCOTT. Gresham's law again applied to the communication field.

Mr. CRONKITE. There is so much happening and we are in such constant turmoil and we have such limited time on the air, much too limited time on evening news broadcasts. To belabor what must be the obvious to at least a fair portion of the population is to us not a useful use of the time. It would be if we had more time, but with the limited time it doesn't take its priority in that order.

In the case now of the cool summer in the inner cities, this is an interesting story. There is no question about it. And, as a matter of fact, we are working on it right at this very moment. I am sorry I am telling the opposition we are. But it is something to be looked at now that we are at the end of September. I am not so sure, we thought about this not once but several times during the latter part of the summer—it would have been a good idea to have said at that point, "Look how lucky we are, everything has gone so well. Despite all of the provocations there haven't been any great riots in the cities this summer." Wouldn't that perhaps inspire somebody to say: "We will take care of that, let's have one?" I think it is better to wait until the period is finished and you take a good look at it and see whether it is true. I have a little bit of a feeling that whether intimidation played any part, or not, that maybe we didn't pay enough attention this summer to some things that did take place in the cities and which didn't get much publicity or any publicity on a national basis; that maybe there was more of that than we think there was. Maybe this is only partially because of the kind of normal journalistic pogo stick effect of jumping from one story to another, from one headline to another, and the summer riots weren't the popular story of the moment, they weren't in fad, but they might have taken place. Obviously there wasn't anything like Detroit or Newark but small occurrences.

Senator SCOTT. I am delighted you all are working on it because I think it may help to lift the mood of the American people if they know everything isn't all bad.

How would you propose to handle the forthcoming, which I suspect is going to create quite a sensation within the industry on the Efron book. This is going to be a book which will be hostile to television broadcasting in its conclusions and I have no way of knowing whether the graphs and charts are accurate or not. As you know, one chart shows each network using, for example, one network, as I recall, using 7,000 words of criticism against one candidate and 1,500 words of criticism against another over a 7-week period in the period from 7 to 7:30.

Now, that book is not going to be popular with the industry and I am just wondering whether it will be handled on a balanced basis with objectivity and if this TV essence of what you plead for here? I think your own self criticism in your statement is unwarranted. I think you are the best in the business and I think you know I believe that over the years that we have known each other. You deny being the spokesman, but if you are a spokesman for the industry you are the best they have got.

I wonder how you think it would be fair to handle the Efron book if it should boil up into a newsworthy controversial story? Because upcoming is the thought you hate. That is what I am getting at. In Justice Charles Evan Hughes, freedom of speech being the freedom of the thought we hate, and here is a thought broadcasters will hate. How will they handle it?

Mr. Cronkite. I can't predict, Senator, how each individual will handle it or each individual network or station may handle it. Miss Efron already is beginning to make the appearances on television, clearly she is not being shut out from her chance to tell her story on television and that is being done. I would assume if the book is a major controversial issue, a front page story, it will certainly be covered as any other story on "The Evening News." I would cover it by the statements that people make pro and con on the book which I assume will follow. I suppose network executives will make statements, I may end up quoting myself, I may make a statement about it, but there won't be any blacking out of that story if it gets to be that kind of story.

I have just thumbed that book. I haven't had a chance to read it yet, but I immediately picked out some things I think I would quarrel with quite naturally. Just one of the first things that strikes me —I really hesitate to get into it at all in detail—but just one broad thing is that when she puts a checkmark pro or con this again is judgmental.

Senator Scott. Each time it is done.

Mr. Cronkite. It may be that while she thinks an item is for somebody, someone else may think it is against.

Senator Scott. The reason I raised that particular question, I think it draws the distinction between the situation you were discussion with Senator Hruska where you hit on the highly felicitous euphorism of public official No. 2. I was wondering how to handle that myself.

Now, if public official No. 2 indicates certain things are said in the form of a threat, you say your reaction, you have certain points of view, but, this book is not by a public official, it is not by anyone who can do anything about it except by public opinion, so it clearly comes within the category of criticism which has a right to be heard, discussed, debated, dissented with, and all the rest. That was the point I was making.

Mr. **Cronkite**. Certainly.

Senator **Scott**. There is no threat in the book.

Mr. **Cronkite**. Not at all that I know of. I haven't read every word.

Senator **Scott**. I haven't read it all other than the threat implicit is in any words that they might be true.

Mr. **Cronkite**. Yes, sir.

Senator **Scott**. I appreciate the chance to hear you and thank you.

Mr. **Cronkite**. Thank you, sir.

Senator **Kennedy**. I want to extend a warm welcome to Mr. Cronkite, as well, and apologize that I was unable to be here for your statement and for your comments.

I asked Mr. Stanton yesterday, Mr. Cronkite, whether he felt that the attacks by the Vice President on the news media, and the utilization of a grand jury to try to get newsmen's notes, and the comments that have been made by the administration on the development of various programs, whether he felt that there had effectively been intimidation of the networks and, particularly, those that are charged with reporting the news and the development of stories.

I think that he commented on that, about the challenge that it presented to the newsman. He, I think, in fairness, said that he didn't feel that the news that is being presented to the American public now is really being affected in its accuracy or presentation even since these attacks had taken place.

I would be interested in your own views whether this kind of attack has been effective to any extent in infringing, to some extent, on the public right to know various news stories and matters which those that are responsible for the development of these kinds of stories would feel to be important.

Would you comment on this?

Mr. **Cronkite**. Well, Senator, although I consider myself an independent man, it is clearly more comfortable to agree wholeheartedly with your boss, but I think in this case, I really don't fully, in the sense that I am not so certain that there hasn't been some reaction to this, whether we consider it correctly or not, intimidation. If there has been, it is indeed an insidious thing, even as intimidation itself is. It is like a poison gas in a room, or like perhaps the first effects of narcosis on a deep sea diver. He is not aware of it exactly, you are not sure you are dying, but you may have a sense that something is wrong.

The effect I know on myself. I think that is really about all I am qualified to say. It is a matter here of, as insidious as it is, being constantly alert to my own reactions of being influenced by this threat in being, and, therefore, bending over backwards to be sure that I am not threatened, and that I am not influenced. Therefore, if that happens, if I am conscious of that, the news is being influenced. There is a new element of awareness of things over here that are extraneous to the clear objective judgment of that news as I make the news judgment. I may feel that I have not been influenced, that I have not been intimidated, in other words, but in bending over to avoid being intimidated, I am intimidated. It is kind of a rapidly accelerating merry-go-round, but I think this is what happens.

Now, I think it also should be said here that on the network level it is true, we are powerful, we are rich, we are strong. We are not as immediately subject to an intimidating phone call or a letter from somebody in power as is a small station which does not have the resources for legal, constant legal attention, to these matters that we have. And if we get the 20-day letter, we can send it to a lawyer and it is not going to break the company; it is not going to knock our profit picture into a cocked hat; not going to prevent us from doing other programing we want to do perhaps to answer that letter. But you get a very small station out in the country and they get a phone call from Washington and they are shaken by the telephone call from Washington asking "how are you." No threat, no intimidation. This is a little bit like the comedy act in wrestling. The fellow is sticking his finger in the other wrestler's eye. But when the referee admonishes him he feigns innocence. The other fellow just knows he keeps getting a finger in his eye. It is like this, with these little stations. There may be all the denial of intimidation in the world, but if they are getting phone calls from Washington and letters from Washington, and they hear the speeches being made, their reaction is going to be: "Let's not take a chance the next time that story comes around. Let's not take that chance. Come on, fellows, let's lay off, it is not going to make that much difference if we let that story go." I think clearly intimidation is there.

Senator **Kennedy.** In another area, in your comments on the fairness doctrine, which you have talked about in your testimony, I am wondering what forces or factors you feel will be effective and will work to ensure that either minority rights or minority representatives, or perhaps even persons attacked will be given the opportunity for response. I am concerned, particularly, in light of the recent development of a greater concentration of power with the newspapers operating radio and various television stations. I know you have commented on this earlier, that you think there are factors and forces within the industry which would provide adequate response or competition. But I think some of us are mindful for example of the evolution of children's programs, with the violence and fantasy that have been associated with television programs for a period of years. It was really only after the FCC became involved in it, I understand, that there were some rather serious changes.

So I would be interested in whether, first of all, you are completely satisfied that the forces within the industry would offset in a reasonable way any inequity, or whether you have other suggestions as to what steps you know might be taken, if the fairness doctrine that were eliminated, to assure adequate protection of minority rights generally.

Mr. **Cronkite.** I feel, Senator, the assurance that fairness will prevail is in the diversity of broadcasting station ownership, television station ownership. All of the owners are not going to look at things exactly alike. Where, as I say, it may not be possible for the offended to get air time on the station that offends, I think he will have every opportunity on another station to air his views because there is natural competition in the marketplace of ideas, too, and competition in the marketplace in radio and television station availability, that they simply will get on somewhere.

As I said, it would be nice to think you could get a fair hearing by simply granting access, if that could be done without inhibiting freedom of press and speech, which I think it would. Even that is not an assurance of an audience. Even getting equal access in newspapers is no assurance that people are going to read the other view. I don't think there is any guarantee of that, and I just don't believe —I think the dangers, the inhibitions this poses, are greater than in the calculable benefit of total freedom.

Senator KENNEDY. But certainly the trend in recent times has been for the competition and interplay among the various media, whether it is radio or newspaper, or television, to be toward greater concentration. There may be greater utilization of assemblage of power with the newspapers owning radio stations and even television stations. So I am just wondering, I can understand somewhat the argument, if you had either the television stations owned independently or television with more variety of competition between the TV stations, or the newspapers not owning the television and not owning the radio, perhaps there would be a greater opportunity. But given the fact that certainly the trend recently has been for a greater concentration of power in terms of ownership, do you feel that your argument is just as presentable? And I would suspect the trend would probably continue over the next years.

Mr. CRONKITE. I think in all honesty, I would have to say, Senator, that the trend is in turn an inhibition toward this very diversity of which I speak. There is no doubt about that. It is perfectly as one follows the other, as night and day, it can't be helped, but I think the facts are that where there is this concentration of power, in most cases, in the larger markets, the larger owners, the chain owners and so forth, want the big market ownership, they want to get the biggest market they can and they have the power to get the biggest market they can. But the result is, it being a large market, there are more radio and television stations in the market, and it is rare that they own the only station in town, and the only newspaper in town. I think it is unfortunate when that happens, but I don't believe there are many such cases really.

Senator KENNEDY. And you think there is sufficient motivation within the networks themselves, that they would be willing to subjugate the economic interests which obviously are a significant factor in the development of the programs, and be willing to subjugate these interests to the more general public interest?

Mr. CRONKITE. Are you talking about entertainment programs?

Senator KENNEDY. I was thinking of the news, the availability of public service time, the amount of news broadcasting. I suppose there would be those who would say without any kind of regulations, that perhaps the economic interests for the particular network would come into a more prominent position.

Mr. CRONKITE. I think that this in effect, would be equalized as we go along. If there were no FCC controls over a program, no dictates that so much time be used for public affairs programs, I would suspect a trend in the direction you suggest initially, but I think it would come back very shortly, I think we are seeing it even now to a certain extent, that there is a public demand, a request for this type of programing and the stations that are doing it are getting good audiences again after a sag. There will be a flow of a certain type, and it is certainly true if there were Government dictates that a percentage of time be used for public affairs programing, there might be more of it than there would if there wasn't, if that was not the case, but, again, I take the lesser of the evils.

Senator KENNEDY. Thank you.

Senator ERVIN. I want to thank you again for your kind contribution you have made to the hearings

Mr. CRONKITE. Thank you, sir.

Mr. BASKIR. Our next witness this morning is Professor Jerome Barron, professor of law at George Washington University Law School.

Professor Barron is appearing on very short notice and does not have a prepared statement.

Senator ERVIN. I am delighted to welcome you to the Subcommittee and express our appreciation for your willingness to appear and give us the benefit of your views on the very short notice we gave you.

STATEMENT OF JEROME A. BARRON, PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY

Mr. BARRON. Thank you, Senator Ervin. I was lucky that I was able to hear most of Mr. Cronkite's testimony this morning. I think the best way for me to start is perhaps to give my reaction to it. I might borrow something from you, Senator Ervin, to frame that reaction.

You said the First Amendment was drafted not only for the brave but for the timid, and I would just like to put an addendum to that:

The first amendment was not drafted for the broadcast networks. Yet I think really that is the conclusion which we got from Mr. Cronkite's testimony.

I had said before in print that I think that it is one of the great public relations triumphs of the 20th century over the 18th that broadcasters have managed to identify themselves so completely with the First Amendment.

I think the problem comes because we are groping for a constitutional theory which will somehow be adequate to the communication problem of the 20th century.

I think all of our difficulties stem from a rather myopic view of what the freedom of speech means in broadcasting.

I think the conventional view has been that freedom of speech in broadcasting is exhaustive when the freedom of speech of the communicator is protected. In other words, if Dr. Stanton, Mr. Cronkite, Mr. Reasoner, Mr. Brinkley, have their say, then freedom of speech in America is safe; but they are three or four people out of 200 million. I don't think it is conspiratorial or anything like that. It is a combination of the marriage of technology and the pressure of the concentration on the economic system, which has given them this enormous power. I don't accuse them of seeking it, I realize in many ways they just find themselves at the throttle. But our problem is, what are we going to do about it? As far as the Supreme Court of the United States is concerned, the beginning of wisdom came in the *Red Lion* case in 1969. Most people in this room, I think, are familiar with that case, where the fairness doctrine and personal attack rules were validated, held to be consistent with the First Amendment; the Court suggested perhaps that fairness was compelled by the First Amendment.

When that case was up before the Supreme Court, there were long, and I daresay extensive, briefs filed by the networks opposing the validity of the fairness doctrine, asking that it be held unconstitutional. I am sure that the networks were very much surprised when the Supreme Court went much further than the FCC had done, and gave a constitutional dimension to these regulatory ideas. One of the things I wondered about is how Mr. Hugo Black would vote in *Red Lion*. Surely *Red Lion* would be a test, I suppose, of the meaning of the First Amendment in the fundamental sense, in the sense that he understood it. I was very happy, very gratified to see that Justice Black joined in the unanimous opinion of the Court as well as over what Mr. Justice White said for the Supreme Court in the *Red Lion* case. He said that in First Amendment matters, it is the interest of the reader, the listener, and the viewer that is paramount. In other words, Mr. Justice White was not suggesting for a moment that the interest of the communicator was not important, but in his view, it was not paramount, and this is where I would like to begin.

Mr. Cronkite talked this morning about there being more outlets in broadcasting than in the print media, and that, of course, is true. But the point that we should look for, if we want some understanding about our communications system, is not just for a multiplicity of outlets but for a multiplicity of ideas. The point is that the VHF markets between 7:30 and 11 emit exclusively, in their prime time, programing that is originated in New York with the three major networks. Diversity in terms of what people actually receive, is completely a myth. It is very interesting, considering the testimony we have had this morning about network great concern for diversity that those same networks fought the prime time access rule that the FCC has been trying to implement this year to free up an hour of broadcast time across-the-country for programing originating in sources outside of the networks.

So what I say to you is that we have a very difficult problem, and a problem that, to use a phrase of Mr. Justice Frankfurter, will not be solved by uncritical libertarian generalities applied to the networks or broadcasters.

Now, I think as far as the fairness doctrine, personal attacks rule, equal time rule, and the rising access principle, are concerned that these procedures cannot be called government interference with broadcasting, and for this committee to think that they are governmental interference with broadcasting would be a grave mistake.

There is the situation when the Government substantively tries to interfere with the opinion process in terms of ideas, in terms of content. There is also the situation when the Government tries to provide a procedure for dialogue. That is what these various rules and doctrines do; they provide a structure for dialogue. They reflect an awareness that the real opinion of this country is made in broadcasting and in television. I don't have to tell people in Congress that this is true.

The question is what can we do to share in the opinion process.

When I read the Supreme Court opinion in the *Red Lion* case, it was really a great experience. Even after having read a great many opinions, nevertheless, I found that opinion full of surprises. One of the surprises I found in it, was a remarkable sentence by Mr. Justice White where he said something like this. He said: "Broadcasting doesn't really have to be set up the way we have set it up." Conceivably and legitimately it could be allocated among each of 200 million Americans, because it is they to whom it belongs. And I think it nothing short of amazing for a representative of broadcasting to content they should be free from all regulations. They don't suggest everybody should be licensed anew as an original proposition. To that extent they are not willing to abdicate or abandon government aid.

Well, I think this gives you the general tenor of my views and I would certainly be happy to answer any questions you might have.

Senator **Ervin**. Well, you have a very unique, and I might say original approach to the First Amendment.

It is undoubtedly true that the First Amendment gives certain expressed freedoms, freedom of speech and freedom of assembly, freedom of petition and freedom of religion, but undoubtedly, there are certain other freedoms which are not given in the expressed words that are necessarily implicit in the First Amendment, such as freedom of thought. It is not expressed but it is certainly implicit there.

It is also implicit that there be freedom to dissent.

You take the position there is another implicit freedom, freedom of access to communicating ideas?

Mr. **Barron**. That is right. The view that I have been urging, the view that the Supreme Court, I think, accepted in the *Red Lion* case. It is a view which now is being carried out in some of the more recent decisions of the Federal Court of Appeals of the District of Columbia. It is the idea that there are some issues so important that as a First Amendment matter, they merit a right of entry or right of access to broadcasting. I will give you an example.

The Democratic National Committee, almost a year ago, I suppose, asked the three broadcast networks for two things. They asked them for time to make spot announcements, appeals for funds, and then they asked them to sell them some program time to develop commentary on various social and political issues.

The response of the three networks, although they had different rhetoric to deal with the requests, was negative to both requests. And it was negative, they said, because this is like advertising time and they don't sell advertising time for ideas. They sell advertising time for soap and for automobiles and for beer, but they don't sell it for ideas, and that is their policy.

Well, the Democratic National Committee, using the ideas in *Red Lion*, and taking the view that the First Amendment encouraged access for ideas in broadcasting, after having lost at the FCC, went to the U.S. Court of Appeals for the District of Columbia. There, Judge Wright, writing for a panel of three—and one of those dissented—held for the court that as a first amendment matter, broadcasters could not refuse to take a whole section of time and say this is reserved for commercials but not for ideas. In other words, this would be taking the First Amendment and putting it upside down, for commercialism would be preferred over ideas.

He said any such rule, in his view, violated the fundamental notions of freedom of speech.

It seems to me that in a medium like broadcasting, this decision is completely consistent with the intent of the framers. I cannot imagine that the intent of the framers, if they could have envisaged anything like the electronic media, would have contemplated that the 20 or so people who write network news should have no accountability or responsibility for it.

Senator **Ervin**. Isn't advertising an expression of ideas?

For example, I look over this media of communication and I read in the papers that if I use Aqua Velvet all the girls will immediately become enamored of it. I think that is a rather foolish idea because I have used it and it hasn't had that effect at all on me. But still it seems to me that the question of whether you need this can of peaches or patronize this tailor, and that sort of idea——

Mr. **Barron**. This happens to be, as I think we are all aware, a very exciting time in broadcast regulation. It is very clear when we are at the beginning of a new approach to the whole process.

You talked earlier about tobacco. The conventional FCC doctrine was that product advertising was not subject to the fairness doctrine and the first significant break in that position was, of course, the *Banzhaf* case, which went first to the FCC and then was affirmed in the U.S. Court of Appeals. The case held that cigarette smoking was different. That case resulted in the extension of the fairness doctrine to the problem of cigarette advertising. We have now extended product advertising under the fairness doctrine and the access concept to other kinds of commercials. Environmental groups recently prevailed in a case here in Washington in the Federal Court of Appeals, the *Friends of the Earth* case. They contended that the ad for big cars, and pollution laden gasoline, were as much a threat to the health of an asthmatic in New York City as cigarette smoking is to someone who has emphysema, for example. They said environmental groups ought to have the right of reply. There ought to be an opportunity, they said to give the position of the environmentalist group about what the constant push for the purchase of these products is doing to the Nation. The court of appeals agreed, although the FCC did not.

I really felt sorry for the FCC as I read the testimony yesterday and listened to it today, because no one has been a better friend of the broadcasters than the FCC. The FCC has been dragged by the neck to move and respond to the petition of citizen groups around the country. It is the citizens group who brings the petition for access and fairness. It is the FCC which has used the fairness doctrine to block the rights of access to broadcasting. I really feel sorry for the FCC, and the people working for it. The FCC has been working for so long and yet the broadcasters have been so critical of them because the FCC is the best friend the industry has.

Senator ERVIN. I don't know whether I caught your statement or not, but if I caught what you said, when you first stated this, the First Amendment didn't apply to broadcasting?

Mr. BARRON. No, I didn't say that.

Senator ERVIN. I want to clear that up.

Mr. BARRON. In *United States* v. *Paramount Pictures* in the 1940's, and only this June in *Rosenbloom* v. *Metromedia*, the Supreme Court made it clear that the First Amendment speaks to broadcasting. But in what sense does it speak to broadcasting?

What I said was that the First Amendment, the meaning of the First Amendment is not exhausted by protecting the networks. That is what I said.

Senator ERVIN. I am glad you clarified that because it does seem to me that since the First Amendment says Congress shall make no law abridging the freedom of speech, and the broadcasters certainly do speak, there is no question about that, and it comes down to the question then whether the right to speak is limited to the use of those powers which nature endowed us with, or whether we can artificially multiply our powers by, and you quoted Justice Frankfurter, and I have always been intrigued by Justice Frankfurter, the remarks of his, I believe, in the *New Rochelle* case where it involves the question of whether the police could prohibit setting up a loud speaker by a gentleman in a park to disturb, to multiply their voices and hurl them.

Mr. BARRON. I think that was *Saia* v. *New York*.

Senator ERVIN. And he said, there ought to be such a thing as freedom to listen, and that is, of course——

Mr. BARRON. Yes. Another thing Justice Frankfurter said in the opinion you are talking about, was that we have to interpret each medium in context. That is exactly right.

It makes no sense for these people who can reach 60 million people nightly to say that they ought to have the same freedom as anybody in a public park can have. I don't think it makes any sense for them further to suggest that they should be the sole censors of what appears in broadcasting. I think it is an intolerable suggestion.

Senator ERVIN. That is what everybody else criticizes, the freedom of speech and freedom of press, and would you extend the theory of access to the newspapers?

Mr. BARRON. Yes, I would, and I have written in that direction.

The first piece I wrote on this subject in 1967 is in the record, an article on access to the press, which was in *80 Harvard Law Review*. I was very pleased this summer because of a case that applied the *New York Times* v. *Sullivan* doctrine, the *Rosenbloom* case. The opinion for the court in *Rosenbloom* said in a footnote that it might be time to consider the responsibilities of the press. The Court said it might be a task for constitutional adjudication to fashion a right of access to the press. Certainly in terms of the monopoly problem, I would agree with Mr. Cronkite; the newspaper monopoly problem in some cities is even worse than the broadcast problem. I think that is true.

Senator ERVIN. That article was printed in your article on access to the press, the first amendment right, which is published in the *Harvard Law Review* for June 1967, which is a very intriguing article and I would like to have permission to put it in the record, if you have no objection.

Mr. BARRON. None at all.

Senator ERVIN. I am sure we can secure permission from the *Harvard Law Review*. I will ask counsel to contact the *Harvard Law Review* for permission.

Since you mentioned the *Red Lion* case, I would request counsel to put a copy of the *Red Lion* opinion in the appendix of the record.

Now, if Congress is going to give the right to any legislative body on a State level, is going to give the right of access to the broadcast media or to newspapers, Congress, in effect, is going to have to curtail or express to some extent their right of freedom of speech.

Mr. BARRON. Senator, I would like to bring to your attention a very interesting thing that happened here in Congress. I guess it occurred the summer before last here in Washington. The matter concerned the question of access to the press.

At that time, there was a bill pending before Congress called the Failing Newspaper Act. I think the final title of the bill was the Newspaper Preservation Act. I thought the passage of the bill was one of the more hilarious events of my experience with press law problems. Here were all of these publishers who for so many years had contended that government and the press were mortal enemies and that the hand of government should never be placed on the press. Here they were begging Congress to pass special legislation aiding them, and immunizing them from the antitrust law. That special legislation didn't violate the First Amendment. Not a single publisher of the ones that wanted that legislation thought there was any First Amendment problem at all.

All right, at the same time, a Congressman tried to introduce another bill. There was a thought perhaps that it might be amusing to tack it all on a rider and call it the Truth Preservation Act. The intent of the other bill was to suggest that if you got that government aid maybe you had a responsibility, if you attack somebody in an editorial to give him the right of reply. That the bill didn't pass shouldn't surprise anybody. Such a bill violated the First Amendment! I began to wonder about the view of the First Amendment, at least as it is held by the newspapers and broadcast industry. It seems to me that if the amendment does not forbid government aid for the press, it ought not to forbid government aid for the reader.

Senator ERVIN. The Failing Newspaper Act, as I recall from hearing much of the discussion of it on the Judiciary Committee, didn't attempt to place any limitations upon what editors or journalists could say, it merely permitted newspapers to use certain physical facilities such as the same presses, or the same buildings in certain instances, to say what they wished to say. There was no expression that I see.

Mr. BARRON. That problem with the bill was this. In a country where we only have something like 50 cities with separate ownerships, if we then go ahead and say that where two papers do exist, and can pool facilities, the prospect of a new entrant, already remote, would be nil. In terms of stimulating diversity of ideas, that would be an undesirable result.

Senator ERVIN. Of course you had an undesirable result that had already been reached. In other words, with the increased cost of publishing newspapers you wound up with virtually the same people owning, where they had formerly been competing newspapers in most of our major cities.

Mr. BARRON. I agree with you to some extent on this. The economics of the problem make it unlikely that antitrust policy is going to solve our immediate problems.

I think that the weapons that have been devised in broadcasting, the legal weapons like the Fairness Doctrine or the access principle, things like that, are more likely to be responsive to the problem because they are indifferent to the question of ownership and yet they get the ideas out. I think we need a similar approach to some extent in the press.

Of course, the broadcast area, as I say, is an exciting area right now in broadcast regulation because the courts are leaving uncritical libertarian generalities as an approach to broadcasting.

On the other hand, we have in front of us the rise of another technology, cable television. It is still unclear to what extent cable is going to make available the access for ideas that so many of us would like.

Senator ERVIN. It seems to me that the right of access would require a curtailment or limitation on the news media right to freedom of speech. In other words, to illustrate what I mean, a newspaper that customarily has, we will say, eight pages in it, and if you give the public or the individuals the right to access to that, it is going to have to curtail part of the paper that I used to exercise this freedom of the press——

Mr. BARRON. One thing——

Senator ERVIN (continuing). And, furthermore, it is going to curtail the newspaper to say things that the newspaper doesn't believe.

Mr. BARRON. Well, I have tried to begin in that area by suggesting something that I thought would leave the editing process alone, would meet the economic objectives. I would start with the very modest suggestion that there is a right for nondiscriminatory publication of editorial advertising in newspapers.

I think that if the papers were paid at the regular rate and the group wanted to buy an ad, that the paper ought not to be able, particularly in monopoly situations, to say they can't.

Now, to me that seems a fairly reasonable proposition. We have had some cases recently on it in the Federal courts and the newspapers have won. They have been fighting access.

To give you an example of how it would work. In Chicago, a Chicago group of the Amalgamated Clothing Workers Union were picketing the Marshall Field Department Store and they were picketing Marshall Field because Marshall Field was selling textiles made abroad and they contended that the result was the loss of jobs for the American working man. They had pickets out in front of the store making that contention. The union felt that they weren't getting across to the people of Chicago and so they went to each of the four Chicago dailies. Although there are only two ownerships, there were still four dailies in Chicago. The union argued this access approach to the First Amendment. Really the union was completely shut out, yet they were willing to pay for the ad. They had the State action problem. There was a very interesting ordinance in Chicago that only newspapers printed in the city of Chicago can be sold on the streets of Chicago. A very unusual ordinance. The union tried to show that the ordinance would be sufficient State action. The union lost in the Federal District Court and the court of appeals. One of the grounds on which the union lost was that Chicago was not a newspaper monopoly situation. I thought this was a very strange comment.

Senator ERVIN. I should certainly think, and I don't see how any court could have denied them that adjudication to the effect that an ordinance that prevented any other newspapers being sold in Chicago on the streets of Chicago, was clearly an infringment of the First Amendment.

Mr. BARRON. Well, I wish you had been deciding the case, because I felt it was a very strong case. I felt it was a controversial issue, I felt it was a complete shutout, and I thought to say that this was not a monopoly situation made no sense.

For first amendment purposes, the test of monopoly is whether there is any outlet for ideas.

Senator ERVIN. And I think that illustrates another situation in which individuals are denied the freedom of speech, because evidently the Chicago papers would refuse to take their advertisements, they figured that they would profit more by getting advertisements in the long run from Marshall Field than they would have these people and, therefore, not offending Marshall Field they denied these people something, I think, a person willing to pay for an advertisement in the newspaper has the right to get it.

Mr. BARRON. I think there is probably considerable justice in your observations although these points didn't come out in the opinions. But I think you are right and I think that this kind of press action is an illustration that the kind of advice you heard this morning from Mr. Cronkite is not really the kind of advice you ought to act on. Although I have no doubt that he means it, it is not the kind of advice that we can rely on for communication policy. The idea is that the wicked will not prosper. If they don't give everybody a chance, this reasoning says, they won't prevail.

Well, I am willing to share and hope that the wicked won't prosper, but I am also unwilling to give them the opportunity. I would think it would be a great mistake for this committee to suggest anything critical about the fairness doctrine and personal attack rule or anything like that.

Senator ERVIN. I hate to see the wicked prosper, and that is the reason Gun Smoke is my favorite television program because the righteous always prevail, even though they have to resort to illegal violence to do it.

Mr. BARRON. I am glad they prevail somewhere, but I must say I don't think they prevail in the media.

Senator **Ervin**. That, of course, one of the objectives of freedom of speech is the hope that the truth will ultimately prevail rather than a falsehood and I am optimistic, I believe as they say in North Carolina, I am not plum-certain of it.

Anyway, if you give a right of access, every individual ought to have the same right of access, shouldn't he? Do you have some ideas?

Mr. **Barron**. No, I don't think so.

Senator **Ervin**. The reason I fear we have to have a tremendous amount of Federal regulations.

Mr. **Barron**. I haven't suggested Federal regulation in my own writings on access to the press. I have not suggested that the press be subjected to Federal regulation as an overall proposition. I am not that enamored with the history of the Federal Communications Commission to enlarge their jurisdiction to include the press. What I have suggested is that in a situation like the litigated case I just gave you that the appropriate remedy should be to the Federal courts for enforcement of what, after all, are first amendment rights. One of the courts in the Chicago area, the District Court, hinted if there were legislation affording the right of access they would have upheld the union. The case for access is a much stronger case because of the remarks in the *Rosenbloom* case. The opinion of the Court seemed to be sympathetic to the idea that the First Amendment demanded some kind of right of access to be enforced through the constitutional adjudication. But I think you would have to show a shutout. I think you would have to show that you had made a request for publication, that the advertisement had been denied and that it had been denied essentially for discriminatory or ideological reasons.

Senator **Ervin**. It would seem to me you have a difficulty of creating the right of access, and then limiting to certain groups of people that you come to the same things you have to give everybody the right of access.

Mr. **Barron**. Well, you know, a similar argument was made, sir, several years ago in the broadcast area. The law used to be that a citizen group did not have a right to participate in the renewal proceedings. The idea was that if you wanted another license, if you wanted somebody's license in the broadcast business and wanted to get in it, and wanted a license, you had standing and you could get an evidentiary hearing. The idea was that you and I as viewers and listeners didn't have a sufficient enough stake to entitle us to the same opportunity.

In the *United Church of Christ* case, which arose down in Jackson, Mississippi, a case which was decided, two opinions on it, by Judge Burger, when he was on the Court of Appeals here, changed the law. Judge Burger thought that the listeners' and viewers' interest was what broadcasting was all about. He thought certainly they ought to have standing. The FCC incidentally was opposed to this position. Needless to say, so was the industry. Their argument was something like yours; that this would have no stopping place. As a matter of fact, the citizens groups had still been successfully sabotaged until quite recently in their efforts to get evidentiary hearings before the Commission. The decision has not led to an intolerable floodgate of litigation. In fact, Judge Burger said every reform of the law always meets the floodgate argument and he was unimpressed by it.

Senator **Ervin**. It seems to me a fellow who couldn't get a person to agree with his views and couldn't get any group to form around him, would be more in need of access than the people who had some folks that agreed with them.

Mr. **Barron**. I am sure that would be his opinion, but I don't think I would begin my efforts in securing his rights first. He would not be my ideal client, I guess I would rather start with community groups.

Senator **Ervin**. But he would be the one most in need.

Mr. **Barron**. I would rather think that the claim of the union, for example, ought to be something that would be clearly and more easily recognized than that of an individual. But I agree with you in theory, I agree with you as a matter of the inherent merit of the idea.

Senator **Ervin**. I think the one individual who might not agree with the view of the union and wanted to express his views on the subject, would be just as much entitled to express them on your theory.

Mr. **Barron**. Commissioner Johnson has taken in broadcast renewals, the position that even one listener or viewer is enough. I certainly would be glad to see this result. But it is a question of where you begin in terms of legislation. I guess I would suggest starting with groups as Judge Burger started with the Church of Christ.

Senator **Ervin**. Well, individual rights ought to be just as sacred as those of the group, even more so.

Mr. **Barron**. If you will introduce legislation to that effect, I will be glad to support it.

Senator **Ervin**. It seems to me this is forcing people to broadcast things they don't believe. It is also in a sense a confiscation of their profit.

Mr. **Barron**. I would like to respond to that.

Senator **Ervin**. By people who have made no investment.

Mr. **Barron**. I would like to say a couple of things about that. First of all, it isn't their property. That is where we begin, with broadcast legislation. And in the *Red Lion* case, Justice White said that the broadcast licensee has a license that is up for renewal every three years. The spectrum belongs to the public. What has happened is this. The Federal Communications Act, the one we are now living with, dates from 1934. But from that time until very recently, the broadcast licensee has been automatically renewed even though there was nothing in the statute itself to suggest that such would be the result. So as a consequence, the industry has decided (and in light of the history I suppose with some justice) that they have an expectancy of renewal. But in very recent cases, in the two United Church of Christ cases, in the *Citizens Communications Center* case in the district court, and the *Red Lion* case, the courts have all emphasized the broadcaster does not have a proprietary right in his franchise. Thus the response that the broadcaster objects to what is being presented is completely irrelevant. The broadcasters have also long argued they don't own their franchise. They say they are the trustees for the public.

Senator Ervin. But they own the buildings and the electronic devices used to broadcast things.

Mr. Barron. Well, right now in the Commission and in the *United Church of Christ*, which brought many of these cases, they are trying to work out formulas for reimbursement in terms of paying a reimbursement sum to which previous or past licensees would be entitled.

Senator Ervin. You say this same doctrine should apply to the newspaper. The newspaper certainly owns everything they use.

Mr. Barron. That is why I have not suggested it go to a Federal commission. It seems to me the most expeditious and fairest way to handle those problems, such as the one I gave you in Chicago, would be in the Federal court.

Senator Ervin. I have a friend, or old schoolmate, who has notions which are rather peculiar from my viewpoint and he used to send me these long documents and ask me to put them in the Congressional Record. I disagreed with everything in them and declined to put them in the Congressional Record. So he said he had a right to forward them and since he was an American citizen and paid taxes and this was at the expense of the taxpayers, he had the right to require me to put them in the Congressional Record.

I told him I had a right to say what I was going to put in the Congressional Record, because everything I put in there people attribute to my views, and I told him I would get a thousand letters protesting my putting such foolish things in the Congressional Record, and I refused to put them there.

I think maybe the media or communication, whether they are broadcasters or newspapers, ought to have some say in what they will disseminate and it seems to me it is fundamentally a denial of freedom of speech to tell them, to say they have to publish something that they don't want to publish.

I don't think it would be much freedom if a man is compelled to say something he doesn't want to say.

Mr. Barron. I think that it is all how you go about solving the First Amendment interest in these media problems. Say to yourself, who is the addressee of first amendment protection? Suppose you ask that question? The traditional response to that question has been that the newspaper publisher is the addressee of first amendment protection—the publisher and the broadcaster. My difficulty with that response is that it doesn't give enough protection.

One must go back to *Red Lion* as a first amendment matter. There the Court said it is the right of the public to receive esthetic, social, moral, political ideas, and that right was spoken of in terms of a constitutional right. But if we take an approach to first amendment problems which exhaust the First Amendment in terms of the property notions of those who are the media proprietors in an age of such complete concentration, I think we have an inadequate theory.

Senator Ervin. I will agree that people are entitled to hear, but are people entitled to compel someone to speak things they want to hear, rather than what the speaker wants to say?

Mr. **Barron.** In terms of the advertising pages of newspapers, we had a number of cases in the early days of the Vietnam war when papers wouldn't sell ads against the Vietnam war, for example. But it doesn't matter what the ideological position is.

It seems to me that when you are talking about the traditionally open section of the newspaper, particularly in a monopoly situation the papers have an obligation. I don't think that obligation hinders their freedom of maneuver. They can still print an editorial opposing the ad. But at least the people in the community have some idea of what is going on.

Senator **Ervin.** You have presented a most intriguing viewpoint, and on occasions when I have wanted to say something, and I was denied the right, I was inclined to agree with you.

Mr. **Barron.** Thank you, sir.

Senator **Ervin.** At least, temporarily.

Mr. **Baskir.** If I can summarize your position, if I can do it justice, I gather you are unwilling to leave to the economic market the decision about access to media, and the case you gave in Chicago where the decision was based on advertising revenues, is one you don't like. You would rather give it to another determining factor, another determining body other than economics?

Mr. **Barron.** That is right.

Mr. **Baskir.** I gather from what you said, you would not prefer Congress, you would not prefer the executive agency?

Mr. **Barron.** Well, I would prefer the Congress to act in one respect. If the Congress would enact legislation in this area which would then be implemented through the Federal courts, I would be all for that. But the enforcement level should be, in my judgment, in the courts.

Mr. **Baskir.** I was getting to enforcement, it should not be in the executive branch, but the courts?

Mr. **Barron.** Absolutely.

Mr. **Baskir.** I gather because you have more confidence in the objectivity of the judicial branch as an institution as opposed to the executive branch?

Mr. **Barron.** Exactly.

Mr. **Baskir.** Without getting into the question of whether the people who wear the robes are human and politically affiliated, and politically appointed, and whether a judge like Skelly Wright might be entirely different in his point of view than a judge like Harold Cox, let's say, which would give you a very difficult problem, maybe the same kind of problems?

Mr. **Barron.** Well, it all depends on your idea of the Federal judiciary and how much they managed to achieve. I think their record in recent years has been a credible one.

Justice Frankfurter used to say that people change once they are appointed judges. A lot of people said that when Justice Frankfurter went on the Court he was a Liberal and that when he came off he was a Conservative. He used to contend that wasn't true, that the difference was that he was now a judge and had to call issues the way he saw them as a judge.

I think this controversy between Mr. Stanton and Mr. Staggers comes from the fact that each is claiming a kind of absolutism in determining very difficult questions: the networks accountability for propaganda and the question of Government censorship over broadcasting. Both issues are involved, and yet each spokesman says that he should be the sole determinator. But I don't think such absolution that is adequate for a solution. Each spokesman is too much interested in the issue at this point. The questions we are talking about belong in the courts. That is why Federal judges write opinions.

Mr. **Baskir.** We all know because of the current interest in the two nominees, that although there are judges and even justices and they are human beings and the choice of the particular human being has a great influence on the course of the law, and the course of the Nation, and it may be a risk that we are willing to take in all issues of human society, to give it to the courts that decide this fundamental issue, because they are the best we have.

But maybe in the area of ideas, that is too great a risk if, for instance, a President manages to get the opportunity by chance to appoint five or six people to the Supreme Court, they will be people of different ideas and different ideas and different approaches than if a different President had appointed them, and those are the people who are determining who have the right to get into the newspapers under your theory, and they will make different decisions than another set of judges.

Mr. **Barron.** I will tell you what I think about that, Mr. Baskir. I teach Federal jurisdiction at my law school. During the past few years the object of most of my students has been to develop theories that would expand the Federal jurisdiction, because in many areas they have more confidence in the Federal courts than they have in some of the State courts. But I then raise with them the question you have just asked me. If you like the Federal courts so well, if some President came along you did not like as much as some of the Presidents who appointed some of these Federal judges, would you then be constructing theories to get the Federal court back in the State court? I think the answer to that kind of inquiry shows some of the genius in our system. We have enough room for maneuver in the court system, State and Federal, to take care of the problems you are talking about. It is not the greatest system but in terms of entrusting it to regulators for a term of years, I prefer the court system.

Mr. **Baskir.** My point is that maybe the better thing is not to even go to the courts but in the area of deciding which ideas are important enough to be expressed under your theory, that is too important a decision?

Mr. **Barron.** Then the question gets back to the question who do you leave it to? Dr. Stanton?

Mr. **Baskir.** Yes, indeed.

Mr. **Barron.** These are questions of ultimate choice. I think he is a good man. I think most of these people are good people. But I think that they are much too involved in the controversy to be allowed to have the complete say. They have, as I said earlier, too much power. Mr. Cronkite conceded that himself this morning. I would be the last to say that they have sought this power but they have it. I think all power merits some oversight and some accountability.

Senator **Ervin**. That is a danger. I think you wind up eventually with limiting freedom, when you try to prevent an abuse of freedom and. for that reason, I am not much inclined to give much power to the Government. I would rather have power in the hands of individual than in the hands of Government because you can do something with individuals when they exceed their power, but you can't with the Government. It is an intolerable thing to say that the Government should have the power to pick out which ideas are worthy of dissemination and which are not. I am sure, since I am so much in the minority, they wouldn't pick out many of my ideas for dissemination of freedom of the press; I wouldn't like that a bit.

Mr. **Baskir**. You made reference to the *Banzhaf* case. As you reminded me, he had initially a lack of success in getting access in the Fairness Doctrine and now it looks like his success has gone full-circle, because now at least his opponents have succeeded in getting a judge to say that smoking is no longer controversial, and would you be willing to say with me, as long as one person wants to smoke, or even if nobody wants to smoke, in a sense the issue of smoking, like the issue of just about everything else in the world, ought to be controversial?

Mr. **Barron**. My problem on that issue is this. I have serious doubts about the constitutionality of the statute Congress passed. I think a statute which says that an idea, any idea, even cigarette smoking, is such a threat to the public interest that it cannot even be discussed. I think it violates the First Amendment.

Mr. **Baskir**. I agree with you on that, but in the application of the Fairness Doctrine, it strikes me as being sort of a small example of——

Mr. **Barron**. I don't agree either with the FCC position on that. I don't agree with their position on it.

Mr. **Baskir**. Isn't the Fairness Doctrine in a sense an undeveloped version of your concept of access?

Mr. **Barron**. Well, it is very undeveloped. Yet we have it and I wouldn't want to get rid of it. But it is not great by any means.

The problem of the Fairness Doctrine is it has a trigger mechanism. In other words, you put on a conventional idea, you put on an issue, and then that puts on or gives a group or individual a right to ask for an opportunity for a reply. But the problem is, of course, the path of evasion is very simple; you don't put on the issues. It is in that respect that the access principle is very helpful in regard to the Fairness Doctrine. The access principle says if you have a constitutional duty to provide access for ideas of public importance, for controversial ideas of public importance, you can't avoid the whole thing by saying we don't want to hear from that group. If there is a duty to give access, as an original proposition, for controversial ideas, you have sort of outfoxed the trigger mechanism aspect of the Fairness Doctrine.

Senator **Ervin**. To me, the tobacco situation is an absurd position because the Supreme Court of the United States, as I read its opinions, has held in many cases that the Government cannot put any limitation upon freedom of speech of persons who even advocate the overthrow of the Government of the United States by violence, as long as they do not advocate action to carry out that, and yet under the amendment that protects peoples' rights to advocate overthrow of the United States by force and violence, as long as they don't accomplish that; that very government can prohibit a person saying on the air, but, advocating smoking cigarettes, even when he doesn't urge anybody to smoke them.

Mr. Barron. Well, I agree with you on that. The analogy I use on the problem.

Senator Ervin. And that is the reason I am rather strongly opposed to the Government having any power to say what anybody shall say about anything.

Mr. Barron. Well, I guess that is where I think you and I differ because I think we should be concerned with a mechanism for dialogue on the broadcast media today. To me censorship is no less censorship if it is in a few private hands that have Government licenses than if it is directly wielded by the Government. I don't think anybody should be under the illusion that there won't be any censorship if the legislation that Mr. Cronkite asked for here this morning were granted. Then you would have the complete censorship, a censorship which neither the courts nor the FCC, nor anybody could do anything about.

Senator Ervin. I have to agree there is tremendous power in the media of communications. No question about that. But I am just one who happens to entertain the view you have to be careful when you start limiting freedom on the theory that freedoms are being abused.

Mr. Barron. My test is a practical test. Are you excluding anything, or are you really adding to the information process? I think that a generous construction of the Fairness Doctrine is intended to add to the information process. And, oftentimes, the Fairness Doctrine has received a very wooden mechanical response by the Commission, and I think that has been very unfortunate.

Mr. Baskir. I think you used your definition up, I don't have it completely right, something in the idea of public importance or some such phrase.

Now, I am not sure you will concede that the opportunity to get through the airway media is limited, so is the newspaper limited by practical things, and so if you have a definition and a power to decide things that come out, you also have the same power to decide whether an idea falls outside of this role, and Mr. Banzhaf 15 years ago, because he is the only one who thinks there is a danger in smoking, can't convince the FCC or Judge Skelly Wright or any other judge, it is an idea of public importance, and now you have the opposite situation where at least two judges, I gather, out of three, have the idea that smoking is not dangerous, is not an idea of public importance.

Any time you have a definition like that and somebody to decide —they have the power to decide that it falls outside—they are the censor, and in your theory, they would be government officials, be it judges, they are still government officials, and aren't you trading one form of censorship, private censorship, for another, public?

Mr. **Barron.** In the sense that someone has to make a decision as to whether one of these procedures, equal time or fairness, or personal attack rules apply, or access rules apply, I suppose you are. But I think it is an advantage when you can talk about these problems in the open in a court where you can brief the issues and where you can show the community interest in the matter, the media silence on the point, or the media partisanship on the point. I think the opportunities for public expression in such a situation are likely to be greater than if it is confined to some network board room.

Mr. **Basker.** John Banzhaf is a lawyer and, therefore, he got the free legal assistance. However for the person who feels that adding fluoride to water is dangerous, who is considered a crank, and he turns out 30 years later not to have been such a crank after all, going to the court is cumbersome and expensive.

Mr. **Barron.** You are taking a theory in its most ideal sense and saying, since it would be unlikely to expect success there, that, therefore, it is not usable. I don't think that is really the alternative. Our alternative isn't the ideal that you are talking about. Our alternative is really the reality we have now, and I don't think it is a satisfactory one.

Mr. **Baskir.** I think my feeling is trading two unsatisfactory situations. I think the one with the government wasn't making satisfactory decisions. I resent the fact a judge doesn't like smoking can tell me——

Mr. **Barron.** I guess you and I have different opinions of the judiciary. I know some years ago, the Public Utility Commission here in the District of Columbia was sued along with D.C. Transit because they had some music, canned recordings on the bus. You couldn't turn it off. Justice Frankfurter used to take the bus from Georgetown to the Supreme Court. The case came up there and he felt so strongly about the intolerable intrusion into his privacy in regard to the noise that he refused to participate in the case. And I think that reflects well on the character of judges. If they think the matter is something that they cannot conquer their personal opinion on, they won't participate. His would have been a useful opinion in the case but for the reasons mentioned, he did not participate.

Mr. **Baskir.** I would say if all judges were like Justice Frankfurter, even when I didn't agree with him, I would have more confidence the issues had been wisely decided, but the eight other Justices felt very strongly about that, as I suspect they do on many other issues, and they felt they had to decide the case.

Mr. **Barron.** I think the legal architecture is there in the broadcast media.

I guess my final words to you people would be, if you don't want to go any further, certainly don't recommend doing any less. I think the public needs the opportunities for dialog that section 315 provides. I think they are in no sense unconstitutional. I agree completely with the Supreme Court. They are completely valid, and I further agree with the Court on the affirmative view of the First Amendment.

Senator **Ervin.** I want to thank you again for your appearance here, and say your viewpoint is very intriguing and I think you made a substantial contribution to the hearings. In the absence of a consideration of the weight that should be given to the question of right of access, I think the hearings would be decidedly incomplete.

Mr. **Barron**. Thank you very much for asking me to come.

Senator **Ervin**. We have one other witness, and it is such an interesting subject, and I would rather come back this afternoon.

Suppose we recess until 2:30.

(Whereupon, at 1 p.m. the hearing recessed to reconvene at 2:30 p.m. this day).

AFTERNOON SESSION

Senator **Ervin**. The subcommittee will come to order and Counsel will call the next witness.

Mr. **Baskir**. Our witness this afternoon is Mr. Laurence Leamer, author and journalist, who is the author of the forthcoming book, *The Paper Revolutionaries*, which is a product of a grant from the Twentieth Century Fund, to be published by Simon & Schuster.

Senator **Ervin**. I want to welcome you to the subcommittee and express our appreciation for your willingness to come and give us the benefit of your views in respect to a very important aspect of the matter we have under study.

You have done some very original research and so we welcome you with considerable interest in your views.

STATEMENT OF LAURENCE LEAMER, AUTHOR AND JOURNALIST

Mr. **Leamer**. Thank you very much, Senator.

I would like to begin by giving a little bit of background.

Perhaps you remember just half a dozen or so years ago coming upon someone selling a strange, colorful tabloid publication. An underground paper. Back then in the midsixties there were only a handful of such papers put out by people dropped out of the American dream. On little money and even less journalism background, they popularized New Left critiques, the hippie philosophy, rock music, and other hip cultural activities. Now all that seething anger, alienation, and yearning has erupted into a mass radical youth movement. There are over a million teenage runaways, several million adult dropouts, thousands and thousands who call themselves political radicals without fear or apology, countless sympathizers, hip areas in every major city in America, and communes from one coast to the other. Now the papers take a wealth of forms. There are youth-oriented undergrounds; tens of undergrounds put out by GI's at great personal risk; high school undergrounds in hundreds of schools; women's liberation papers; homosexual papers; commune papers; and college papers every bit as radical as the more militant undergrounds.

The underground press includes the largest paid weekly in Georgia and one of the largest in California; the two biggest weeklies in Berkley; and important papers in Chicago, Detroit, Philadelphia, Boston, and in towns and cities across the United States. In all, over 200 newspapers, publishing at a given time, are part of the loose confederation known as the Underground Press Syndicate (UPS). Membership in UPS would be the narrowest possible definition of an underground paper, and that alone adds up to a circulation over 2 million. By using the formula employed by mass magazines (six readers to one magazine) this would represent a readership of over 12 million. And by including high school undergrounds, reupholstered old left papers, rock culture papers, and other publications that identify with youth culture, it's possible to come up with a circulation figure of 3 million, or 18 million readers, an even better idea of the enormous audience for a medium that is blatantly anti-establishment.

In other words, we are not talking about a sideshow; the freak show of American journalism. We are talking about what is probably the most important innovation in print journalism in the last 40 years. We are talking about the first mass radical media in this country since the first decade of the 20th century. We are talking, too, about the most venerable and one of the most respected traditions in American journalism, that of impassioned dissent. You will remember, of course, that America's first newspaper, Benjamin Harris' *Publick Occurrences*, lasted only one issue because Boston officials found it too critical. We are talking, thus, about a press whose problems should be at the focal point of this committee's interest—for nowhere else in American journalism is freedom of the press so grievously and immediately threatened.

Underground editors are arrested on trumped-up charges. Paper sellers are pushed off the street. Printers are warned not to take work from the underground press. A thousandfold worse than such common and frequent harassments as these are other abuses that lie in that dark and growing area beyond the traditional boundaries of civil liberties. Here lie monstrous evils that some day may step over into conventional life to haunt us in ways we can scarcely imagine. Nowhere is this more true than with the historic case involving the *Los Angeles Free Press*. Its 90,000 circulation makes the paper the largest underground in the United States. In July 1969, 24-year-old Jerry Resnick came into the *Free Press* office. He said he was a clerk at the State Attorney General's office. He told Jerry Applebaum, then a free-lance reporter for the paper, that he had something the paper might be interested in. Resnick showed Applebaum a Xeroxed copy of a report that had been sent to Chief Deputy Attorney General Charles O'Brien by Richard Huffman of the DA's Los Angeles office. It was a shocking document dealing with alleged misconduct on the part of members of the UCLA police department. No journalist could ignore such a document. After deleting the name of the accused officer the Free Press placed an account of the report on the front page of the next issue under the headline "Secret Report Probes Crimes of UCLA Cops."

Several days later Resnick returned, this time with a printed pamphlet containing the names, addresses, and phone numbers of 80 California State narcotic agents, many of whom were involved in frequent undercover work. The *Free Press* justified its position in publishing the names with typical elan and bravado, stating that there should be no secret police. The 80 agents suffered mild harassment, and within days their phone numbers had been changed.

The State of California immediately set out to silence the paper.

The State filed a $10 million obstruction of justice civil suit against the paper, and some of the agents filed a $15 million action claiming invasion of privacy. Soon afterwards, the State charged Art Kunkin, the publisher, and Jerry Applebaum with receiving stolen property. The act of publishing the documents, then, was theoretically not in question, and the State did not appear to have much of a case. Irresponsibility is not a crime. If the *Free Press* were convinced that any editor who even looked at a proffered document, or a Xeroxed copy for that matter, could find himself charged with a criminal offense. As any reporter knows, investigative reporting is a necessary and nefarious craft. Often stories are built out of the whispered tales of the bitter and the discontent or the frankly amoral cunning of the reporter. It was Seymour Hersh who broke the story of the My Lai massacre. The trail that led him from a Washington rumor to Lt. William Calley, convicted murderer of Vietnamese civilians, in Fort Benning, Ga. was constructed out of bluffing and half-truths. At one crucial point as Hersh himself admitted in an article in the Saturday Review, he got a private "to steal Calley's personal file," not a Xeroxed copy or a printed pamphlet but the battalion information sheet itself.

For his troubles Hersh received the 1970 Pulitzer Prize in International Reporting, the highest honor in American journalism. For their troubles Kunkin and Applebaum were convicted, put on 3 years probation, and fined respectively $1,000 and $500 apiece. The civil suits were settled out of court for sums that have helped to bankrupt the paper.

I happened to have been in Los Angeles when the trial was going on, sitting in a half empty courtroom. Almost no members of the press even looked in on this precedent making trial. A few blocks away, though, scores of journalists scrambled into the Manson trial to provide grist for the public rumor mill. The local Los Angeles media did not consider themselves the least bit derelict in their duties. "It's just an ordinary trial," Bill Thomas, city editor of the *Los Angeles Times* told me. "It has nothing to do with freedom of the press. For what they did they got what was coming to them." The *Los Angeles Times* finally woke up. "Should this case stand and become a precedent," wrote Gene Blake in the September 20, 1970 issue, "the impact on the investigative efforts of the press to disclose wrongdoing in government could be devastating." The *Los Angeles Times* reprinted that article and mailed it to about 1,000 publishers and journalism schools across the country.

Our mandarins of the press did not have long to wait before the Pentagon Papers proved that they too were subjected to the most overt kinds of government pressures. The ePntagon Papers case, in fact, almost exactly parallels the case of the Los Angeles Free Press. But look at the difference in treatment. No one is accusing the *New York Times* of fencing stolen merchandise. No one is trying to put Katherine Graham behind bars.

Imagine, if you will, what would have happened if Daniel Ellsberg had gone to an underground paper with the Pentagon documents. The paper would have published them, of course, and then almost certainly the editors and publishers of that paper would have been slapped with criminal indictments. The mass media can't always hope to be handled so gently. It is time, past time, for the establishment media to realize that the underground press stands at the forefront of everyone's first amendment freedom. And it would only be self-interest for publishers and top editors to see that that freedom is protected.

There are other areas that lie in this dark area beyond conventional civil liberties. Printers, for example. What does freedom of the press mean if you can't find a printer? Jackson, Miss.'s *Kudzu* has to be printed in New Orleans. Austin's *Rag* has to be printed in a city 100 miles away. Atlanta's *Great Speckled Bird* has to be printed in Montgomery, Ala. New York City's *Rat* has to be printed in various cities along the eastern seaboard. One man, one printer, resisted all intimidation. Bill Schanen of Port Washington, Wis. In 1970 he began printing Milwaukee's underground paper, *Kaleidoscope*. along with his own weekly *Ozaukee County Press*. Local right-wing industrialists and such organizations as the local American Legion told Bill Schanen he had better stop. He refused and they organized a boycott. During June 1970, the very week the *Press* won first place in general excellence in the 1969 National Newspaper Association contest, 25 advertisers canceled. In all, Bill Schanen lost about $200,000 in 1970, but he refused to stop printing *Kaleidoscope*. He was a stubborn man and he said that he believed in freedom of the press and earlier this year at the age of 57 he died of heart attack.

The drug bust is another familiar scene on underground papers; drug laws represent yet another of those dark areas I've been talking about. Bret Steiner, the former editor of *Dallas Notes*, says about the police raid on his office: "If they had gotten us for dope during the police raids, the ACLU wouldn't even have taken the case." It is not the drug laws themselves I am objecting to here but the enforcement of those laws. The hip radical's very looks are enough to render him suspicious. He's the one most likely to be busted. And since marijuana is as ubiquitous in the underground as crabgrass in suburbia, underground press people live with the pesky fear that today may be the day of the big bust. To all this one might well argue, "Well aren't the police just doing their duty?" Imagine, though, if some police posed as waiters and bartenders while others hid outside elite drinking places, in order to enforce the laws against drunken drivers. That kind of duty would last about one weekend. And that, please remember, is exactly how most police go after marijuana violaters.

Discrimination does not end once the arrest is made. The sentence often depends on the whim and wisdom of the individual judge, the wits of one's lawyer, and the wealth of one's family. In Texas, in August 1968, Lee Otis Johnson, a former SNCC organizer was sentenced to up to 30 years in Federal prison for handing a marijuana cigarette to an undercover police agent.

This harassment of underground papers pushes them relentlessly away from the trust and openness that once were the essence of the movement. In San Diego, for instance, one of the nightly duties of a staff members on the *Street Journal* is to take a watch sitting on the front porch shotgun in hand. These underground journalists are not acting out somebody's fantasies of revolution. Since the fall of 1969 when the paper began featuring exposes of such individuals as C. Arnhalt Smith and John S. Alessio, then both leading citizens, the *Street Journal* has suffered persistent harassment. November 18th: bullets from a .38-caliber weapon shot through the office window. November 23rd: five patrol cars surrounded the offices, entered, and searched the premises without a search warrant. November 29: the office's glass front door smashed, and 2,500 copies of the Street Journal stolen; little police investigation. During November more than 20 street vendors arrested for "obstructing the sidewalk," handcuffed, searched and jailed under an ordinance since declared unconstitutional by the municipal court. December 11th, police without a search warrant entered the paper's residence and arrested a guest on "suspicion of burglary," handcuffed him, but later let him go without taking him to jail. Christmas eve: someone broke into the offices and destroyed over $4,000 worth of typesetting equipment; little police investigation. January 3rd: a Street Journal car firebombed; little police investigation. January 18th and 25th: more vendors arrested, handcuffed, searched and booked for littering.

Any journalist worth his salts would have taken one look at the *Street Journal*'s troubles and known he had the makings of a great story. It was a story that involved freedom of the press, and newspapers are inevitably conscientious about protecting their own freedom. But the Copley-owned *Union and Evening Tribune* exercised their news monopoly in San Diego by burying the story.

In Jackson, Miss., in June of last year, the local vice squad rented a house directly behind the residence of the staff of the *Kudzu*, the local underground. Now they could keep the *Kudzu* under surveillance 24 hours a day. The police could drive up to their quarters through driveways on either side of the *Kudzu* house, but whenever a car belonging to the *Kudzu* people or to one of their friends was parked in one driveway, the police would choose that side and force those inside to come out and move their car. On the morning of June 12th, the police agreed to use whichever driveway was vacant. That evening, however, the *Kudzu* people heard a police car honking and one staff member, Bill Rusk, went out to talk to the officers.

"I reminded them of our intentions to be neighborly," Bill Rusk said later, "and I ended up saying "Now you mother——— come and do this." Twenty minutes later the car I was driving was stopped and I was arrested on warrants for abusive language. I was immediately handcuffed behind my back. While being frisked at the side of the car, I was lifted off my feet. As I came down the officer said that my elbow touched him and that was assaulting a police officer. Saying that he hit me below the right eye with the butt of his flashlight.

> Inside the patrol car the officer said that I was four-eyed and hardheaded and that he would take care of me. Then he took my glasses off saying that otherwise they'd get broken. At the police station basement I got out in a circle of five policemen. Each hit me with openhanded roundhouse blows around the head. Then I was dragged across the floor 20 or 30 feet. At the elevator I was picked up and my head was rammed against the cement wall. I fell down and was told no sitting's going to be allowed and yanked me up by my hair.

I found out standing wasn't allowed either. They knocked me up and down several more times. Inside the elevator two other officers got in their licks. One jammed his elbow in my stomach.

Upstairs Rusk was charged with resisting arrest, abusive language, assaulting an officer and failure to yield to an emergency vehicle. After paying $162 bail he was released. Eventually, all the charges except abusive language were dropped. On the latter charge Rusk paid a small fine. As for Rusk's story of having been beaten up, police spokesmen say it is a complete fabrication. The surveillance of the *Kudzu* house is no longer an issue since everyone has moved out.

I could go on with this—Houston, Buffalo, Chicago—adding to this litany of woes, but to what purpose. I think we have seen enough examples of harassment and outright repression to realize that the traditional mechanisms and institutions for protecting civil liberties are shoddy instruments for guarding the rights of the citizens of Woodstock Nation. Authorities, lawyers, journalists and others most capable by position and sentiment to stand in the forefront of the constant vigil to protect our civil liberties are barely able to see that rights are being violated. As specifically regards the underground press, the melange of politics and youth culture found in most papers is simply too much for many of those concerned with civil liberties. Why, rubbing up next to a power structure exposé is a collage of naked bodies! Within a lengthy expose of city government, the writer spatters four-letter obscenities and insults. An article details the half-truths and deceptions of U.S. policy in Vietnam and then concludes with a histrionic tirade against American imperialism. How can one consider such papers worthy of high regard or protection? They are not serious. More likely, the underground press represents its own kind of seriousness, a seriousness that those brought up on more sedate journals of opinion cannot understand.

Let's take an example of this. In January 1970, *Nola Express*, an underground paper in New Orleans, became the first underground paper indicted under Federal obscenity statutes. If convicted, the two editors could have been sentenced to up to 5 years in prison and hit with $10,000 fines. The *Nola Express* issue in question was the November 21, 1969 one, specifically page 16, which the indictment characterized as "obscene, lewd, indecent, filthy and vile matter." Page 16 was a parody of a *Playboy* and touting the magazine as the bible of swinging affluent young Americans. The ad as it originally appeared in the *New York Times* showed a cleancut college man helping a pretty girl out of a sports car. "What sort of a man reads *Playboy*," the copy read, "he's on his way. He is young active, affluent. A hard man to get through to." The *Nola Express* version kept the copy intact but pictured a nude man masturbating before four Playboy centerfold nudes. It was vulgar and offensive and like most good satire, it struck at something very real.

The picture incensed the U.S. attorney's office. "The court has before it issue No. 43 of the *Nola Express*. The first government memo stated, "a cheap and unorganized tabloid consisting of trashy editorials, letters from its readers, classified ads, cartoons and on page 16, an obscene (sic) and filthy picture of an ugly naked man with his hand wrapped tightly around his erect penis masturbating to a climax in front of four pictures of *Playboy Magazine*."

Look at how *Nola Express* had succeeded in shaking up, in outraging, its audience. It had gone beyond permissible excess. The Government attorney quite obviously was outraged. He calls the naked man ugly, which doesn't happen to be the case. And despite all his mention of nudity he forgets to even mention that the pictures from *Playboy* are themselves of naked women.

Judge Rubin of the U.S. District Court at New Orleans dismissed the case, and his ruling is one of the most perceptive statements about the underground press that I have read anywhere. It deserves to be quoted at some length:

> Contrary to the government's assertion, it [*Nola Express*] is remarkably uniform in its approach to its general subject—the assumed foibles of the way of life generally accepted in this country today. Because it is a newspaper it is comprised of discrete articles, but it is more thematically integrated than most magazines or newspapers of general circulation and, in this regard, it adopts a single point of view of life, much like a novel or a film.
>
> Critics of the established order have frequently found it necessary to use language that shocked their audiences—neither Ezekiel nor Martin Luther spoke in bland terms. The defendants in this case were engaged in another kind of social and political criticism: they were attempting to expose what they consider hypocritical and venal in everyday life. They used emphatic, shocking and disturbing language and techniques of communication in their paper both to express their own depth of indignation and to arouse their audience. While their editorial format may be experimental, their objective is serious. . . .

I can't do any better than Judge Rubin in trying to bridge the generation gap. One unfortunate result of this gap is that the aboveground media have almost completely ignored the problems of the underground press. When Attorney General John Mitchell issued guidelines to limit the subpoena of newsmen and their information, and the Justice Department pointedly refused to say whether the underground press was included, there was no outcry. No professional organization of journalists jumped in realizing that some aboveground papers might next be excluded from the administrations definition of the "press." Since then part of the liberal establishment press—the *Washington Post*, the *New York Times*, and the *Baltimore Sun*—have had their reporters excluded from at least one presidential briefing.

It seems to me then that any legislation involving freedom of the press must—simply must—specifically include the underground press. Freedom can't be hoarded. It's perishable. You either use it or it dies. The underground press's only crime is to use that freedom. The papers expand the boundaries of journalism. They open up the media to ideas that are found nowhere else. They print articles and opinions that are not found elsewhere. Sure some of it is terribly biased and opinionated but so are some of the articles in your local paper and in mine. And so we just can't sit by, like good Germans, and let underground papers have their freedom taken away, for it's your freedom and mine, and it's our fight to see that underground papers can be sold freely on every street corner in America.

Senator Ervin. Some people think freedom of speech and freedom of the press is absolute, is that your opinion, it is absolute?

Mr. **Leamer.** I think you, in the morning session, Senator, were talking about the use of advocating the violent overthrow of the Government, and you made the distinction between talking about it and specifically advocating it, and I suppose in terms of the Constitution, that is the distinction, I suppose, one makes.

Senator **Ervin.** I think there are some people who occupy high positions, such as Justice Black and Justice Douglas, who have taken the position that freedom of speech and freedom of the press are absolute and there are no limitations whatever on it.

I think the generally accepted position among most people in the legal field is that, with the exception of the freedom of thought, which is implicit in the first amendment, that other first amendment freedoms can be subjected to limitations in extraordinary circumstances by Government.

So decisions are largely, to the effect, despite some recent holdings, which seem to conflict with it, that freedom of the press does not protect, has no application whatever to obscenities.

There are other decisions which recognize that freedom of the press does not extend, does not protect the right to incite others to the commission of crimes, and that freedom of the press does not protect people who libel or slander others and the majority of the Justices in the Pentagon Papers cases held that the freedom of the press does not protect the publication of information which may pose an immediate threat to our national security.

Now the courts have said, have gone pretty far to extend the freedom of the press to words in a speech which attacks the establishment. They have gone so far as to say, as stated this morning, as I construe the decision, that the Government cannot limit even the right to advocate the overthrow of the Government by force or violence or by other unconstitutional means, as long as it is the advocacy of ideas and does not teach action to accomplish that purpose.

As I further construed the decision, that they make a distinction between an individual and a group on the theory that a group can have a potentiality of being more dangerous than an individual, so they say that an individual cannot be punished or limited in advance in his right to exercise freedom of speech even though he may advocate unlawful acts unless his speech is other than such circumstance that it creates a clear and present danger, that it would incite action to accomplish the unlawful act.

They had sort of modified that in the *Dennis* case in respect to a group and they said that the Government could punish a group or limit the power of a group to advocate the overthrow of the Government by force and violence, only if the exercise of speech occurred under certain circumstances as to reasonably justify the conclusion that it would result in acts, either immediately or at some future time, of which the group deemed officious for accomplishing that purpose, and certainly under the recent decisions, the underground press has the protection of the first amendment insofar as it does not incite others to criminal action or to actions to overthrow the Government by force and violence, or engage in obscenity.

I have to confess what is obscenity is a very difficult thing, exactly. The old decisions were very plain on the subject, that obscenity was something, the publication of something which offended the sense of the average person in the community.

Of course, the Supreme Court in 1958 started putting some limitations on that, they still pretend they are not dealing with obscenity, but they are dealing with just discussion of sex, and they say the Government can't prohibit it unless it meets several particular qualifications, one of which it must destitute of social value—what that means nobody knows. Justice White suggested in one case, if you had obscene matter in a pretty binder, that while obscenity might not have any social value the pretty binder would.

I think the point you make insofar as the underground press does not go beyond any of these limitations which are very far out really, it has the same right of freedom of the press as anybody else.

Mr. **Leamer.** Which is a point which I suggested has not been made clear at all.

Senator **Ervin.** Undoubtedly what they say and what they advocate in many cases is rather offensive to the State and the sturdy people of the establishment.

Mr. **Leamer.** I think the obscenity issue has been used as kind of a screen for what are essentially political issues. When they talk about the underground paper, they immediately talk about sex and obscenity, which, actually, the underground papers never had more in them three or four years ago, which was not to sell newspapers. It was a part of the whole kind of contention of freedom. Whatever a person wants to advertise in a newspaper is fine, and the classified ads also, whatever one wants to put in the classified ads.

Senator **Ervin.** I was very much interested in your account of what happened to the *Los Angeles Free Press.*

The people were convicted of receiving stolen property?

Mr. **Leamer.** Yes; at that point there was not a law against publishing stolen documents. The State legislature again hurriedly put a law through and now there is such a law. But at the time, that was all they could get them with and the young gentleman who had in fact taken these documents, I believe received a suspended sentence. He turned State evidence and received a suspended sentence, and in that case there was a very high ranking, I believe, official involved, I think the deputy State attorney general was involved in trying that case, and the State went all out with the kind of the case they prepared to get them. And in their case, then, obscuring the fact to the jury that the publication had nothing to do with it, that the regular publication was absolutely no matter——

Senator **Ervin.** Are these things that gave rise to these prosecutions eventually the fact that they charged certain people occupying public positions with what is essentially corruption in office?

Mr. **Leamer.** Yes, they had a documented report about robbing a dormitory and the alleged rape of a student, I believe.

Senator **Ervin.** They were certainly publications which were designed, or rather would have the inevitable effect in the mind of those who read them, of lowering those in governmental power in the estimation of the readers?

Mr. **Leamer.** Excuse me.

Senator **Ervin**. In other words, a publication of this kind has a tendency to give the people who read it a very lower estimate of those people exercising Government power referred to in the publication?

Mr. **Leamer**. Yes, I think with reason, not only individuals involved, but also that the Government had been sitting on those documents for a long time in the case of the curruption in the police department, and nothing had been done.

Senator **Ervin**. That comes awfully close, a person prosecuted for that, assuming they are prosecuted for the publication.

Mr. **Leamer**. The fencing of stolen merchandise, the coercing and fencing, were the more serious crimes, and coercing a person to steal the merchandise.

Senator **Ervin**. They were not prosecuted for making the publication because that would have been essentially in the nature of one of the old common law prosecutions for seditious libel.

Mr. **Leamer**. Yes.

Senator **Ervin**. In those days they prosecuted anybody who said anything that affected the good reputation of the Government, no matter whether it was true or false, and so they seized upon the other pretexts which may have been legally sound, receiving stolen property?

Mr. **Leamer**. Yes, and the paper since then, because of the damage suits, has been forced to sell because they had other financial trouble but the civil law suits were settled out of court because he didn't feel he had the money to go ahead and pay the legal fees.

Senator **Ervin**. I would say undoubtedly under this system, these people certainly are entitled to their day in court because Justice Frankfurter spoke a great truth when he said many of the great rights which the law, the Constitution recognizes, had been proclaimed by the Supreme Court in cases which involved not too reputable people. And they are the people whose rights need protection more than those who have in high society more respectability.

Mr. **Leamer**. My point is, if we protect Arthur Kunkin we have protected Walter Cronkite as well, and the *Los Angeles Free Press* has not been able to get press passes. They have a circulation of over 90,000 and they have been refused time and time again. If there is a question about their bias, well it certainly makes it difficult for them to get the other side of the story when they don't have the traditional prerogative of the newsman, and that is true in other cities.

Senator **Ervin**. I look forward to the privilege of reading your book. I might say I haven't subscribed to these underground newspapers, and have seen only a few that have been sent to me by constituents, so I am not as thoroughly posted on the character of their publication as I should be.

It may be that some of them run afoul of the limitations that are placed upon them by the first amendment rights by most of the decisions and certainly a lot of them do not.

Mr. **Leamer**. I doubt again it's a question of how we are going to define these things. I am not a lawyer, but it seems to me they are performing an extremely important function, and we would be better off if we would look at some of the things they were saying 4 or 5 years ago. They might seem terribly radical but we are reading it in the editorial pages of other newspapers.

Senator ERVIN. I have frequently said and firmly believe, even though society may be very much annoyed by a publication of or the demonstrations by people who are dissatisfied with conditions or policies, that it is a value to society to listen to them because if the protests which they are voicing are valid, it should ultimately lead to reforms that are necessary and if the criticism is not valid, it is a good thing to allow them ordinarily to express their criticism, because it certainly has therapeutic value in relieving the tensions of those who are protesting.

Mr. LEAMER. I might add that President Nixon's State of the Union message this year could have been lifted almost directly out of a 1963 Port Huron SDS statement. Many of the kinds of issues being brought up then are now accepted as the problems we have.

Senator ERVIN. Thank you very much.

I think that we are slowly getting consideration of all of the questions that arise in this field, as we consider your testimony, which is thus far without parallel within the hearing, and also we have the very intriguing viewpoint expressed this morning by a professor from George Washington University Law School.

Thank you very much.

The subcommittee stands in recess until the 12th of October, at which time the place of our meeting will be designated.

(Whereupon, at 3:25 p.m., the meeting adjourned to reconvene on October 12, 1971.)

FREEDOM OF THE PRESS

TUESDAY, OCTOBER 12, 1971

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 1202, New Senate Office Building, Senator Sam. J. Ervin, Jr. (chairman) presiding.

Present: Senators Ervin and Thurmond.

Also present: Lawrence M. Baskir, chief counsel; and Bill Pursley, counsel.

Senator ERVIN. The subcommittee will come to order.

Today the Senate Subcommittee on Constitutional Rights resumes in hearings on freedom of the press.

Our first 3 days of hearings were designed to bring into sharp focus some of the issues surrounding the First Amendment's guarantee of freedom of the press. We heard newspaper representatives underscore the threat to the independence and integrity of reporters posed by increased issuance of government subpenas. Several witnesses expressed their continuing concern, despite the Supreme Court's holding, over the impact of the Government's recent attempt to secure injunctions against certain newspaper publications. Broadcast executives and journalists pointed out existing and potential threats to the first amendment from too much Government regulation of broadcasting. Several Members of Congress testified that they share the concern of many Americans about the state of freedom of the press and suggested various solutions to some of the problems.

Over the remaining 5 days of hearings we will continue to hear witnesses with different perspectives on the issues. However, it is clear that there are many more individuals and groups whose views should be presented than can be accommodated in these 5 days. For this reason, the subcommittee will conduct a second series of hearings on freedom of the press in early 1972. At that time we will hear from individuals and groups whom we have not been able to schedule during this first series.

The second series of hearings is also necessary because the subcommittee thus far has been unable to arrange for the presentation of the views of the administration. Already, several witneses have challenged, directly and indirectly, the commitment of the administration to the principles of the first amendment. Widespread public concern over the relationship between the White House and the press is obvious.

Regrettably, Mr. Herbert Klein, the President's Director of Communications, has declined the subcommittee's invitation. As the man most concerned with communications policy for the President, he was, I thought, the ideal witness to speak authoritatively for the executive branch.

The Attorney General, Mr. John Mitchell, who was invited to testify today, is also an ideal person to present the administration's views. As chief legal officer and one of the President's most trusted advisers, his testimony would be invaluable. However, thus far we have not been able to complete the arrangements for his appearance. While I hope that we can arrange for his appearance sometime before the end of this first series of hearings on October 20, it will probably be more convenient to plan for his testimony in the second series.

The need for having a senior administration figure testify as to the administration's views and policies on the First Amendment issues and controversies seems obvious to me. There is no more important liberty than freedom of thought and expression. The first amendment stands at the pinnacle of our system of individual liberty. It incorporates what have often been called the "preferred freedoms." Certainly there can be no more important subject for the administration to address itself to than this. It takes no great perception to see that the issue of press and government directly concerns the administration. The witnesses last week, the hundreds of letters I have received in just a few days, and dozens of editorials and articles I have read attest to this. Our hearings give the administration an opportunity to present its views that it should not pass up. Furthermore, I believe the administration has an obligation to the Senate and the people to address itself to the issues before the country. That obligation cannot be filled by anyone other than a senior official of the administration who speaks for it, and who is publicly recognized as speaking for it. Quite obviously a third-echelon official, no matter how well qualified, is not an adequate substitute for the Attorney General on an issue as important as this.

Counsel will call the first witness.

Mr. BASKIR. Mr. Chairman, Mr. Stanford Smith, representing the American Newspaper Publishers Association, has an engagement later on this morning, and the other two witnesses, Mr. Goodman and Mr. Friendly, have kindly consented to let him appear in advance.

Senator ERVIN. Mr. Smith, I am delighted to welcome you to the subcommittee. And I wish to thank you for your willingness to appear and express your views and those of the organization you represent respecting this very important matter.

STATEMENT OF STANFORD SMITH, PRESIDENT AND GENERAL MANAGER, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION; ACCOMPANIED BY ARTHUR B. HANSON, GENERAL COUNSEL

Mr. SMITH. Thank you very much, Mr. Chairman.

In the interest of time and trying to be equally accommodating to the other witnesses, I would suggest, sir, that I can summarize fairly briefly the prepared testimony, and you can receive the prepared testimony for the record in the form in which it was submitted.

Senator **Ervin**. That will be entirely satisfactory.

Let the record show that the entire written statement of Mr. Smith will appear in the record at the end of his oral testimony.

Mr. **Smith**. Mr. Chairman and gentlemen, the newspaper publishers congratulate you on the timeliness of this study. Our testimony seeks to supply some of the historical background of freedom of the press in America.

As I have been identified, my name is Stanford Smith. I am president and general manager of the American Newspaper Publishers Association. I am accompanied by our General Counsel, Mr. Arthur B. Hanson.

Our membership is more than a thousand daily newspapers whose circulation represents more than 90 percent of the total daily newspaper circulation in the United States. Therefore, we are concerned with all matters of general significance to the profession of journalism and the daily newspaper business.

We concur completely, Mr. Chairman, in your statement that "it is necessary at this time in our Nation's history to reexamine the purposes and the principles embodied in the constitutional guarantee of freedom of the press."

In attempting to assess where we are in that respect, we believe it is important to review the point of origin and to retrace highlights of the journey to the present. And that is what our statement essentially does.

History teaches us many lessons if we will but learn. The genesis of freedom of the press under the first amendment to the Constitution is an example. The important point which is sometimes ignored today is that the original demand for a guarantee of press freedom came not from those who were then engaged in the business of publishing newspapers or other types of publications. The demand came from persons in all walks of life who knew from their own experience at that time the threat to all individual liberties if there is no freedom of the press and no freedom of speech.

We need to emphasize that point continually. Freedom of the press is embodied in our Constitution for the benefit of all the people and not as an exclusive prerogative of those who are engaged in the business of news dissemination.

Our statement traces some of the historical background. As a matter of fact, through most of the world's history, tyranny was the norm, dating back to Emperor Augustus. And we trace our origins from England, and the situation in the Colonies. An early Governor of Virginia, for example, promulgated an order that no person be allowed to use a printing press on any occasion whatsoever.

There was one brilliant triumph of freedom of the press. And that is the famous John Peter Zenger case, which I need not recite at this time.

But an interesting point of history, to this day many consider it odd that the Constitutional Convention did not include any section regarding the press in the original draft. The main reason was the theory that the powers of Congress extended only to matters expressly delegated to it. By that reasoning the freedom of the press was not mentioned, and Congress would have no authority to legislate on the subject. But others took an opposite and ultimately prevailing position, that Congress had implied as well as express powers, and that it was therefore necessary specifically to preclude Congress from legislating in the area of freedom of the press.

Ultimately it was the assurance that the first Congress would remedy the Convention's omission that resulted in ratifications. Those assurances were accepted in faith, as was the entire foundation of this nation. And those assurances were not betrayed.

The first Congress in 1789 did indeed, as the primary order of business, set about buttressing the Constitution with the basic protection provided in the first 10 amendments and the Bill of Rights.

Incidentally, it is interesting to note that the package of amendments approved by that Congress numbered not 10 but 12. And what became the First Amendment was originally the Third. And the first two were dropped as being less consequential.

I am going to skip some of this historical background, Mr. Chairman, and get to a couple of the principal points.

Freedom of the press has been challenged in several different areas which have already been alluded to in some of your hearings, including the historic collision of the first and sixth amendments involving free press and fair trial.

The Supreme Court's decision in the *Sheppard* case nailed down with finality what long has been obvious, that the courts are not without ample remedies for limiting and counteracting prejudicial publicity. Fortunately in recent years there has been commendable initiative in the bar and the press to establish ground rules for more responsible practices in both professions. The common objective in stemming prejudicial disclosures and allegations is to safeguard more effectively defendants' rights under the sixth amendment without unduly restricting the press rights under the first amendment.

A related matter is the threat of contempt actions against reporters who have been subjected to subpenas recently in increasing numbers. Many journalistic organizations have recently filed briefs before the U.S. Supreme Court in three pending cases which test the validity of subpenas issued to reporters in connection with news gathering duties. There is widespread agreement in the field of journalism that this increased use of the subpena does represent a serious threat to the effective functioning of a free press on behalf of the public.

The remedy is yet to be decided. In our amicus curiae brief before the U.S. Supreme Court, ANPA argued that nothing short of an absolute privilege for professional newsmen to refuse to testify will create the certainty necessary to guarantee confidence in the promises of reporters to their news sources and thus guarantee the right of the public to be fully informed.

Many members of the Congress have indicated interest in the enactment of legislation to guarantee this right to professional newsmen. We suggest that the extent to which this legislation will be needed can only be determined after the U.S. Supreme Court renders its decision in the pending cases involving reporters under three different sets of circumstances.

What, then, is the condition of a free press in America today?

Reviewing in perspective its evolution under the first amendment, and assessing in particular the interpretations of that amendment at the highest judicial level, we believe one must conclude that on balance the concept of a free press has withstood the tests of time and the storms of challenge remarkably well. Despite the libel and obscenity limitations, and those of national security and contempt of court as well, and despite also the inevitable political pressures generated from time to time by official displeasure, the constitutional guarantee of press freedom has in our opinion measured up sturdily to the intentions, wishes and expectations of the Founding Fathers.

Yet in a world where change is a constant and crisis a certainty, no freedom is ever indefinitely secured. Under even the best of circumstances it is difficult to foresee a time when freedom of the press will not be under challenge, in court and out. Eternal vigilance is the price of liberty, and surely that will continue to be true where press freedom is concerned.

But more than being vigilant, the press must above all be responsible, which is to say professional, conscientious, discreet, fair and accurate in discharging its cardinal obligation, its reason for existence: to serve the American public as a medium of information and enlightenment.

That equation requires, however, that the public have a clear and deep understanding of the nature of a free press. For if the public doubts that the press is doing its job, if it fails to value the role of the press in protecting the foundations of a free society, then all of this country's institutions will be in peril.

Ten years ago our board of directors sponsored the organization of ANPA Foundation, a public foundation to encourage in the broadest manner the advancement of freedom of speech and of the press in the United States, and to promote education, study and scientific research in all fields relating to freedom of speech and of the press.

Our foundation is now engaged in a $10 million endowment campaign with one of its highest priorities accorded to a vastly expanded educational effort to develop and strengthen public understanding of freedom of the press.

Mr. Chairman, the prospectus of our foundation included statements which are completely in accord with your own statements in connection with these hearings. To quote briefly, that prospectus states:

> Most publishers and editors agree there never has been greater need for strengthening public understanding of the press. Nor is this simply to protect the interests of the press, for the public interest is plainly involved. Indeed, it is paramount. For, if the public does not value a free press, then all our institutions are in peril.
>
> The ANPA Foundation proposes to assume a central role in promoting public understanding of the nature of a free press and of the constitutional roots of freedom of speech and press.

The concept of this program involves many different projects which in total impact would make a major contribution to the expressed goals of this subcommittee; namely, "a greater public appreciation for the role of a free press in a democratic society."

I would like to close with a quotation from the pen of the eminent American jurist, Judge Learned Hand. He said of the first amendment that it "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection."

"To many," Judge Hand wrote, "this is, and always will be, folly; but we have staked upon it our all."

Thank you very much.

(Prepared statement follows:)

TESTIMONY OF STANFORD SMITH, PRESIDENT AND GENERAL MANAGER OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

Mr. Chairman and members of the subcommittee, The American Newspaper Publishers Association appreciates the invitation to participate in this important study of the state of freedom of the press in America today. We congratulate you on the timeliness of this study. It is our purpose in this testimony to supply something which will be a useful basic record for the continuing work of your committee.

My name is Stanford Smith. I am President and General Manager of ANPA. I am accompanied by our General Counsel, Mr. Arthur B. Hanson. ANPA is a non-profit association with a membership composed only of daily newspapers. Our membership consists of more than 1,000 daily newspapers whose circulation represents more than 90 percent of total daily newspaper circulation in the United States. We are concerned with all matters of general significance to the profession of journalism and the daily newspaper publishing business. Our headquarters is now in New York City but we are constructing a new headquarters building and will move next Summer to Reston, Virginia, near Dulles Airport. One purpose of that move is to facilitate collaboration by our Committee on Government Relations and our staff with undertakings such as that which is now engaging your Subcommittee.

We concur completely, Mr. Chairman, in your statement that "it is necessary at this time in our nation's history to re-examine the purposes and the principles embodied in the Constitutional guarantee of freedom of the press."

In attempting to assess where we are in that respect, we believe it is important to review the point of origin and to retrace highlights of the journey to the present.

History teaches us many lessons if we will but learn. The genesis of freedom of the press under the First Amendment to the United States Constitution is an example. The important point which is sometimes ignored today is that the original demand for a guarantee of press freeedom came not from those who were then engaged in the business of publishing newspapers or other types of publications. The demand came from persons in all walks of life who knew from recent experience the threat to all individual liberties if there is no freedom of the press and no freedom of speech.

We need to emphasize that point continually. Freedom of the press is embodied in our Constitution for the benefit of all the people and not as an exclusive prerogative of those who are engaged in the business of news dissemination.

All other things being ostensibly equal, if that were possible, the infallible hallmark of tyranny would be—and is—government control of the printed word.

Through most of the world's history, tyranny was the norm, dating at least as far back as the public burning of undesirable books by the Emperor Augustus—which is to say during the earliest years of the Christian calendar.

The history of England is replete with comparable tyranny in the form of suppression, censorship and punishment. In the pre-revolutionary years of the American colonies, England had mellowed only in degree and technique. The Star Chamber, with its notoriously cruel and summary punishments, had been abolished in 1641. Governmental licensing of printing, a highly effective instrument of censorship and control, lapsed later in the century.

But the substitute techniques were hardly more benevolent—such as discriminatory and sometimes prohibitive taxes on newspapers and ready resort to prosecutions for seditious libel.

Some colonies fared worse than others. In Virginia a fifty-year ban on printing ensued after the royal governor of that colony and his council called one John Buckner before them in 1682. His offense had been in printing the laws of 1680 "without His Excellency's license." Buckner and his printer were ordered to post 100 pounds and promise not to print anything thereafter until His Majesty's pleasure might be known. A year later the colony's new governor promulgated an order that no person be allowed to use a printing press "on any occasion whatsoever."

One of Virginia's royal governors, Sir William Berkeley. bluntly stated the rationale in these words: "I thank God there are no free schools nor printing. . . For learning has brought disobedience and heresy and sects into the world and printing has divulged them and libels against the best government. God keep us from both."

To be sure, the press had scored one brilliant triumph during the otherwise desolate history of colonial times. John Peter Zenger won the earliest battle for freedom of the press in this country.

Zenger, who published a New York paper, had written that the liberties and properties of the people were "precarious" under the governor of New York and the current administration. He had complained of the removal of judges, creation of new courts without consent of the legislature and denial of the right to trial by jury. Zenger was arrested for having brought the government into disrepute.

At the now famous Zenger trial in 1735, the prosecution argued that he should be punished because he had "scandalized" the government. The court followed tradition in rejecting any notion that truth might be a defense. But Zenger's lawyer, Andrew Hamilton of Philadelphia, succeeded in having the case tried by a jury. That jury, by its verdict of not guilty, established the concept of truth as a defense to libel—and deprived judges of sole power to determine what was libelous.

While the outcome of the Zenger case is properly celebrated as a millennium, and always will be while a free press exists, its immediate effect was less than epochal. The colonial press continued to be plagued by every sort of legalistic inhibition and harassment the British governing mind could conceive.

In all, it is clear from our country's early constitutional history that resentment against this pattern of repressive taxation, prosecution and peremptory silencing as a means of controlling the press played a substantial role in the rising sentiment for independence in the American colonies. It is equally certain that this was the genesis of the First Amendment.

To this day, many consider it odd that the Constitutional Convention did not include any section regarding the press in the original draft of the U.S. Constitution. The fact is that this subject—along with several other major rights and freedoms for which the Revolutionary War had been fought—received little mention during the months of laborious debate and composition at Philadelphia in 1787.

At one drafting session, Delegate Pinckney of South Carolina suggested a clause granting safeguards to the press. He proposed that the clause be worded: "The liberty of the press shall be inviolably preserved." The suggestion evoked little comment and no action, but not for lack of accord with his view.

The apparent basis on which Pinckney's suggestion was dropped was the theory that the powers of Congress extended only to matters expressly delegated to it. By that reasoning, if freedom of the press was not mentioned, Congress would have no authority to legislate on the subject.

But others took an opposite and ultimately prevailing position—that Congress had implied as well as express powers and that it was therefore necessary specifically to preclude Congress from legislating in the area of freedom of the press.

While that view did not prevail at the Constitutional Convention, it certainly did when the Constitution made the ratification rounds of state conventions. Time and again objections arose that the freedoms and rights of average citizens had been neglected in a preoccupation with forms, structures, rules and mechanisms. In Massachusetts, John Adams said in nearly as many words that his state would vote for the proposed constitution only on condition that certain basic amendments would be added.

Ultimately, it was the assurance that the first Congress would remedy the convention's omissions that resulted in ratification of the Constitution in 1788.

Those assurances were accepted in faith, as was the entire foundation of this new nation, and those assurances were not betrayed. The first Congress in 1789 did indeed, as the primary order of business, set about buttressing the Constitution with the basic protections provided in the first ten Amendments, the Bill of Rights.

Incidentally, it's interesting to note that the package of amendments approved by that Congress numbered not ten but twelve. What became the First Amendment was proposed as the Third. The first two, having to do with apportionment and congressional pay, did not win ratification. They were regarded as administrative matters of small consequence compared with the other ten amendments representing the legal embodiment of fundamental human freedoms, rights and privileges. In particular, the states were impressed by James Madison's assertion that what is now the First Amendment was the "essential difference between the British government and the American Constitution."

The Bill of Rights became part of the Constitution late in 1791. But it has taken most of the intervening 180 years to define the latitudes and limitations of freedom of the press. It could well be that the definition process will continue indefinitely.

To begin with, the First Amendment prescribed that "Congress shall make no law . . . abridging the freedom . . . of the press." This left the states relatively free to determine their own restrictions, with a resulting unevenness that was only technically remedied by adoption of the 14th Amendment in 1868. That amendment states in part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law. . ."

Since immediate attention focused on the 14th Amendment as a bolstering sequel to the 13th Amendment, which abolished slavery, the 20th century was more than a third of the way along before Supreme Court rulings imposed on the states the same strictures against press-freedom abridgment that the First Amendment had imposed on Congress.

In the early years of the Republic, the British colonial concept of seditious libel lingered on, First Amendment or no.

Mainly to silence critics of foreign policy, the Federalists enacted the Sedition Act of 1798, a broad-gauged statute that resulted in the fining of several newspapermen and the imprisoning of a few. They were pardoned and the fines refunded when Thomas Jefferson succeeded John Adams as President on March 3, 1801, the day the statute expired. The Federalist Party, incidentally, never again won a national election.

The next major threat to press freedom arose during the Civil War, when direct military censorship was imposed for the first time in the nation's history. Various northern periodicals were barred from the mails, editors were jailed occasionally on orders of the Secretary of War or Secretary of State, and federal troops seized some newspaper offices in New York City, Chicago and Missouri, suppressing issues of the papers.

American entry into World War I saw the enactment of the Espionage Acts of 1917 and 1918, giving the government broad leeway in suppressing unpopular sentiments. President Wilson imposed strict cable censorship under his powers as Commander in Chief.

But primarily—and here was a hopeful turning point—President Wilson established the Committee on Public Information, which specified types of information, esentially of a military nature, that "obviously must not be mentioned in print." Newspaper editors were advised that "matters of doubtful nature . . . should not be given publicity until submitted to and passed by the committee."

In general, newspapers cooperated and thus was set a pattern of "voluntary censorship" that was to function again in World War II.

The Espionage Acts of World War I did result, however, in several convictions that were upheld in the Supreme Court. One involved a newspaper publisher attacking the war, another the publisher of a German-language newspaper critical of capitalism and the war—but the one that was to frame a lasting judicial concept involved one Charles T. Schenck, who during the war had distributed Socialist circulars opposing military conscription. In concurring with the high court's decision to uphold the conviction, Justice Oliver Wendell Holmes originated the criterion of "clear and present danger."

Holmes stressed that the First Amendment's protections were not absoluate. "The most stringent protection of free speech," he asserted, "would not protect a man falsely shouting fire in a theatre and causing a panic. . ."

Holmes went on to say: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

The "clear and present danger" yardstick resurfaced in the 1930s through the 1950s as a protector of constitutional rights. Far from obsolete, that yardstick seems likely to see further service.

A so-called "ad hoc balancing test," as enunciated by Chief Justice Vinson in 1950, held that the court must in each case balance the individual interest in freedom of expression against the social interest sought by the regulation which restricts expression.

In the years spanning the standards enunciated by Justices Holmes and Vinson were two Supreme Court decisions of special note.

The case of *Near* v. *Minnesota*, decided in 1931, involved a Minneapolis newspaper that had charged rampant racketeering in the city and had accused the police chief of receiving graft. Under a state gag law, the newspaper was permanently enjoined from publishing.

The high court upheld the defendant and demolished the Minnesota statute. Chief Justice Hughes said in the majority opinion that "the question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. . . The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct."

Ten years later, in 1941, the Supreme Court made this emphatic declaration in the case of *Bridges* v. *California*: ". . . The only conclusion supported by history is that unqualified prohibitions laid down by the framers [of the Constitution] were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society."

The same could be said of a decision 23 years later, in 1964, in a landmark libel case against the *New York Times* for printing an advertisement that criticized official conduct in a civil rights controversy. In substance, the Supreme Court held that no person may be subjected to either a civil suit for damages, or a criminal prosecution, for comments about public officials unless there is proof that he made a false statement with actual malice in mind—that is, "with knowledge that it was false or with reckless disregard of whether it was false or not."

The Court said it had considered the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."

The foregoing so-called *New York Times* rule was extended the same year by the Supreme Court to include voluntary public figures, such as individuals engaged in political or social movements. Also in the same year, the high court applied the Times rule to an invasion of privacy suit by involuntary public figures—in this instance a family held hostage by escaped convicts.

In the most recent landmark decision concerning freedom of the press, national security was a major consideration—thus in effect pitting the doctrine of clear and present danger against the precedent forbidding prior restraint. The latter prevailed in the Supreme Court's refusal to bar the *New York Times* and *the Washingtom Post* from resuming publication of highly classified Defense Department documents. Unresolved at the present time is other legal action concerning the conveyance and possession of the documents.

Just as freedom of the press has faced recurrent challenges under national security and libel statutes, so too have certain publishers—mainly in the book and magazine fields—run afoul of obscenity laws. The Supreme Court has flatly declared that obscenity is unprotected by the First Amendment—although the court's definitions of obscenity have generated considerable confusion and uncertainty among state and local legislators, enforcement authorities and lower courts.

Finally, among the major circumscriptions on freedom of the press is the risk of being deemed in contempt of court. The courts have broad authority to punish interference with the orderly administration of justice.

One prominent source of friction in this respect has been the long and painful effort to rconcile the First and the Sixth Amendments, the latter guaranteeing a "speedy and public trial." A corollary is that the trial also be fair. This in turn presupposes an impartial courtroom atmosphere and, particularly, unbiased jurors.

Thus it has many times been charged that "pre-trial publicity" has influenced jurors and prospective jurors to a point where a fair trial was impossible. Such publicity has led to contempt of court charges against newspaper publishers and editors.

Criticism of judges or attempting to influence them, especially before or during trials, are the other main sources of contempt charges placed against newspapers.

A historic collision of the First and Sixth Amendments evolved from the Sheppard case, as did a significant decision by the Supreme Court sorting out the means of averting future collisions.

Dr. Sam Sheppard was convicted in Ohio in 1954 for the murder of his wife. Publicity accorded the case before and during the trial was plentiful, sensational and frequently bizarre, not to say sometimes wild and reckless.

The central issue posed in the appeal heard by the Supreme Court was not, however, the legitimacy of the reportage but rather Sheppard's allegation that he had been deprived of a fair trial because of the trial judge's failure to protect him sufficiently from massive, pervasive and prejudicial publicity that attended the prosecution.

The Supreme Court agreed with Sheppard and set aside the conviction, thus making possible a retrial. Following are brief excerpts from the court's 1965 decision:

"The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court."

"The court should have insulated the witnesses."

"In addition, sequestration of the jury was something the judge should have raised *sua sponte* with counsel."

"The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action. . . More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witness or their probable testimony: any belief in guilt or innocence; or like statements concerning the merits of the case."

Continuance and/or change of venue were cited as further remedies the trial judge could have ordered.

The Supreme Court's decision in the Sheppard case nailed down with finality what long had been, or should have been, obvious: that courts are not without ample remedies for limiting and counteracting prejudicial publicity.

Fortunately, in recent years there has been commendable initiative within the bar and the press to establish ground rules for more responsible practices in both professions. The common objective, in stemming prejudicial disclosures and allegations, is to safeguard more effectively defendants' rights under the Sixth Amendment without unduly restricting the press' rights under the First Amendment.

A related matter is the threat of contempt actions against reporters who have been subjected to subpoenas recently in increasing numbers. Many journalistic organizations have recently filed briefs before the U.S. Supreme Court in three pending cases which test the validity of subpoenas issued to reporters in connection with news gathering duties. There is widespread agreement in the field of journalism that this increased use of the subpoena does represent a serious threat to the effective functioning of a free press on behalf of the public.

The remedy is yet to be decided. In our amicus curiae brief before the U.S. Supreme Court, ANPA argued that nothing short of an absolute privilege for professional newsmen to refuse to testify will create the certainty needed to guarantee confidence in the promises of reporters to their news sources and thus guarantee the right of the [illegible] be fully informed.

Many members of the Congress have indicated interest in enactment of legislation to guarantee this right to professional newsmen. We suggest that the extent to which this legislation will be needed can only be determined after the U.S. Supreme Court renders its decision in the pending cases involving reporters under three different sets of circumstances.

What, then is the condition of a free press in America today?

Reviewing in perspective its evolution under the First Amendment, and assessing in particular the interpretations of that amendment at the highest judicial level, we believe one must conclude that on balance the concept of a free press has withstood the tests of time and the storms of challenge remarkably well.

No one could reasonably expect that concept to be absolute. Even in a free society, all freedoms have their limits if that society is also to be orderly and equitable.

The abiding essence of the First Amendment was perceptively expressed by Justice William O. Douglas nearly 20 years ago in an essay on censorship in his book "An Almanac of Liberty." Douglas wrote:

". . . The very idea of a censor is instantly at war with the demands of the mind and spirit of men. This does not mean that anything one likes may be published with impunity. There are laws of libel and obscenity. One takes the calculated risk that he may be punished for what he says or writes. But one who offends gets the benefit of a jury trial and is not subject to the mere whim or caprice of the censor. Our system develops in the end, I think, a stimulating diversity and a sense of responsibility not known when authors are dependent upon a bureau for what they may publish."

So, despite the libel and obscenity limitations Justice Douglas mentions, and those of national security and contempt of court as well, and despite also the inevitable political pressures generated from time to time by official displeasure, the constitutional guarantee of press freedom has in our opinion measured up sturdily to the intentions, wishes and expectations of the Founding Fathers.

Yet in a world where change is a constant and crisis a certainty, no freedom is ever indefinitely secure. Under even the best of circumstances, it is difficult to foresee a time when freedom of the press will not be under challenge—in court and out.

Eternal vigilance is the price of any liberty, and surely that will continue to be true where press freedom is concerned.

But, more than being vigilant, the press must above all be responsible—which is to say professional, conscientious, discreet, fair and accurate—in discharging its cardinal obligation, its reason for existence: to serve the American public as a medium of information and enlightenment.

That equation requires, however, that the public have a clear and deep understanding of the nature of a free press. For if the public doubts that the press is doing its job, if it fails to value the role of the press in protecting the foundations of a free society, then all of the country's institutions will be in peril.

Ten years ago our Board of Directors sponsored the organization of ANPA Foundation, a public foundation to encourage in the broadest manner the advancement of freedom of speech and of the press in the United States and to promote education, study and scientific research in all fields relating to freedom of speech and of the press.

The ANPA Foundation is now engaged in a ten million dollar endowment campaign with one of its highest priorities accorded to a vastly expanded educational effort to develop and strengthen public understanding of a free press.

Mr. Chairman, the prospectus of the ANPA Foundation includes statements which are completely in accord with your own statements in connection with these hearings. To quote briefly, the ANPA Foundation states:

"Most publishers and editors agree there never has been greater need for strengthening public understanding of the press. Nor is this simply to protect the interests of the press, for the public interest is plainly involved. Indeed, it is paramount. For, if the public does not value a free press, then all our institutions are in peril.

"The ANPA Foundation proposes to assume a central role in promoting public understanding of the nature of a free press and of the constitutional roots of freedom of speech and press."

The concept of this program involves many different projects which in total impact would make a major contribution to the expressed goals of this subcommittee: namely, "a greater public appreciation for the role of a free press in a democratic society."

I would like to close with a quotation from the pen of the eminent American jurist, Judge Learned Hand. He said of the First Amendment that it "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection."

"To many," Judge Hand wrote, "this is, and always will be, folly; but we have staked upon it our all."

Senator ERVIN. I want to commend you on the excellence not only of your written statement but also of your oral statement.

I think you point out in an excellent manner the fact that all other freedoms hinge upon freedom of speech and freedom of the press. Without the freedom of the speech and the freedom of the press we could have no political freedom; without these freedoms we could have no intellectual freedom; without these freedoms we could have no religious freedom. And so you are undoubtedly correct in saying that all the other freedoms stemmed from these basic freedoms of speech and the press.

I also appreciate the fact that you pointed out that these hearings are of value. And I think that is true even though they may not result in legislation. There is a great truth which is embodied in the original constitution of my State, which was drafted in December 1776. It says: "The frequent recourse to fundamental principles is essential to the preservation of the lesson of liberty."

And I think that it is absolutely essential for us to appreciate such fundamental principles embodied in the First Amendment. As you point out, the freedom of the press is not established for the financial benefit of the press, it was established for the people, for two reasons, it seems to me. One is philosophical, the men who drafted the First Amendment recognized that it was essential to have freedom of the press in order that America might be free from the worst sort of tyranny, that is, tyranny over the mind. The second reason was pragmatic in nature; the men who drafted the first amendment realized that the freedom of the press was essential to the proper functioning of the governmental institutions they established.

Therefore I think it is undoubtedly correct, as you observe, that this Nation staked its existence upon the principle that it has nothing to fear from the exercise of the freedom of the press as long as it leaves truth free to combat error.

So I want to thank you again.

And I thank Mr. Hanson for his appearance here today.

Mr. SMITH. Thank you sir.

Senator ERVIN. Call the next witness.

Mr. BASKIR. Mr. Chairman, our next witness this morning is Mr. Julian Goodman, president of the National Broadcasting Co.

Senator ERVIN. Mr. Goodman, I want to welcome you to the subcommittee, and express our appreciation to you and the National Broadcasting Co. for your appearance here, and for your willingness to give us the benefit of your views on what I think is the most important part of the Constitution, if any one part can be singled out as having a priority over other parts.

STATEMENT OF JULIAN GOODMAN, PRESIDENT, NATIONAL BROADCASTING CO., INC.

Mr. GOODMAN. Thank you, Senator.

My name is Julian Goodman and I am president of the National Broadcasting Co.; but, before I became that in 1966, I spent 20 years as a working reporter and administrator in broadcast journalism and my interest in a free press stems from personal experience as well as public and corporate concern.

I appreciate this opportunity to testify, because the issues before you are very important ones that deserve careful consideration by thoughtful men who are interested in the past and the future as well as the present.

These issues do not involve simple cases of right and wrong, or heroes and villains. The officials of government seek to advance the public interest, as they see it in their own fields. Their efforts to promote justice, enforce the laws, investigate the need for possible legislation, and foster fairness are honorable and well-intended.

However, when such government actions limit journalistic independence, they also affect the public interest in a free press. This results in conflicts among different sets of public values. As you have already noted, Mr. Chairman, this very conflict between the functions of government and of the press attests to the vitality of the first amendment.

But the existence of such a conflict also requires a judgment on the public interest priorities. On this question, we believe that there is a paramount public interest in having a free and independent press. It should take precedence over other interests that could interfere with press freedom.

That goal is not a special favor to journalists. It is essential to the design of an open society. In such a society, constant communication between the Government and the public is necessary. The press is a principal means through which the government communicates with the people. But the purpose of the press is not to serve as an instrument of government. It must also hold government policies and actions up to public attention and examination.

Without this independent press function, there is no effective offset to the Government's enormous power to mold public opinion its way. An important part of the press today is television journalism. Abridgment of press freedom—print or electronic—will impair the balance of our system, and can lead to a tyranny of government which the system is designed to prevent.

The reasons for guarding press freedom should apply with particular force to television journalism because it is the medium most used and most relied upon by the public as its primary information source.[1] In view of this fact, as you have said, Mr. Chairman, if the First Amendment principles are not applied to the broadcast press, "it may well be that the Constitution's guarantee of a free press is on its death bed."

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[1] "An Extended View of Public Attitudes Toward Television and Other Mass Media 1959-1971. A report by the Roper Organization, Inc.

It is true that broadcasting operates under Federal license, while the printed press does not. But the necessity for government licensing of frequency use does not license the Government to set aside constitutional principles. And the standard of public interest which governs broadcasting should not be applied to limit the public's paramount need for and interest in a free broadcast press.

In the light of these considerations, let me summarize my comments on the major questions before you affecting the broadcast media:

1. Is the First Amendment under any special attack today? Yes; we believe it is for many reasons.

2. Does the increase in the number of subpenas issued to newsmen have any part in this assault on the first amendment? Yes; we believe it does.

3. Do newsmen need a special protection, such as that proposed in S. 1311, which would protect them from forcible disclosure of their sources? Yes; we believe they do.

4. Does the interpretation of the fairness doctrine by the FCC constitute an invasion of the rights of the broadcast media under the first amendent? Yes, we believe it does.

5. Does the use of press credentials by Government investigators compromise the credibility of a free press? We believe it does, and more than that, it can threaten the personal safety, and sometimes the lives of legitimate reporters. For example, Welles Hangen, one of our most distinguished foreign correspondents, has been missing in Cambodia for a year and a half. We have used every possible avenue to get word about him, thus far without success. But it is clear that what might most endanger him is the unfounded suspicion that he is in any respect an agent of Government, rather than the independent professional journalist he has always been.

Each of these items raises fundamental questions, but I would like to concentrate on two specifics involving increasing threats to broadcast news—subpenas on newsmen and FCC regulation of the broadcast press under the fairness doctrine. Because of the nature of the public interests at stake, the expansion of Government power in these areas is alarming even though it may fall short of direct censorship.

During the past 2½ years, more than 100 subpenas were served upon two television network companies, requiring their newsmen to appear and disclose films and other material that had not been broadcast. This raises two dangers—the tendency it has to dry up confidential sources of the very kind of information which is not otherwise readily available; and the public distrust of the press that can be created if it is forced to become an agency of public or private litigants.

The public disadvantage, in our opinion, is too high a price to pay for what often is only a convenience to the prosecution or defense. And since many courts impose few bars on issuing subpenas, the practice can be overdone, so that the reporter, in effect, becomes part of the investigative machinery of the Government or the courts.

We feel that the traditional respect accorded to newsmen's information is no longer adequate and that a Federal statute is now desirable to protect this information on a uniform national basis. We therefore support S. 1311 although we believe it can and should be made more effective. With your permission, we will submit a brief memorandum, prepared by our counsel, recommending some revisions for that purpose.

A problem much more difficult to treat relates to public criticism of the press by Government officials. I do not suggest that the press should be free of criticism, because newsmen are not more infallible than other men and because the press is no more perfect than other human institutions. Specific errors of fact or analysis should properly be called to public attention, and the correcting factual material should be publicly supplied.

Certainly Government officials do not constitute a class that should be prohibited from criticizing failures of the press. But when the criticism by Government officials is sweeping rather than factual or specific, when it broadly condemns the press as irresponsible or malicious, it can damage the public interest in several respects. It can discredit news media which have the responsibility of reporting disturbing and unpopular developments about which the public should know. It can also lead to public apathy toward the weight and significance of First Amendment principles.

There is the added danger of intimidation when broad and general condemnations are directed against a federally-licensed press medium by Federal officials. The fact that the Government and press serve different functions is no reason for antagonism between them. If a problem exists in this area, it is best dealt with through suitable self-restraint of officials sensitive to the issues involved, and through public airing of these issues. That is one of the purposes of these hearings and we believe it is a purpose of great public value.

As a news medium, we subscribe to the journalistic standard of fairness, and we seek to practice it conscientiously. The FCC rule dealing with fairness—its system of regulations called the fairness doctrine—has little in common with journalism. We are increasingly concerned at the process by which Government judgments are being made in this field.

The FCC is evidently concerned, too. It is conducting a general inquiry to reformulate its policies in this field, because as Chairman Burch of the FCC recently said, under the present situation "both licensees and the public can only fall back on prayer to divine the Commission's intent."

Even more serious than the resulting confusion is the fact that the FCC is deep into the news area, and this sort of Government oversight of the journalistic function does interfere with freedom of press expression.

The fairness doctrine started with a simple proposition that if a broadcaster editorialized on one side of a controversial issue, as many individual stations do, he should provide opportunities for the presentation of contrasting views, so that the public would not be misled. In recent years, this simple doctrine relating to editorials has been expanded to the point where officials of Government, rather than professional journalists, can determine most of the elements that involve news judgment on presenting controversial issues:

What is the issue; what represents a position on the issue; and the extent and manner for presenting other positions.

As a result, we have even arrived at a situation where the FCC draws inferences of expression on controversial issues from product advertising, and counts the minutes and seconds of commercial presentations to calculate the time devoted to direct opposing argument on the issue inferred.

The problem is aggravated by the fact that the fairness doctrine is typically invoked by complaint, and almost always, the complainant is a special interest group that seeks to use broadcasting as its propaganda instrument. To the degree the FCC assists in this process under the fairness doctrine, the information material presented by broadcasting will not be that selected by journalists but that required by the government at the behest of special interest groups.

We are hopeful that as the Commission reexamines its position in this matter, it will return to first principles in applying the doctrine so that it does not make the Government the ultimate editor of broadcast journalism.

We are asking the Commission to recognize that the basic purpose at hand is to avoid misleading the public by presenting a controversial issue as if it had only one side. A Federal court has stated the matter precisely in observing that "the essential basis for any fairness doctrine * * * is that the American public must not be left uninformed."[1] We believe this purpose is met if the broadest schedule discloses the existence of the issue so that the public has the opportunity to learn that there is a controversy and to learn its nature.

This does not justify the Commission in undertaking to judge the respective amounts of time, frequency, persuasiveness, or methods of presentation with which the various aspects of the issue are presented. Even if no other problems were involved, the Commission is simply not equipped to make these editorial judgments. But more profound questions are involved. Fairness in journalism is a quality that cannot be regulated. And in a field of expression that borders so closely on constitutional guarantes, a Federal agency should act with particular restraint.

As we will point out in our filing with the FCC, the fairness doctrine should be limited to situations where the material broadcast directly and clearly advocates a position on a controversial issue, and the broadcast schedule does not elsewhere inform the public on other viewpoints on the issue. When confronted with such a possibility, the Commission should give substantial weight to the broadcaster's judgments on all aspects involved and should find a violation only when there is no rational basis for supporting the broadcaster's judgment.

These principles, it seems to us, will protect the public from misrepresentation, without making the Government the participant or overseer of the details, mechanics, and substance of journalistic judgments.

This committee can assist in the situation by emphasizing the public policy principles involved. We ask that you examine the guaranties of the First Amendment as they apply to broadcast journalism, that you provide guidance to the FCC in its present review of the fairness doctrine, and that you keep open this hearing to receive the results of that review.

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[1] Green v. FCC, — F.2d —, 22 Pike & Fischer Radio Regulation 2d 2022, 2031, (D.C. Cir., 1971).

Thank you very much, Mr. Chairman.

Senator ERVIN. You state that you favor the proposal to create what may be called a newsman's privilege by legislation. Do you not agree with me, however, that the necessity for implementing such a proposal will be either increased or decreased by the decision which the Supreme Court will make in the three cases pending before it, such as the *Caldwell* case?

Mr. GOODMAN. Yes, sir, I do agree that that could affect the need for such a bill. But it seems to me that it would be helpful to have the bill in any circumstances. I recognize the reason for the title of the bill. I think it is really a protection of the public rather than of a newsman.

Senator ERVIN. It is really the advocacy of a privilege which is fundamentally based on the fact that society has a real need to know the truth, and that the truth can be best presented by those who have an incentive for conducting the investigation and either printing or broadcasting the truth as they view it.

In my judgment the decision of the court of appeals in the *Caldwell* case is really one of the outstanding judicial decisions. It recognizes the public's right to receive truth, and it recognizes also that it is most likely to receive such truth through free speech or a free press. It also recognizes that the public has an interest in truth for the purpose of administering justice. And it lays down the fundamental principle, as I interpret it, which has a restricted application, that no gatherer of the news for broadcasting or printing purposes can be required to divulge the sources of his information, or even to appear before a grand jury, unless the public can show an overriding public interest in his testimony, and unless the public can also—using the word "public" talking about the prosecution—can show that it cannot obtain the needed information from any other source.

It seems to me that the court in that particular case did a very good job of balancing those two rights according to their respective priorities. It would seem to me that if the Supreme Court in effect adopts a similar view in respect to the right of the public to know and the right of the public to have information for law enforcement purposes, that the need for a substitute will be materially decreased.

I am very much interested in the fairness doctrine. And I think you have given a very fine discussion of that doctrine. I was impressed by your comment on the way the FCC uses the fairness doctrine on product advertising, because I happen to come from a State where they grow a great deal of tobacco and manufacture a great deal of tobacco. And there seems to be a great deal of difference of opinion between the two groups of physicians, those who hold political office, and those who seek to alleviate the ills of society by practicing medicine. The political doctors condemn the use of tobacco, particularly cigarettes. A great many of the medical doctors, however, contradict their suppositions and conclusions in respect to what injury, if any, smoking cigarettes does to the human constitution.

The Congress made a mistake, I think, in banning advertising on television of cigarettes. If the Congress can ban advertising of cigarettes on television they can ban anything on television.

Furthermore I think the FCC—for people who are not supposed to be influenced by political considerations as much as Members of Congress—compounded what I call a very injudicious act on the part of Congress. I fundamentally think that Congress has no constitutional power to ban the advertising of anything which is legal to sell to the general public. But the FCC came along and compounded the offense by saying that those who adopt the views of the political doctors, including the FCC have absolute possession of all the truth on this subject, and those who disagree with them have none. I don't think that that kind of an attitude can be reconciled with the most essential provisions of the first amendment. That was the same old reason that prompted the tyrant to require everybody to get a license for the purpose of being permitted to print a book.

I have some observations concerning people who complain about TV news coverage on the ground that the TV broadcaster selects the news that he is to present, and he doesn't always present the news that they think ought to be presented. That is quite a human attitude, I think. We like to hear the news presented with respect to the things we believe in, as we believe them. And we don't like to hear the news presented on subjects we don't like. That same statement about the selection of what is aired by TV broadcasters be applied to the President of the United States when he delivers the State of the Union message. He selects the subjects on which he is going to talk, and very often he eliminates other subjects from all consideration. The same thing is done by a U.S. Senator when he makes a speech on the floor of the Senate. He selects the views he is going to expound, and sometimes refrains from expressing the views that other people would like to have him expound.

So that complaint is going to be made or can be made in respect to any agency or any individual that exercises the right of freedom of speech or the freedom of the press; is it not?

Mr. GOODMAN. I think it certainly can, Senator.

Senator ERVIN. And an attempt to regulate that fact is likely to result in grievous injury to both of these freedoms; is it not?

Mr. GOODMAN. I think it will result in grievous injury. Too many people, I think, reach the conclusion that those who broadcast news on the air seem to approve the kind of news that they have to broadcast. But by the nature of the world we live in today the news sometimes is unpleasant, and newsmen are often the bearers of unpleasant tidings which people don't seem to like. And each one of them does seem to look at it from his own personal vantage point, as you mention. But I have had a lot of experience in news. And our own company has more than a thousand people involved in its daily coverage. And I can assure you that they go about it only with professionalism and fairness, and a balance, and accuracy.

Senator ERVIN. Some of the truth is very discouraging.

Don't you think it is very unfortunate for this country that there is not very much that is newsworthy in the fact that an individual or a certain segment of society is God fearing and law abiding?

Mr. Goodman. I know that there are some people who would like for us to dwell more upon the good things that happen in life rather than those things that do, according to most editors, make the news. But the experience and knowledge of many news editors goes into the makeup of every newspaper and every broadcast. And they go about it as best they can, and without trying to bring in an improper balance by looking for something that will cover the unpleasant news they have to report.

Senator Ervin. Isn't an inescapable truth with respect to what is newsworthy expressed in the old saying that "when a dog bites a man, that is not news, but when a man bites a dog, that is news"? In other words, the general public is not as interested in normal occurrances as they are in abnormal occurrances. A great majority of people in our society are nonviolent, and so there is no great news value in presenting news of these law abiding and God fearing persons.

Mr. Goodman. I think perhaps, Senator, that the viewer might tend to accentuate that which he sees and doesn't like, and tends to overlook what he likes which we do broadcast and which does reflect a good side of American life.

You may have seen the series that a fellow North Carolinian David Brinkley has been doing about good places to live in the United States. Some of them are very attractive.

Senator Ervin. Yes. And I think it is very wholesome to present them.

Now, as I construe your remarks, there is a place for the fairness doctrine in broadcasting if the application of that doctrine is restricted so that it does not interfere or curtail the right of the broadcaster to express his own views.

Mr. Goodman. That is correct, Senator.

Senator Ervin. And you accept the validity of the fairness doctrine, as I take it, insofar as it imposes an obligation upon the broadcaster to permit a reply to his editorializing.

Mr. Goodman. That is correct. The original concept of the fairness doctrine applied to editorials, and it said, when a station broadcasts an editorial, it should give time to reply to the man who is affected by that, or the institution. And that doctrine over the years has been changed. And as you yourself noted in the case of the cigarette decision by the FCC, the fairness doctrine was used to cover the decision the FCC made in the case of cigarettes. And once that decision is made, it can lead them down a regulatory road that could say anything is controversial. And that is what we find is a prospect to be avoided if possible. And that is why we suggested a return to the basic principles for which the fairness doctrine was first established to reply to editorials.

Senator Ervin. The Supreme Court in the *Red Lion* case recognized another application of the so-called fairness doctrine. Where a personal attack was made on an individual, the broadcast media should give him an opportunity to reply to the personal attack. In my opinion if that interpretation is restricted to what are really personal attacks, then that is a valid application. I believe that most news media will recognize it and voluntarily afford an opportunity to reply to the one who has a genuine claim that he suffered personal attacks. But the day is coming, it seems to me, that any expression or a statement of views on public questions that doesn't give the "right" emphases will be construed as a personal attack and demands will be made for an opportunity to express personal opposing views. I would think that under a proper interpretation of the fairness doctrine that the right to reply to a personal attack should be called into play only rarely.

Mr. GOODMAN. As I mentioned, Senator, we have always adhered to the journalistic standard of fairness. We simply feel that we do not require additional exterior regulatory reasons to enforce that. We feel that the judgment of broadcasters can be trusted. And as you yourself point out, while these kinds of things will be rarely required, they can be administered fairly by responsible broadcasters, which I believe we are.

Senator ERVIN. Your point, as I understand it, is that there is always danger in Government regulation that the regulators will be tempted, and will sometimes succumb to the temptation, to substitute their views as to what is newsworthy for that of the broadcaster.

Mr. GOODMAN. That is absolutely correct, Senator. One governmental regulatory step follows another, and the end result down the road could be increasing control over what is broadcast on a free journalistic basis. And I think for that to happen would be very bad for the country.

Senator ERVIN. That is certainly consistent with the undoubted truth that every journey starts with a single step.

Thank you very much for a most lucid statement of the issues involved and of the necessity for keeping the broadcasting industry free from violations of the first amendment.

Mr. GOODMAN. Thank you very much, Senator.

Senator ERVIN. To my mind the First Amendment is one of the great works of genius of the Constitution. No one at the time the first amendment was written ever envisioned such things as the radio or television. But yet the freedoms which the first amendment guarantees, the freedom of speech and the freedom of the press, clearly embrace within their protection those media of communication and all other possible media of communication which may yet be developed.

Mr. GOODMAN. Your hearings are going a long way toward reminding people of that, Senator. And I am afraid it is something that too many people have forgotten in the hectic times we live in.

Thank you.

Mr. BASKIR. Mr. Chairman, our next witness this morning is Professor Fred Friendly of the Columbia University School of Journalism.

Senator ERVIN. Professor Friendly, I want to welcome you to the subcommittee, and express deep appreciation for your willingness to appear and give us your views in an area in which you have had vast experience, and are most knowledgeable.

STATEMENT OF FRED W. FRIENDLY, EDWARD R. MURROW, PROFESSOR OF BROADCAST JOURNALISM, COLUMBIA UNIVERSITY GRADUATE SCHOOL OF JOURNALISM, AND ADVISER TO THE FORD FOUNDATION ON TELECOMMUNICATIONS

Mr. **Friendly**. Thank you, Senator.

I am afraid I am going to have to invoke in one place a word that you used in your opening day testimony, an old North Carolina word, "I am not so plum' sure." Some of the things I am going to talk about which I was sure about all my life, recently, I have come back to say, I am not so plum' sure.

Senator **Ervin**. That is the reason we have the freedom of the press, because there are many things you are not plum' sure about and society is not so plum' sure about. It is in the interest of society to have free discussions about all subjects where doubt and uncertainty exists.

Mr. **Friendly**. Good.

Mr. Chairman, I am Fred W. Friendly, Edward R. Murrow Professor of Broadcast Journalism at the Columbia University Graduate School of Journalism, and advisor to the Ford Foundation on telecommunications. Previous to these assignments I was, for 16 years, an executive producer at CBS News, and for 2 years, president of that organization. Before that I sat side by side with Mr. Goodman in a newsroom in NBC.

This fall, in collaboration with a Columbia law professor, I began teaching a new course, "Journalism and the First Amendment." In preparation for this I spent the past year reexamining a lifetime of convictions and assumptions concerning the first amendment and my profession. I have concluded that the first amendment, like all of the Bill of Rights, is a cornerstone but not a completed building. To paraphrase a 19th century professor of constitutional law, Woodrow Wilson, who went on to other things, "It is a root, not a perfect vine * * *. It is the sap-center of a system of government vastly larger than the stock from which it has branched. * * *"

I believe, Mr. Chairman, with all my heart and conscience, in the spirit of the First Amendment. To say that I believe the absolute letter of that law should automatically be applied to 20th century technology would be simplistic and unfair to James Madison and his fellow framers of the Bill of Rights. It would be, to borrow from Mrs. Malaprop, "to anticipate the past."

There is every evidence that the drafters of the first amendment were being purposefully ambiguous. We must resist the temptation to put our own libertarian words in their mouths. The canon, "Congress shall make no law * * * abridging the freedom of speech or of the press * * * ," presupposes a community of equals, which is the very core of the Constitution and the Declaration of Independence. Yet, when Congress passed the Communications Act of 1934, it implicitly created an electronic community where some citizens are more equal than others.

The premise of the First Amendment is that free expression will flourish as long as:

1. Government remains neutral—stays out.
2. Everyone has the same tools and/or access to those tools.

When the Government, through the FCC, disturbs that delicate balance and enfranchises several citizens to operate the equivalent of a super public address system that can, in effect, drown out that multitude of diverse and robust voices, then the ground rules may have been changed. The Federal Government, because of the limitations of the electromagnetic spectrum, had no choice in the twenties and thirties but to issue radio licenses. And in the forties and fifties to issue television licenses. But in giving some citizens this awesome responsibility and unique privilege, it, by definition, denied these rights to others. The open market place of ideas became more dynamic, more far-reaching but, nevertheless, limited.

Indeed, the gift of this license can be considered a form of "prior restraint," as the courts have stated, and if one wanted to pursue a legal point, one could argue that the Communications Act and the first amendment have been on a collision course. The Blackstonian principle against "prior restraint" so simply restated in our First Amendment, foreclosed the divine right of kings and governments to license only selected printers and publications. The Communications Act, although clearly forbidding FCC censorship of radio and television communications, necessarily bestows licenses on some but denies them to most others. The franchise holder, as the gatekeeper to the biggest soapbox in town, becomes an adjudicator of everyone else's First Amendment rights. Walter Lippmann once put it another way: "Suppose there were only three printing presses in the Nation, to whom would you give that responsibility?"

The Government, having made this major alteration in the system by which we communicate, has an obligation to make certain the system is used well and used enough. To say that is not to imply that the Senate or the House of Representatives or the FCC has any place in the "content" business. It does have an obligation to make sure, as Edward R. Murrow once put it, that "licensees don't welch on their promises"—promises not to please all the people all the time, but to use the system to communicate, not just to amuse and to sell goods.

At a time "when what the American people don't know could kill them," high officials who are critical of broadcasters for doing their best remain virtually silent about their worst, which is clearly visible almost every night in prime time. If the Vice President of the United States were one-tenth as concerned with the low level of nighttime entertainment as he is with the performance of Cronkite or Brinkley or Reynolds, his motives might not be so suspect. If some Members of Congress were as concerned with the selling of violence and superfluous medicine as they were with "The Selling of the Pentagon," the debate over slanting the news might be more understandable.

I am more distressed with attacks on the news media from the Vice President and certain members of Congress than I am with the Communications Commission. Most of the time the FCC has been a leaning tower of Jello, more concerned with citizen's band radio and marine frequencies than with the crucial communications that shape our lives. But there have been some notable exceptions. Some of my former colleagues may not like what I am about to say, but the truth is that the threat of Government action after the quiz show scandals in 1959 and 1960 is what caused "CBS Reports," NBC's "White Paper" and other documentary programs to be placed on the nighttime schedule. And now that the threat has receded, the programs have gone back to the intellectual ghetto, receiving only an occasional nighttime exposure.

When I hear some broadcasters whom I respect complain about the chilling hand of FCC intervention, I share that concern but, frankly, I perceive very little FCC meddling in newsroom activities. The chilling hand that concerns me far more is the corporate concern for maximizing profit. It is this profit drive that causes the network evening news programs to remain a half-hour in length. And if you take out the commercials, that means 22 minutes—when every newsman and producer and executive knows they should be an hour.

It is the dollar sign, not the Government's censorship stamp, that has caused the termination of all weekly scheduled documentaries and public affairs in prime time. The news organizations of the three major networks are capable of far more professional journalism than ever gets on the air, and the frustration of many practitioners is hardly a secret. Vice President Agnew, for all his denunciations of broadcast journalism, has not really influenced the cancellation or abridgment of a single program. The real censor remains the high cost of air time.

My position is that the First Amendment should apply to broadcast journalism, but I also believe that the broadcast industry must meet the Bill of Rights half way or at least a quarter of the way. There ought to be an electronic bill of rights, but to make that work there would have to be an electronic "bill of responsibility." Broadcasters would have to give their professional consciences "equal time" with their corporate balance sheets. The fairness doctrine, section 315, and the FCC's requirements for diverse programing are nothing more than substitutes for this bill of responsibility, and they are not adequate. The fairness doctrine is awkward to enforce and demeaning to the FCC and I think to the broadcast profession.

I think that the equal time provision of Section 315 of the Communications Act is counterproductive and causes less public access, less debate, not more. And the programing requirement is sampled only at license renewal time, and even then it is seldom successfully met.

Frankly, Mr. Chairman, I don't believe the fairness doctrine works very well. If the doctrine is enforced in broad and general terms, it represents no more than the credo of an honest journalist. If—and this has sometimes been the tendency—the doctrine is applied fastidiously by the FCC, the potential for abuse is enormous. In the hands of a lazy management or a timid journalist, the doctrine is a convenient excuse for doing nothing, and I have seen it used as an excuse for doing nothing. On balance, I suppose that the fairness doctrine is a necessary evil in a technology of scarcity—an ultimate restraint against the broadcaster who might abuse his public trust. But I look forward to the day when, with broadband cable capacity, we have sufficient television channels so that the doctrine, will not in capital letters, be necessary.

Nor do I believe that congressional or FCC investigators have any place in the newsroom or second-guessing the editing of documentaries. Frank Stanton of CBS was on solid ground in refusing to give up film outtakes and other unused material from "The Selling of the Pentagon." Judging from the number of policy changes made by the Defense Department as a direct result of the broadcast, Congressman Staggers and his subcommittee should be asking why there aren't more investigative documentaries.

Congress has a responsibility to make certain that the long-range promises affecting the public interest are honored. It has no place in the newsroom or in monitoring individual programs. It is unfortunate that the House of Representatives decided that issue of "The Selling of the Pentagon" on political grounds before the courts had a chance to decide it on constitutional grounds.

I think, on another subject, that the subpenaing of a reporter's notes, which you talked about with Mr. Goodman, whether he be a print or broadcast reporter, is a futile exercise which is an unproductive as it is unconstitutional. The plain fact is that experienced reporters leave very few relevant facts in their notebooks or on the cutting room floor. Prosecutors looking there for admission evidence will do better to spend their time in more fruitful pursuits. In truth, the subpoenaing of reporters' notes is attempted much more for harassment than in search of light. Incidentally, I think the Pearson Bill, S. 1311, is an excellent step in the right direction, but it is really only a beginning. And I do hope that cameramen and photographers can be included as being protected behind the shield. And you can watch them covering a hearing like this, or any other major event today, or minor event. The cameraman is an important element in broadcast journalism.

On another subject before you, the use of false press credentials by police officials who seek cover seems to me as fraudulent and dishonest as the false use of police badges by newsmen—both are inexcusable. Both should be unlawful.

But getting back to broadcast regulations, repealing the fairness doctrine or improvising other patchwork alterations in the communications structure will not reorder the priorities of the first amendment. Specifically, it is the piecemeal approach which has made us face a situation where Presidents of the United States can avoid debating their challengers by hiding behind the equal time provisions. It is the absence of an electronic Bill of Rights which caused CBS News to spend far more money and energy defending "The Selling of the Pentagon" than in producing it. It is the absence of an electronic Bill of Responsibility which necessitates broadcast editors compressing complex issues to such a point that too often they must maximize heat at the expense of light. Television is so unfair to its own journalists in the distribution of air time and its use that it can't possibly be fair to everyone.

It is the lack of an adequate communications policy that requires politicians to mortgage their consciences, hock their souls, as one politician once put it to me, to raise anywhere from $10,000 to $50,000 for a few minutes of air time, which, in most other democracies, is provided free to candidates for political office. It is the absence of a communications policy that subverts the newly established Public Broadcasting Service to second-class status by denying almost half of our major cities the use of a VHF (very high frequency) public television transmitter. Think of the irony. Congress and the foundations pour tens of millions of dollars of funds into public broadcasting while "Sesame Street," "The Advocates," "Masterpiece Theatre," and the other refreshing programs of public broadcasting cannot be seen in approximately 45 percent of American homes. For example, the Washington-Baltimore area, with a total of seven commercial VHF stations and not one public VHF license, is a constant reminder of the high price we all pay for bad planning.

The situation has reached such proportions that in Los Angeles recently—and I don't think this has been revealed—even $15 million, raised in the philanthropic and business worlds, could not ransom a commercial VHF channel for the public sector. Half the children of Los Angeles still cannot watch "Big Bird" or the other characters of "Sesame Street" on the public television in the Los Angeles area.

The absence of a long-range communications policy causes the Nation to improvise and stumble from one crisis to another. Television regulations grew out of radio law, just as the term "public interest, convenience and necessity" was borrowed from Interstate Commerce Commission language pertaining to grain elevators.

If we continue to improvise we shall never break out of the thicket which slows our progress. Even today when broadband community cable could put 50 or 60 channels into every home, could end the constricting limitations of the VHF quasi-monopoly, could change television as much as television changed radio, we are bogged down in jurisdictional controversies between cities and States, between the States and the FCC, between the FCC and the White House. Cable television, the wired city, as it is sometimes called, could virtually eliminate limited access and the other problems which now make it difficult to apply all of the principles of the first amendment to broadcasting.

It could happen, the open access, if we reorder our priorities and create the kind of long-range communications policy that can carry us into the next century.

To change this course we need a knowledgeable citizens' commission. I think, to question and report on where we have been. After 37 years, how well has the Communications Act served the Nation? Has the FCC been a threat to journalistic independence? Has it been a goad for progress some of the time? Should a new agency be created exclusively for telecommunications? Is the First Amendment compatible with a semiclosed franchised system? What should replace the fairness doctrine? Should vast conglomerates be allowed to own television stations and/or cable systems? After all, aren't our banking institutions limited in the kinds of corporations they may acquire? Should members of Congress be permitted to own stock in conglomerates which own powerful broadcast operations? How can public broadcasting be provided with a long term finance plan completely insulated from Government and foundation control?

We need a serious study of all these problems, not by Government and not by the broadcast industry, but by a panel of concerned and learned citizens. In Britain the Pilkington Commission in 1962 evaluated the long range performance of the BBC and there are constantly surveys like that being made in that and other countries.

I am not recommending an examination of day-to-day content, and certainly not an inspection of broadcast practices on any one program. I am talking about the promise and the performance for a decade. It is precisely this kind of long range evaluation which will keep opportunists from sharpshooting practices that take aim at individual journalists and documentaries.

To conclude, merely reciting the litany that broadcasting deserves all the protection of the first amendment will not make it true. Like patriotism, integrity, and marriage, it is better upheld in the demonstration than the recitation. Much more work and thought, much more self-examination on and off the air, much more access to air time for those who believe they have been wronged by television and radio, is essential. For communications to be truly free, there must be opportunities to vent the steam that builds up in what Jefferson called "the most certain and legitimate engine of government."

Mr. Chairman, in your eloquent statement at the beginning of these hearings, you had a sentence which ought to be on the first page of the book which I hope you or someone else will write about these hearings: "If the First Amendment principles are held not to apply to the broadcast media it may well be that the Constitution's guarantee of a free press is on its death bed." The outcome of this issue lies not only with those in high places who make communications policy, but also with those who make television and radio programs.

The First Amendment will apply when the broadcast schedule is worthy of it. Did the Founding Fathers mean what they seemed to be saying? Had they ever dreamed of broadcasting, would they have included it under the protections of the first amendment? Perhaps the best answer to that is another question. Do broadcasters mean what they seem to say about their responsibility to the public in their applications for license renewal?

Senator **Ervin**. Your statement is very illuminating and very intriguing. As far as these hearings to date are concerned, you have expressed some quite original viewpoints.

I would infer that it is your opinion that First Amendment freedoms carry with them first amendment obligations which rest very heavily upon the broadcast media. This is so because of the very nature of the broadcast media; it enjoys some exclusive privileges which are not enjoyed by the news media generally. Is that a fair summation of your general thesis?

Mr. **Friendly**. I think you have said in 30 seconds what it took me 13 pages to do. I think if there were enough time the ability to be fair comes much easier. If the better newspapers of this country had to do it all in one page it would be very hard to be fair. The recent advent of the op-ed page of The New York Times and other newspapers means that when Senator Ervin or Fred Friendly has something said about him that he doesn't like, he has a chance to stand up and answer back. Sometimes in broadcasting you don't have a chance to argue back. And very often, controversial issues don't get aired because there's always the threat that you may have to provide all that time that doesn't exist. In the early days of broadcasting when air time was inexpensive, there was much more of this.

Senator **Ervin.** I believe you would agree with me that one of the tendencies of our generation is that we tend to emphasize rights rather than responsibilities.

Mr. **Friendly.** I think there are no rights without responsibilities.

Senator **Ervin.** Your criticism of the broadcast media is based largely on your beliefs that it has an obligation to inform the public as to what is going on in our country and the world, and that it restricts the coverage of the news too much in favor of commercials and programs which are designed to amuse rather than to inform.

Mr. **Friendly.** I am all for entertainment, and the performing arts, obviously and implicitly. But I think the news organizations—it is because I think so much of the news organizations that I hate to see them relegated to 22 minutes every night.

For example, yesterday in a class at Columbia we ran one of the McCarthy broadcasts that Ed Murrow did that I worked on. It was very interesting. In our broadcast, although we tried to present the case for and against the Senator, I think a great many people thought it was more anti-Senator Joseph McCarthy than it was pro. Mr. Murrow said at the end of that broadcast that if Senator McCarthy feels that he has been harmed by this broadcast, or we have not been fair, he can have a half-hour. And we gave him a half-hour as soon as he was ready to do it, which was 10:30 on a Tuesday night. Not only is there no program like "See It Now" on the air on a regular basis, but there is no place to vent that. I think the open robust debate we need automatically requires lots of space, lots of time. I don't want to make broadcasting into a 19-inch wailing wall; I just want to make sure there is enough time so that there is always the problem of doing the other side. But when you add to that problem the fact that there isn't enough space, enough air time, you dramatize that more than it can stand. And there is no reason to do it, because there is enough air time, there is enough air time for the broadcasters to make a very fair profit and still leave enough time for venting. I think there ought to be two or three half-hours a week when people who feel that their ox has been gored have a chance to come on and say, Mr. Broadcaster, you did wrong by me, and here is why.

Senator **Ervin.** There would undoubtedly be a great deal of difficulty in administering the system in such a way as to give everybody who felt that their ox had been gored the opportunity to reply. There would have to be a way in which to determine who had made a meritorious complaint.

Mr. **Friendly.** Yes. But I think we can do that, I think broadcasters and editors can do that. Obviously, you can't give everybody the opportunity the same night. But I do think—I proposed this in a speech that I made once at Tufts University—that there be a kind of ombudsman procedure, and when somebody, whether it is Vice President Agnew or a little man or a great man, feels that something about him has been unfair, that he gets to face the man who attacked him right there in the studio. And he says, Mr. Friendly—were I the producer of that program—at another time you did a program about me, and you said this and this, and I want to argue that with you. And it would have two values. I think it would allow venting, which you need in an engine like this. But also I think it would make journalists a lot more careful, when they know that they are going to have to face the man they are talking about in a studio, it has a great therapeutic value. And I think to do that you need air time. That is what we don't have enough of.

Senator ERVIN. I recently reread the script of Edward R. Murrow's telecast in respect to Senator McCarthy. And in the light of what I later learned from sitting on the committee which recommended the censure of Senator McCarthy, I am compelled to say that that telecast was one of the greatest blows for freedom of thought and freedom of speech and freedom of the press and for the first amendment that has ever been made in the history of our Nation. To my mind it is just about as important, if not more important, than the verdict of the jury in the *Zenger* case.

Mr. FRIENDLY. Mr. Murrow would be very proud to hear you say that.

I think he would add if he were here that he always believed that Senator McCarthy's answers to him—he had a half-hour to answer Murrow, in which he did attack him, using the tactics in the way for which he is now famous—Murrow also felt that that broadcast was more of an indictment to Senator McCarthy than Murrow's broadcast, that giving to him a half-hour of air time and the way he used it was so counter-productive to what Senator McCarthy was trying to do.

And that of course, reinforces my view that enough air time will help to do that.

But it is very generous of you to say that, Senator.

Senator ERVIN. I became well acquainted with the effects of Senator McCarthy's tactics on the Nation. In spite of a lot of recent controversy about the right of speech and all, I think it is really impossible for us to criticize today what was going on in the days of Senator McCarthy.

Mr. FRIENDLY. It was a nightmare.

Senator ERVIN. I came to Washington from the cloistered ivory tower of an appellate court. I was put on that committee simply because I had had a little judicial experience, and nobody else was fool enough to accept service on the committee. I just couldn't believe what had been going on—that the public allowed itself to be intimidated to the extent that it was. No politician wants any mud thrown on him. And, politicians at that time were always in danger of getting mud thrown on them if they showed their independence of that individual.

Turning to another point in your presentation.

You stated your opinion that since the broadcast frequencies in the VHF field are now so restricted, you hope that through the use of cable television a point will be reached someday where there will be enough broadcast outlets so that the broadcasting industry can virtually be relieved from any stringent government regulation, except that of assigning channels.

Mr. Friendly. I think in 10 years or less, if the policy is made properly, it will be possible for almost everyone to have access to the air, what we now call the air.

Senator Ervin. You draw a distinction between the printing press and the broadcast media, particularly those enjoying the benefit of UVH and VHF channels. You base this on the fact that anybody can go into the printing business with enough capital, whereas the broadcast industry must be restricted under present conditions because of the lack of sufficient channels.

Mr. Friendly. Yes. And yet, Senator, that is where I use your word plum' sure again. I grew up believing that. And I still believe that about the broadcast side. And yet if you push me very hard about your statement that anybody with enough money can start a newspaper, that really isn't true. You need $50 million to start a paper in a major city, and you might not make it. And I think someday we are going to have to look at that situation. I think it is true that there are a lot of underground newspapers that become overground newspapers. The newspaper in New York now called the *Village Voice* which just a few years ago started on a shoestring now has quite a readership. But I do think that there are too few newspapers. And I do think the plain truth is that the chance to start new newspapers in major cities is less and less a possibility, and I grieve over that.

Senator Ervin. I will certainly agree with you that from a practical standpoint the idea that any person can go into a newspaper business is more theoretical than practical. But there is a legal distinction. The law allows anybody to go into the newspaper business provided they can meet the practicalities of the business, whereas the law necessarily restricts to a comparatively small number—I am talking about the law, not the facts—those who go into the broadcasting business. Despite that fact, however, we probably have more competition in radio and television than in printing.

Mr. Friendly. But you know, Senator, I read the testimony of some of the earlier witnesses, and that really is a suspect figure. There are on paper more television and radio stations than major newspapers. But a great many of those radio and television stations do very little news. And what they do they do very badly. So I don't think that is a very fair comparison. And I think that it's one of those numbers games that people like to play to make a point. There are too few television stations doing a good job, and there are also too few newspapers. But you are quite right, the government had nothing to do with giving the newspapers their monopoly. The government had everything to do with giving the broadcasters their monopoly. And that does make a difference.

Senator Ervin. You state that it would be unwise, in your judgment, for Congress to attempt to cure any of the ills in the broadcasting field by piecemeal legislation, and that the only ultimate regulation that you believe would work satisfactorily would be what you call a Bill of Rights and Responsibilities?

Mr. Friendly. I think that is part of a major communications plan for the country for the rest of this century.

Senator Ervin. And that is something that requires much profound study?

Mr. **Friendly.** A lot of work. And you are beginning it here. But we have a great deal of back homework to do. We haven't tended this vine for a long time.

Senator **Ervin.** Senator Thurmond.

Senator **Thurmond.** I notice you refer to the Vice President in your statement several times. Are you critical of the Vice President or critical of the FCC for allowing the Vice President to do what he has done, or just what is your situation?

Mr. **Friendly.** I am certainly not critical of the FCC for allowing the Vice President to do what he has done, because I don't think they have got anything to do with him. I would like to divide the two points if I might. I am critical of the Vice President because I think that in denouncing journalism generally and broadcast journalism generally, he has planted the seeds of doubt in this country about something that is as important in its way as is government. He has every right to do that. I quarrel with his facts and his interpretations.

Senator **Thurmond.** The networks certainly expressed themselves freely. Why would you object to the Vice President expressing himself freely?

Mr. **Friendly.** I don't think the networks expressed themselves freely on subjects quite as explosive as that. I think the Vice President has every right to do that, Senator, every right in the world. And I think that other people, you and I among them, have every right to be critical of him. But I am not talking about his right, Senator.

Senator **Thurmond.** I have been amazed at some of the news media, including the networks, that have been very critical of the Vice President, and yet they have been guilty of the very thing of which they accuse him.

Mr. **Friendly.** How do you mean that, Senator? I am not sure I understand you.

Senator **Thurmond.** In other words, the Vice President has expressed himself very freely on matters, including criticism of the networks and the news media, and yet they criticize him for doing that.

Mr. **Friendly.** That is pretty healthy.

Senator **Thurmond.** Why do they jump on him when they are doing the same thing themselves?

Mr. **Friendly.** Because I think this is what this country is all about, Senator, strong and robust debate. I think the Vice President makes his point—and the people will decide about the Vice President every 4 years—he makes his point, and the broadcaster, whether he be Walter Cronkite or Julian Goodman who was here just today, or David Brinkley or somebody from South Carolina, has a right to answer him. That is what America is all about. The Vice President is either right or wrong. And people have a right to talk about that.

Senator **Thurmond.** They have a right to talk. And the Vice President has done that. And yet he has been censored and criticized and castigated for doing that. And the networks have done the same thing.

Mr. Friendly. Let us just say that the networks and the Vice President deserve each other. And the citizenry will decide who is right.

Senator Thurmond. As a matter of fact, the people generally have been favorable to the position taken by the Vice President, haven't they?

Mr. Friendly. Well, I am not sure——

Senator Thurmond. I believe the polls have shown that, and the response the Vice President has received. I just wondered why the double standard. What I am trying to get at is: Why the double standard?

Mr. Friendly. May I say respectfully, Senator, that I don't see any evidence that the public supports the Vice President any more than it does the broadcaster. But your word is as good as mine, probably better.

As far as the double standard—I see no double standard. I think the Vice President of the United States made his most severe indictment on television from Des Moines on all three networks. 29½ minutes of air time. He had the right; he did it. And people have been talking about it ever since. It has been a very good subject for dialogue. It enables people like you and I to talk about it. And in the end of the day the American people will decide where the credibility is. with the Vice President of the United States who wants less journalism or with the broadcasters who want more. But I think it is a very healthy debate. And I hope there is no double standard.

Senator Thurmond. The public generally have approved of what the Vice President has done. And personally I approve of what he has done. And I think the people have a right to hear what he has to say. And yet the networks and the news media and the newspapers. that is. the so-called liberal ones, have jumped all over him for it. Why the double standard?

Mr. Friendly. Senator, I read the newspapers, and I read them in your State. I read the conservative ones as well as the liberal ones and the radical ones. And I hear as many conservative voices criticizing the Vice President as I do the liberal ones. But I don't think there should be a double standard. And if I were running a news department, I would say to the Vice President of the United States, Mr. Vice President, come sit down. Here is the president of this network and that network, and here is broadcaster X and Y, and Senator Ervin, and Senator Thurmond; let's talk about it. It is very interesting that there has been no dialogue between the Vice President and a prominent broadcaster on television or off. Why not? I am sure they would be glad to invite the Vice President to be on their air to discuss it.

Senator Thurmond. The networks are on the air everyday, and they can brainwash and brainwash, and they have been doing it for years. And I am very proud that the Vice President had the courage and the fortitude to stand up and answer some of these things. And the American people, I think, feel the same way.

Mr. Friendly. Well, Senator, you will permit me to say that I am just as proud that the broadcasters have had the opportunity to answer the Vice President. And I think that both of us will live to see the day when history will judge where the Vice President was and was not.

Senator **Thurmond.** And I hope the public generally will have an opportunity to go on the networks more and answer things that are brought out by the networks, because I have seen this thing go on for years and years, and the public has.

Mr. **Friendly.** But you do agree that letting the public have access, and politicians too, on the air to make their criticism would be a healthy place to do it?

Senator **Thurmond.** I think certainly there is a right to criticize. And they have the right to criticize. But the way some of the networks have been doing it has been very unjust and very unfair. And then when the Vice President jumped on them about it, then they yelled just like a stuck pig.

Mr. **Friendly.** It seems to me the Vice President is doing pretty well.

Senator **Thurmond.** I think he is. I think if you took another poll today the poll would be even higher than previous polls in favor of the position of the Vice President.

Mr. **Friendly.** Well, Senator, that poll is going to be taken one of these days; I guess in 1972, if he is on the ticket. And I am not sure that is going to be true. But the American people have a pretty good chance to make that poll known. I think the Vice President has to take his lumps like everybody else. He can criticize the broadcasters, but then you cannot interfere with letting the broadcasters criticize the Vice President.

Senator **Thurmond.** I am delighted to see freedom of speech in every way, shape, and form. And I hope the public will be given and afforded a greater opportunity than ever before to answer some of the unfair statements by the networks.

Mr. **Friendly.** That is where you and I agree, Senator. Thank you.

Senator **Thurmond.** Thank you very much.

Senator **Ervin.** I have said for a long time that we favor freedom of speech and freedom of the press and freedom of broadcasting when we agree with what is said and that we tend to dislike it when we disagree with the material presented. As a Democrat I don't like to hear the Republicans make campaign speeches criticizing the Democrats, just as I don't think the Republicans like to hear the Democrats make campaign speeches criticizing them. I think that if some of the news media didn't like the criticism of Vice President Agnew, and Vice President Agnew didn't like the criticism of some of the news media, that it is proof of the human element involved on both sides of the controversy. I take great satisfaction in the fact that I think Vice President Agnew has the right to criticize the news media, and the news media has the right to criticize things for which Vice President Agnew stands as well. I agree with your observation that that is what our country is all about, and that is what keeps this country a free society.

Mr. **Friendly.** And that is why you have to use the air time.

Senator **Ervin.** I am very fond of the Vice President personally, and I also believe in his right of free speech. I would be pleased if he would come down and be a witness before this committee.

Mr. Friendly. I think that would be great. I would like to come back on that day, Senator.

Senator Ervin. I have been trying to get somebody from the administration to come down and testify, either from the Department of Justice or the head of the FCC, Mr. Burch. Thus far I have been unsuccessful. I hereby now extend to the Vice President an invitation to come down and testify either for himself or for the administration.

Mr. Friendly. Senator Ervin, the Senator on your left, if you would excuse the expression—I mean that only geographically——

Senator Thurmond. I am generally on the right.

Mr. Friendly. You are on my right. But as long as Senator Ervin would like to have the Vice President of the United States come and testify here, and as long as he seems reluctant to come, and as long as you think it so important for him to be in this drama, why don't you get him to come, why don't you be the talent scout that says to the Vice President, come on down to these hearings, we want to ask you some questions?

Senator Thurmond. I would be very glad to have him come if he cares to come. I guess he has his reasons for doing things the same as you do.

Mr. Friendly. He is in Greece today, and I am here.

Senator Thurmond. That is a good place to be, to be in Greece. I think this country ought to stand by the Government of Greece more than we do today.

Mr. Friendly. I hope that is not a question, sir.

Senator Ervin. As far as I know, the Vice President has not manifested any reluctance to come down here. I have invited other members of the administration to present their viewpoints about this whole question, but they haven't accepted. I would be awfully glad if the Vice President would volunteer to testify for himself and the administration. As I said before, I am very fond of the Vice President.

Mr. Friendly. Well, sir, I share most of those views.

And if you get the Vice President to come, Senator Thurmond, you are going to have 80 cameras here, this room will be packed, and you can be on television for 7 hours. It will be the best and most important broadcast since 1954.

Senator Thurmond. I would be very glad to have him come if he cares to come.

Thank you, Mr. Chairman.

Senator Ervin. Thank you very much.

Mr. Friendly. Thank you, Mr. Chairman, and Senator Thurmond.

Mr. Baskir. Our final witness today is Mr. David Hamer, president of the National Press Photographers Association.

Mr. Chairman, I might say that Senator Hruska had hoped to be here to welcome Mr. Hamer, however he was detained in Nebraska because of a funeral.

Senator Ervin. Mr. Hamer, I am delighted to welcome you to the subcommittee. I appreciate very much, as does the subcommittee, your appearing here for the purpose of expressing your views and those of the organization which you represent. We would also like to welcome Mr. Heileman, who is with you.

STATEMENT OF DAVID HAMER, PRESIDENT, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, INC.; ACCOMPANIED BY DON HEILEMANN, CHAIRMAN, FREEDOM OF INFORMATION COMMITTEE

Mr. HAMER. Thank you.

Mr. Chairman, distinguished members of the Subcommittee on Constitutional Rights. My name is Dave Hamer. I am a newsfilm cameraman for KMTV news in Omaha, Nebr., and I appear today as the president of the National Press Photographers Association.

Appearing with me is Don Heilemann, also a newsfilm cameraman, employed by WTOP–TV here in Washington. He is chairman of our Freedom of Information Committee.

We wish to thank you for inviting us to testify.

The National Press Photographers Association membership is composed of some 3,500 working news photographers, employed by newspapers, magazines, press services, and television stations all over America. We are a voluntary, nonprofit, professional organization dedicated to the advancement of news photography.

The National Press Photographers Association is most interested in Senate bill 1311 and we hope you will give it your favorable consideration. We believe that in these complicated times it is important that the role of the newsman, be he word man, picture man, editor, or whatever, be clearly recognized. We believe the major reason for our existence is our value in serving every citizen through the dissemination of information. We believe further that the public's right to know is a paramount right.

With your permission we wish to make three suggestions which would give added strength to Senate bill 1311.

1. First, as Mr. Friendly mentioned, we believe the news photographer, both still and motion picture, should be specifically mentioned and included among those occupations listed on lines 1 and 2, and lines 11 through 16 of page 2 of S. 1311.

2. We urge the subcommittee to give favorable consideration to a section that would provide explicitly that unpublished news pictures, unaired newsfilm and unused sound recordings, commonly called outtakes, not be subject to subpena by any investigative or law enforcement authority except as provided in subsection (c) of section 4.

3. If the free press of Amerca is to be permitted to publish and broadcast information to which the public is entitled, without restrictions or interference, then representatives of the news media should be free to gather such information, including pictures, without threat or fear of bodily injury.

On this latter point, as you are aware, law enforcement personnel have been found impersonating news photographers at public gatherings and they have been observed taking pictures of people involved in public disturbances. Obviously, to permit such impersonation does pose a grave threat and fear of bodily harm to legitimate news gatherers. Public protestors, knowing that law enforcement personnel are impersonating news photographers, and not being able to distinguish between the two, we believe, will naturally attack indiscriminately all whom they observe with cameras, in order to prevent having their pictures taken for police purposes. If they know the law forbids impersonation of news gatherers by anyone, they will be less inclined to personally attack and inflict bodily harm on those whom they know to be gathering the news legitimately.

We sincerely hope the subcommittee will add these important points to S. 1311.

Further, we give our strongest support to the provision in S. 1311 regarding nondisclosure of sources. It is generally agreed that a strong and free press is the keystone of our democracy; that the public's right to information is fundamental to the freedom of all Americans. However, it is ironic that newsmen have at times risked imprisonment in order to protect the sources of information vital to the very welfare of the communities and citizenry they serve.

We believe the relationship between a newsman and his source must be one of sanctity and must be treated in the same regard as the relationship between a doctor and patient, attorney and client, or clergy man and parishioner.

We feel this legislation, and our proposed additions to it, will insure that paramount right of the American citizen to an uninterrupted flow of news. A well informed citizenry is vital to our democratic system. We believe any watering down of the protection provided by the first amendment, no matter how well meaning, can only weaken that system.

The news media cannot be an effective watchdog over public affairs for the American people if it must disclose all information gathered in confidence and the sources thereof.

The legislation you are considering today will further solidify the well established protection of the first amendment to the Constitution. It will do this by making it explicitly clear that the right to disseminate the news will be meaningless if the right to gather the news is not protected. And it will make it explicitly clear that the public's right to know is a constitutional right which is not to be tampered with.

In summation, we believe news photographers must be granted the same protections as other members of the working news media as enumerated in S. 1311—that all working journalists must be permitted to maintain confidential sources—that unused photographs, newsfilm and sound recordings, must not be the subject of subpoena by anyone—and that the impersonation of news gatherers must be forbidden.

Certainly nothing less than unqualified, absolute protection of the newsman's privilege to gather and disseminate the news without fear or favor is sufficient to preserve the free flow of information the public is entitled to under the first amendment.

That, gentlemen, is what we believe it's all about.

Senator **Ervin**. There is a Chinese proverb to the effect that one picture is worth a thousand words. And I think that is undoubtedly true. Perhaps that is the reason that law enforcement officials adopt the guise of news photographers when they conduct surveillances of a rally or gathering or demonstration. That also explains why those who are being photographed, fearing that their photographs would be used in the future by the Government to injure them, are so often tempted to assault anybody who appears in the guise of a news photographer. This subcommittee heard evidence, in investigating the surveillance of civilians by the Army, that one of the favorite disguises adopted by military intelligence agents in observing persons who were making various protests about Government policies was to appear to be newspaper photographers or photographers for a news media. Now, I believe that the great majority of people who have studied the First Amendment do not agree with the late Justice Black that First Amendment freedoms are absolute. They believe that in compelling circumstances the Government can place limits upon most First Amendment freedoms except the freedom of thought. However in determining what is an overriding public interest there is sometimes a conflict between public interests. I think this conflict appears in the field of news gathering.

The public has a great interest in knowing the truth, and I know of no way for the truth to be more accurately presented than by pictures. Words can be slanted, and while pictures can also be slanted, it is rather difficult.

At the same time the Government and the public have an interest in knowing the truth where the truth is necessary to enforce the law. I can conceive of circumstances where a news photographer might actually take the picture of a man committing a murder.

Mr. HAMER. Yes, sir, indeed.

Senator ERVIN. And even though the photographer never prints that picture I can conceive that the offer of that picture in evidence might be essential to bring the murderer to justice. And it might be the only way that the murderer could be identified.

I have got an open mind on this subject, because I see much to be said on both of these conflicting public interests—the search for truth, but for two different purposes. I wonder whether we should have a rigid statute creating a privilege similar to that of a lawyer and client relation and that of a physician and patient relation, or whether we had better leave it to the courts to work out the first amendment so as to decide in a specific case which one of these interests ought to prevail over the other.

The need for a statute such as you recommend would be either greatly increased or greatly diminished by the future decision of the Supreme Court in *Caldwell* and two other cases that are being considered by the Court in its present session. I think the court of appeals in the *Caldwell* case worked out a very good adjustment for that particular factual situation. They held that Caldwell, a reporter from the *New York Times*, could not be compelled to go before a grand jury because it did not appear that there was any overriding public necessity for the grand jury to obtain his testimony, and there was no evidence that they could not obtain what they were seeking from other sources.

But the subcommittee—and I think the Congress as well—certainly should give serious consideration to the proposal made by

Senator Pearson and his cosponsors, and also to your proposal that this privilege be extended to news photographers in addition to those who gather the news by other means.

Mr. **Hamer.** Yes, sir.

If I may be permitted to make a point on the lawman and his photography, certainly we are in a complete agreement that there must be peace in the community, that law enforcement is a very necessary thing to any community. And certainly we recognize the value of photographs taken by law enforcement personnel to identify people in public disturbances, for example, for future prosecution. But we do not believe that newsmen, news photographers, should be cast in this role of gathering this particular information.

Similarly, we have no objection to law enforcement personnel working in these situations taking photographs as long as they are not identified as newsmen. We believe that news photography puts the newsman in the middle, so to speak. He is the representative of the public at a given scene. And his first responsibility is to that public through the photographs that he takes. Certainly any published or broadcast photographs which are in the public domain, as it were, are available under all circumstances for law enforcement purposes, and we have no objection to that.

Senator **Ervin.** When I practiced law I found a value for photographs in evidence. I won one case because my client, who had got in an automobile accident, was an amateur photographer, and he always carried a camera along with him. He was involved in a head-on collision with another car and immediately photographed both cars after the impact. The photograph showed that both of the cars were over on the extreme side of the road. When the other man brought a suit claiming he was entirely on the opposite side of the road, the photograph proved the truth of the situation and won the case. I certainly am a great believer in the validity of the Chinese proverb which I quoted.

Mr. **Hamer.** So are we, sir.

Senator **Ervin.** Senator Thurmond.

Senator **Thurmond.** Thank you, Mr. Chairman.

I have no questions. We are glad to have you with us, Mr. Hamer.

Mr. **Hamer.** Thank you, Senator.

Senator **Ervin.** Thank you very much. Your testimony has been very helpful.

The subcommittee will stand in recess until 10 o'clock tomorrow.

(Whereupon, at 12 noon, the subcommittee was adjourned until Wednesday, October 13, 1971, at 10 a.m.)

FREEDOM OF THE PRESS

WEDNESDAY, OCTOBER 13, 1971

U. S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 a.m. in room 1202, New Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the subcommittee) presiding.

Present: Senator Ervin, Hruska, and Thurmond.

Also present: Lawrence M. Baskir, chief counsel; and Bill Pursley, counsel.

Senator **ERVIN**. The subcommittee will come to order.

Today the subcommittee will hear testimony from authorities in constitutional law and constitutional history and from an editor and a president of two Midwestern newspapers. The appearance of these witnesses emphasizes the subcommittee's interest both in reexamining first amendment principles and in considering the practical problems associated with freedom of the press in America.

In my judgment, there can be no more important endeavor than a study of the original understanding of the First Amendment's guarantee of freedom of the press. While there have been vast and unexpected developments in every area of American life, including communications, since 1791, the principles of free thought, free speech, and free press remain the foundation of our democratic system. A renewed commitment to these principles is the surest way to secure their continued vitality.

If these hearings do no more than encourage Americans to reconsider these First Amendment principles and their relationship to a free society, they will have served a noble purpose.

Senator Hruska, do you have any statement?

Senator **HRUSKA**. I have no statement, Mr. Chairman, but I have a unanimous consent request. I received in the mail jointly with my colleague, Senator Curtis, a letter and a resolution from the Nebraska Broadcasters Association. The resolution bears on the general subject about which we are making inquiry. I ask that it be inserted in the record at an appropriate point.

Senator **ERVIN**. That will be done.

(The letter and resolution referred to follow.)

NEBRASKA BROADCASTERS ASSOCIATION
Omaha, Nebr., October 8, 1971.

Hon. ROMAN L. HRUSKA,
U.S. Senate, Old Senate Office Building,
Washington, D.C.

DEAR ROMAN: I am enclosing for your information, files and such action as you deem appropriate the resolution passed by the Nebraska Broadcasters Association at its convention in Lincoln September 28th. As you will note, it proposes amendment of the Communications Act of 1934 for the purpose of maintaining our free system of broadcasting.

It has been suggested that it would be appropriate for us to have this entered in the record of the Constitutional Rights Subcommittee currently holding hearings under the chairmanship of Senator Ervin. Obviously too it should go to Senators Magnuson and Pastore under the proper auspices. There may be others in the Senate who should receive it.

As you will note, I am writing an identical letter to Senator Curtis with the same enclosures, thinking that your respective staffs might coordinate these approches for us. The resolution will have a great deal more impact if you will steer it through proper channels.

Sincerely,

FRANK P. FOGARTY, *Executive Secretary.*

NEBRASKA BROADCASTERS ASSOCIATION RESOLUTION

Considering:

(1) That, Amendment I of the Constitution of the United States states in part . . . "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . ."

And, that the Communications Act of 1934 states . . .

> "Section 326: Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be, promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication". . . .

(2) That, the recent court interpretations of the Constitution and Communications Act have actually negated the intent so clearly expressed in these documents,

(3) That, Fairness Doctrine interpretations by the FCC, the FTC, and the courts, have attacked the very foundation of freedom of speech and free enterprise,

(4) That, the proposed license renewal processes by the weight of their implication will limit the freedom of the broadcaster to operate in the public interest, and give to the few control over broadcasting facilities out of all proportion to their importance to the democratic principles of the American way of life,

(5) That, the political strength of America throughout its history has been the result of a privately owned free press and that the economic strength of America was developed through advertising in mass media.

(6) That, the United States does not have a national system of broadcasting such as most of the countries of the world—it is essentially a local system . . . locally owned, locally managed, and locally financed, supplying local news, local weather reports, illuminating local problems, supporting local projects, providing contact between elected officials and the electorate, and providing a medium for local advertisers,

The Nebraska Broadcasters Association, meeting in Convention, September 28, 1971, earnestly recommends: That the Congress of the United States immediately amend Section 326 of the Communications Act of 1934 in such manner that there will be no question of the maintenance of a free and independent broadcasting system in these United States. Free from coercive control by government agencies and commissions; free from misinterpretation by the courts; free from harrassment by small pressure groups.

Senator ERVIN. Counsel will call the first witness.

Mr. BASKIR. Mr. Chairman, our first witness this morning is Professor Leonard W. Levy, who is William W. Clary Professor of History and chairman of the Graduate Faculty in History at Claremont Graduate School.

He held the Earl Warren chair in constitutional history at Brandeis University from 1957 to 1970.

He is the winner of the Pulitzer Prize in history in 1969, and the author of a number of books on constitutional history.

Senator ERVIN. We are delighted to welcome you to the Subcommittee and we wish to express our deep appreciation for your willingness to appear and give us the benefit of your views on the first amendment.

STATEMENT OF LEONARD W. LEVY, PROFESSOR OF HISTORY AND CHAIRMAN OF THE GRADUATE FACULTY IN HISTORY, CLAREMONT GRADUATE SCHOOL, CALIFORNIA

Professor LEVY. Like the devil quoting Scriptures, a skilled advocate adept at manipulating evidence can make history prove any proposition; or he may, like the late Mr. Justice Black have such fixed convictions that he will simply ignore distasteful evidence and compellingly insist that the proposition, if appealing to our freedom-loving instincts, must be true. But a scholar who is faithful to his craft takes the past on its own terms. He does not seek to wrest from it proofs in support of his personal preferences concerning public policy or constitutional law; a scholar may not engage in law-office history which is merely a function of one-sided advocacy. He must base his conclusions on the preponderance of unimpeachable evidence, no matter what it shows.

Senator ERVIN. If I may interrupt at this point, I would like to note that you are the author of the book, *Freedom of Speech and Press in Early American History, Legacy of Suppression*, which I have read with much interest, and have found one of the most intriguing and illuminating books on the subject that has ever been written.

Professor LEVY. Thank you very much, sir.

My studies of the original meaning of the free-press clause of the first amendment prove, to my regret, that the clause, at the time of its adoption, was not intended to supersede the common law. The clause did not repudiate the Blackstonian concept that freedom of the press meant merely freedom from prior restraint; it did not mean no subsequent punishment for the publication of anything deemed illegal. The clause at the time of its adoption was not intended to scrap the Government's principal weapon for muzzling the press and political dissent, namely the doctrine of seditious libel, that the Government could be criminally assaulted simply by harshly critical words that tended to lower it in the public's esteem. Just three and a half months ago, Justices Douglas and Black, concurring in the so-called Pentagon Papers case (*New York Times* v. *United States*), declared, as they often had in the past, and as had Justices Holmes and Brandeis before them, "that the first amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material . . . embarrassing to the powers that be." That proposition, however much we should like it to be true, is demonstrably false. I've presented a summation of that proof in my formal written statement for the record. In effect I have shown that the original intentions of the framers of the free press clause were not nearly as libertarian as we have assumed and that their insights on the subject of freedom of political expression were not the most edifying.

I'm not disturbed by this fact, however much I might miss the comforting assurance that the past's original intentions coincide with my personal preferences. We don't want the Constitution to be frozen in its meaning by some narrow and antiquarian historicism. What passed for wisdom in the 18th century may have passed out of date with the growth of freedom in America. The framers of the Constitution and of the Bill of Rights had a genius for imprecision. They were conscious of the need for and value of generalized terms that could grow in meaning as conditions and beliefs changed. They believed that the supreme law was made for the people, not the people for the law. They meant to outline an instrument that would serve future generations. Deliberately they avoided a detailed code that would rapidly become obsolete. Instead they formulated principles, like the principle of a free press, that are expansive and comprehensive in character. The principles and not their framers' immediate understanding and application of them were meant to endure. The First Amendment's injunction that there shall be no law abridging the freedom of speech or press was boldly stated if narrowly understood at the time. But it is the bold statement, not the narrow understanding, that was written into our fundamental law, and there is abundant evidence to show that the framers would have agreed that when construing the Bill of Rights, it is better to err on the side of latitude than on that of restraint. The framers gave constitutional recognition to the principle of freedom of the press in unqualified and undefined terms. That should be enough for us.

That they were narrow Blackstonians on the scope of free political discourse proves only that they were men of their times. They did not even foresee or understand the development of political parties, without which their Constitution could not have survived or even function. They did not understand that there could be a ligitimate, organized, loyal opposition to the administration in power. They associated parties with subversion, treason, civil war, and foreign conspiracies as the history of Tudor and Stuart England, which they knew so well, taught them. They thought that parties were inimical to freedom, and many of them believed that the new Government which they had established was so fragile that it might not survive dissension. The Federal system of Government was novel, the centralization of powers in the National Government was awesome, and there never before in history had been a republic so great in size nor so handicapped by such diversity of governments, local customs, races, languages, religions, national stocks, and economic as well as geographic differences. In the 1790's men divided politically in their allegiance and believed that their opponents were in league with a foreign power to destroy the new Republic. Until the end of the War of 1812, there was a siege mentality in the United States. Conditions were not ripe for the development of both a broad understanding of the scope of free political discourse and for a principled protection of the right of one's political enemies to express themselves freely.

The framers of the First Amendment inherited the belief that freedom of the press mean the right to print whatever one pleased without obtaining in advance the approval of the Government, but they also believed that one was criminally responsible for the abuse of that right. When the First Amendment was adopted in 1791 the avant-garde among American libertarians, men like Jefferson and Madison, could conceive of no greater freedom for the press than the principles advocated in 1735 on behalf of John Peter Zenger. They did not doubt that Government could be criminally assaulted by words alone, and they believed that the uttermost limit of freedom would be secured if a defendant, on being tried for abusing his liberty of the press, could plead truth as a defense to the charge of criminal libel, and if the criminality of his words might be determined by a jury of his peers rather than by a judge. In 1789 Jefferson thought that the publication of false information, especially about foreign policy, should be punished. Madison agreed that exempting the press from criminal liability in every case involving the publication of "true facts" was "an innovation" worthy of consideration.

Apart from the issue of misusing secret Government documents, the most libertarian law in the country that would have governed the case of a Daniel Ellsberg in those days was the 1790 clause on freedom of the press in the Constitution of Pennsylvania:

> That the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, BEING RESPONSIBLE FOR THE ABUSE OF LIBERTY. In PROSECUTIONS for the publication of papers investigating the official conduct of officers or men in public capacity, or where the matter published is PROPER for public information, the truth thereof may be given in evidence; and all INDICTMENTS for libels the jury shall have a right to determine the law and the facts, under the direction of the court.

That provision, which left the common law of seditious libel intact, was written by James Wilson, next to Madison the most influential member of the Federal Constitutional Convention. At the Pennsylvania State ratifying convention, Wilson declared, without challenge by any of the most ardent advocates of a Bill of Rights, "what is meant by liberty of the press is that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the Government. . ."

When the free press clause was added to the Constitution as part of the first amendment it was in part a reflection of the States' rights principle. That is, a purpose of the amendment was to reserve to the States an exclusive legislative authority in the field of speech and press. The clause was intended to appease those who feared the powers of the new National Government. The phrase, "freedom of the press," as the evidence uniformly shows, meant merely no prior restraints; it did not mean that seditious libels would be protected from prosecution. But the clause begins, "Congress shall make no law" abridging the freedom of the press, meaning literally that there could be no law regulating the press, whether a licensing law, a tax, or a seditious libel act. The framers intended that the National Government should be totally powerless to enact any legislation respecting the press. Thus no matter what was understood by the phrase, "the freedom of the press," the National Government, even in the absence of the First Amendment, could not make the press a legitimate subject of legislation. The amendment itself was actually superflous; it was an additional guarantee that the National Government would be limited to its delegated and necessary powers. Accordingly the infamous Sedition Act, whose purpose was to create a one-party press and a single party system, was unconstitutional. The same act, ironically, embodied every reform the libertarians had demanded since Zenger's case: A requirement that criminal intent be shown; the power of the jury to decide whether the accused's statement was libelous as a matter of law as well as of fact; and truth as a defense—the latter an innovation not accepted in England until 1843.

The American libertarians immediately recognized in the Sedition Act a Pyrrhic victory. The Sedition Act provoked them to develop a new theory of freedom of the press. In speeches by Congressmen opposing the Sedition Act in arguments by defense counsel in Sedition Act prosecutions, and in tracts and books written by lawyers and political theorists like Madison and St. George Tucker, an elaborate theory was advanced that freedom of the press was unlimited, absolute, and beyond the power of any government, national or State, to impair. The *Zenger* principles were abandoned. More importantly the straitjacketing ideas of Blackstone and of the common law were abandoned. The new view denounced the no-iron restraints definition as much too narrow. Said Madison, "this idea of the freedom of the press can never be admitted to be the American idea of it," because a law inflicting penalties would have the same effect as a law authorizing a prior restraint. "It would seem a mockery," Madison declared on behalf of the State of Virginia, "to say that no laws shall be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made."

The reasoning was that the press could not be free if a man could be jailed for what he published, provided merely that the Government took no notice of him until after he published it.

The new libertarianism discarded previous distinctions between "liberty" and "licentiousness," between "truth" and "falsehoods," and between "good motives" and "criminal intent." Those distinctions were discarded because they did not provide meaningful standards that might guide a court or jury in judging an alleged verbal crime. Even the old faith in juries was abandoned on ground that a jury cannot be trusted to give an impartial verdict in a political trial. The renunciation of traditional concepts reached a climax in an assault on the very idea that there could be such a crime as seditious libel.

In brief, the new libertarian theory of the press advocated that only "injurious conduct" as manifested by "overt acts" rather than mere words, might be criminally prosecuted. Advocates of this view did reorganize that the law of civil libel should continue to protect private reputations against malicious falsehoods. They were so absolutist in their argument, however, that they did not even recognize that under certain circumstances words may immediately and directly incite criminal acts.

This absolutist interpretation of freedom of the press was based on the now familiar but then novel and democratic theory that free Government depends for its existence and security on unrestrained freedom of political discussion. According to this theory the scope of permissable freedom depends on the nature of Government and its relationship to the people. Since Government in America is the people's servant, exists by their consent and for their benefit, and is constitutionally limited, responsible, and elective, it cannot tell the people what they cannot say except at their peril. The concept of seditiousness was explained as deriving from a relationship based on inferiority, when people were subjects rather than sovereigns and their criticism implied contempt of their master. "In the United States," Madison declared, "the case is altogether different." Because Government in America depended upon popular elections and its policies on public opinion, the new libertarians agreed that the widest possible latitutde must be maintained, whatever the risks, in order to keep the electorate free, informed, and capable of making intelligent choices. The citizen's freedom of political expression had the same unlimited scope as his representative's who has immunity for what he says. Absolute freedom might be dangerously abused, but the people would decide men and measures wisely if exposed to every opinion.

I have given you a very brief epitome of the new theory of freedom of the press which emerged between 1798 and 1800. That theory developed as an expediency of self defense on the part of a besieged political minority, the Jeffersonians, struggling to maintain their existence and freedom to function unfettered. They proposed a theory justifying the fullest rights of individual expression, of the press, and of opposition parties. That the Jeffersonians in power were not much more tolerant than the Federalists does not diminish the enduring nobility and rightness of their new libertarian theory. They set the highest standards of freedom for themselves and posterity to be measured against.

They did not win in the legal arena. The legal standard that first emerged in the *Zenger* case, then in the Sedition Act, and finally in the *Croswell* case of 1804, is the one that prevailed: freedom of the press is circumscribed by the sanctions of the criminal law as long as a jury decides the criminality of an alleged libel and truth is allowed as a defense if published with good motives.

If then the question is asked, what did the free press clause mean to the generation that framed and ratified it, rather than what did it mean in 1789 when framed or in 1791 when ratified, the answer is first, that there was universal agreement that Government may impose no prior restraints or censorship; second, that there was universal agreement that the National Government is wholly without power to legislate on the subject of the press, except perhaps to protect it as by enacting copyright laws; third, that the Jeffersonians expanded the scope and meaning of freedom of the press to the point of absolute freedom; and finally, that Zengerian principles, regarded by Jefferson and Madison as novel even as late as 1789, became the yardstick to measure freedom of the press within a decade or so of the adoption of the first amendment.

Senator ERVIN. Is it not true that the Government in England in ancient time was afraid of ideas, and undertook measures it deemed necessary to suppress any ideas it considered either dangerous or obnoxious to the Government?

Professor LEVY. That is correct, Senator. As early as the 13th century Parliament was legislating against "dangerous" opinions that might subvert the realm. Initially only "false" opinions were punishable but by the 17th century even true facts whose revelation to the people might damage the Government were outlawed. Almost the first that we hear about the Court of Star Chamber is in connection with the repression of ideas that were feared. Nothing could be published in England, before 1695, without its first being submitted to a Government censor for approval or censorship. Without official imprimature nothing could be lawfully exposed to the public. The motive for such policies was the one you mentioned, fear on the Government's part that the people might be critical of it. Similarly the common law courts, agencies of the Government, developed the law of criminal libel, expecially of seditious and blasphemous libel, to curb the expression of views unfriendly to church or state. Moreover the offense of breach of parliamentary privilege was available in the event that some person might say something which any Member of Parliament might take offense to, anything that was critical that could be regarded as offensive was published as a breach of parliamentary privilege. The individual could be recalled before the House, be required to humble himself, to apologize, and usually thrown in jail for the duration of that session of Parliament. And this became a device which was used by Parliament to intimidate printers after several men in a given session of Parliament were thrown in jail the rest would straighten up and do nothing but what they were told.

The executive department, the Crown's Ministry, did the same kind of thing by using the censorship technique that I mentioned earlier and by prosecuting people for the crime of seditious libel. In terms of substance there was no substantial difference in what was said that could be published as breach of parliamentary privilege or what was said that could be published as seditious libel against common law.

Senator ERVIN. They say an honest confession is good for the soul. I am compelled to confess that much of what I know in this area was learned from reading what you have written.

Professor LEVY. Thank you, sir. But there is also a great book which preceded mine by Zechariah Chafee, *Free Speech in the United States*, which is quite superb—it is wrong on a number of points, as I suggested but it is still very valuable. And the principles which it espouses are those which I deeply believe.

May I add also with respect to the question you asked me a moment ago that while censorship in the form of prior restraints or licensing, developed as quickly as possible after the introduction of the printing presses—indeed even before that there was something called seditious slander, and there were false rumors against the Crown, which could be regarded as treason—while the censorship system, as I say, developed shortly after the development of the printing presses, in the beginning of the 17th century there was the introduction of another legal doctrine which also had a very supressive effect, namely, the doctrine that the more true a libel was the greater the offence it was to the Government. There is an irony here. But the theory was that if an officer of the Government, whether in Parliament or a member of the Crown's Ministry, did indeed take that bribe or was corrupt in some way and sold out, this was a greater scandal than could be imagined had the allegations been false. If it were true, it would alter the people's esteem for their Government, its reputation would be scandalized, and so it would loose credit. Therefore the greater the truth the greater the libel.

It was because of the existence of that doctrine—which, incidentally emerged in the Star Chamber originally around 1606—it was because of the existence of that doctrine that the principle that truth should be a defense was regarded initially by the protection of freedom of the press. It was only after the experience with Fox's Libel Act in England in 1792, and experience with our own Sedition Act in 1798, that the champions of liberty realized that truth as a defense actually provided a very small measure of freedom, because principles can't be proved to be true or false.

And they also realized that allowing a jury to decide the matter rather than merely a judge was no protection either. In the beginning all the jury had to decide was whether the individual did as a matter of fact publish that particular tract, pamphlet, or book, or whether he did in fact make that oral statement. The judge then reserved for himself the decision whether that statement was therefore a libel as a matter of law. Well, what happened was that with Fox's Libel Act, which allowed juries to decide such matters, and with our own Sedition Act, which allowed the jury to decide, and which permitted truth as a defense, it was then discovered in dozens of prosecutions that juries were quite influenced by whatever the popular hysteria might be that raged at a given moment. And it was feared in the United States in the late 1790's that the Jeffersonians were Jacobins, that they were in league with the minions of Napoleon or Robespierre, and that the French armies were about to descend on us, and that the Jeffersonians would cut our throats and rape our women and so on. In this kind of hysteria it was inevitable that a jury become merely a reflection of public opinion, nothing more in effect than a reflection of public hysteria. Juries could not be trusted. Any opinion against the Government was regarded as a false and malicious opinion. The truth as a defense came to mean absolutely nothing. And the power of a jury came to mean nothing as a means of protecting the scope of freedom.

That is why this new libertarian theory emerged as I pointed out.

Senator ERVIN. Well, I think what you said about Zechariah Chafee shows the truth of Ulysses's statement, "I am a part of all that I have met." I think I absorbed some of my views from this statement from Zechariah Chafee, having had the privilege of sitting at his feet at Harvard Law School many years ago.

Professor **Levy**. I envy you, sir.

Senator **Ervin**. The theory which undertook to justify licensing and also seditious libel, was that it was essential for Government to enjoy a good reputation among the people, and that any person who said or wrote, or printed anything which tended to cause the people to have less than a good opinion of the Government, or a bad opinion of the Government, had criminally assaulted the Government by his words.

Professor **Levy**. Yes.

Senator **Ervin**. Now, as I infer from your book, a fight for some degree of freedom of speech was waged by Parliament, not in behalf of the people, but in behalf of the Parliament itself, so that it could assert itself against the Crown.

Professor **Levy**. Yes, that is quite true.

The same thing happened here in the colonies when members of the so-called "popular" party, who were against the royal Governor and the Crown's representative, would critize the Crown or the acts of the Governor, and the legislature in a case like that-the local colonial assembly would defend the rights of that individual. When, however, he turned against the assembly himself, God help him. Then he was subject to the crime of breach of Parliamentary privilege. But it is true that the assemblies on the one hand were themselves suppressive agents, but on the other hand, in the struggle against royal authority, and on behalf of augmenting the power of the assemblies against the Crown, the assemblies were also very effective instruments for advancing the cause of freedom of the press. It worked both ways. It depended in effect, I regret to say, on the principle of whose ox is a gored, theirs or ours.

Senator **Ervin**. Isn't it correct to say that this struggle between Parliament and the Crown for freedom of speech by members of the Parliament is the historical origin of the speech or debate clause of our Constitution which gives Senators and Representatives immunity from answering for what they say in their official capacity.

Professor **Levy**. Yes, that is absolutely correct. I couldn't improve on the excellence with which you make the point.

Senator **Ervin**. After prior restraint and licensing was abolished or ceased to exist, about 1694, the Government prosecuted what was considered to be utterances obnoxious to it by frequently resorting to seditious libel.

Professor **Levy**. Yes.

Senator **Ervin**. And as you have pointed out so well in your statement, seditious libel, in substance, was a crime committed whenever a person said anything critical of government, those who administered Government, or the procedures and practices which Government followed.

Professor **Levy**. Yes, anyone who critized the Government, the form of Government, the officers of the Government, the policies of the Government, the procedures of the Government, its symbols—like the flag, the coat of arms—any hostile critical, or reproachful utterances, or publications of such character, was regarded as a crime, denominated seditious libel. Technically one was supposed to have made the utterances with what was called malice. But, of course, they also presumed the existence of malice from the fact of the criticism itself. One was supposed to have made the utterances with bad motives or criminal intent. But, again, that is presumed. In effect, to the powers that be, as Justice Black and Douglas put it, any statement which was critical of the Government or offensive to those in power was regarded as a crime, seditious libel, yes. I am not sure that the situation has too drastically changed today either.

Senator **Ervin**. Well, Government still does not like for anybody to say or print anything which tends to show that Government is not all wise. This is true regardless of which political party happens to be in control of the Government.

Professor **Levy**. I am afraid that is true. We don't any longer have very many sedition Act trials, thank goodness, not since the enforcement of the Smith Act, which died shortly after the Yates decision in 1957. But the Government has other weapons at its command nowadays to exercise an intimidating effect upon the press without resorting to the old common law of seditious libel or statutes which have been readopted.

Senator **Ervin**. Again you point out so well in your book, as bad as the law about seditious libel was, it might be said that the procedural law was even worse, in that it permitted prosecutions upon information rather than indictments. And, the truth was not a defense. Furthermore, the only function of the jury was to find the bare fact of publication. The question of whether it constituted a seditious libel was a question of law for the judge who was usually beholden for his office and his compensation to the Government.

Professor **Levy**. Yes, that is accurate, sir. Technically seditious libel in English common law was regarded as a misdeameanor and therefore it could be prosecuted merely on information, that is to say, without indictment by a grand jury, so that appointed officers of the Crown could go before the appropriate judicial magistrate—who was appointed by the Crown, and they both had the same interests in the outcome of the case—and secure the accusation, and pack the jury to try the individual. The jury had only one function, as you pointed out, to decide whether in fact that individual made that particular utterance. And he usually did of course. And the court usually reserved to itself whether as a matter of law that utterance constituted a crime. Consequently individuals quite literally by the hundreds were convicted of this crime of seditious libel.

Senator **Ervin**. And, as you pointed out in your statement this morning and also in your book, the libertarians of that day were fighting to rid themselves of the threat to freedom posed by prior restraints and for the purpose of having truth made a defense, instead of an aggravation of seditious libel.

Professor **Levy**. That was their principal objective until 1798, because there, as I pointed out, it is the greatest irony that this suppressive Sedition Act embodied the very libertarian principles which the reformers had been advocating since the *Zenger* case. We look upon the Sedition Act as suppressive, and indeed it was, in its enforcement. It was an effort to create a one party press in this country. And it was a device deliberately calculated by the Federalist Party to control public opinion in such a way as to win the election of 1800, and hopefully, to establish a one-party system. But the fact is that the need to prove criminal intent was required by the statute, and the right to truth as a defense was established by the statute. And the jury was given the power to decide the whole of the matter, the law as well as the fact. They could return, that is, a general verdict, to put it more accurately. And this was the very thing that libertarians in America and in England had been struggling for ever since the *Zenger* case.

You must remember about the *Zenger* case that it was not a decision by an appellate court, that it was merely an argument by Andrew Hamilton and James Alexander, counsels, on behalf of Zenger, before a jury. And the jury was swayed by the forensics of these great lawyers to return a verdict of not guilty. But there were no principles of law established. And after the *Zenger* case there was a great deal of suppression even in New York where the principles advocated by the counsel first emerged.

So it is a very striking and indeed quite a libertarian achievement that the Sedition Act incorporates the principles of the *Zenger* case.

Senator ERVIN. Would it be consistent with ultimate truth to say that the verdict of the jury in the *Zenger* case showed that the jurors were wiser in the long run than the law which they were supposed to be enforcing?

Professor LEVY. I agree with the statement, sir. But I think it is a statement which reflects our own personal biases. Yet I myself have taken a position in my own presentation that the Jeffersonian position was the one that was right, that it was the morally superior one, and that it was the wiser position. It makes for the best public policy particularly in a political democracy. Yes, I agree with that.

Senator ERVIN. The law enforcement officials of that day undoubtedly thought that the verdict in the *Zenger* case was rendered by a rather obnoxious and rebellious jury did they not?

Professor LEVY. Yes; they did. But there is another aspect of the *Zenger* case which we have to remember. John Peter Zenger's newspaper was established by the Anti-Administration Party. Governor Cosby, who represented the Crown, was extremely unpopular. And people like James Alexander, Morgan Lewis and William Livingston—there was a whole group at that time who were opposed to the royal government—had the support of the legislature. So that there was nothing in Zenger's statements which were offensive to the legislature. Zenger didn't even write the piece, he merely published it; the author is James Alexander, one of his lawyers. Zenger's newspaper merely expressed the views of the popular party, which was the party in power in the legislature against the royal government. The judge was a representative of the royal government. We are sympathetic because of the provincial legislature, which was seeking to become in effect a little, miniature parliament, seeking to control its own speaker, its own membership, and get control of the appropriations, and so on, which is the very thing that the royal government was opposed to at that time.

So that the jury then, to conclude the point, was taking a position which we may regard in the long run as substantially wiser than the position of the royal government, but it was also a position which was widespread in colonial New York, and was reflected by the popular party which controlled the legislature.

Senator **Ervin**. Now we think today of Blackstone's statement in his Commentaries on the law of England about freedom of the press as being alien to our ideas.

Professor **Levy**. Alien to our ideas?

Senator **Ervin**. Alien to the ideas of those who value the freedom of the press entertained now, present-day ideas.

Professor **Levy**. There is one very important dimension to Blackstone's position which I think all of us would and should support; namely, that freedom of the press does consist in the principle that there shall be no prior restraints, no antecedent restraints upon publications. This is something which we should not abandon.

Senator **Ervin**. I certainly agree with you.

Professor **Levy**. The only trouble with Blackstone is that he didn't go far enough. What he said was good up to the point that he went. Where he went wrong was in saving that freedom of the press consists merely in no prior censorship, and that one is criminally responsible for anything he may say that abuses his liberty. Anything that the government didn't like was regarded as licentious rather than an exercise of liberty.

Senator **Ervin**. Certainly, if there is censorship and prior restraint there is no freedom of the press.

Professor **Levy**. Absolutely correct.

Senator **Ervin**. And does not subsequent punishment, such as was inflicted for seditious libel, also have a most powerful restraining influence on the willingness of the people to exercise freedom of the press?

Professor **Levy**. It makes all the difference in the world.

Senator **Ervin**. Therefore, to have a free press you have to have freedom from prior restraint as well as freedom from subsequent punishment?

Professor **Levy**. Yes.

Senator **Ervin**. And we have advanced to the point, I think, in our decisions that in certain cases, there can be legally imposed limits upon freedom of the press, but those cases must be very drastic in nature.

Professor **Levy**. Reckless and wanton disregard of truth, and so on.

Senator **Ervin**. And as far as government is concerned, I believe that the Court's decision, particularly in the *Yates* case, laid down the principle that an individual or a group can actually advocate the overthrow of government by unlawful means as long as they do not advocate action to bring that result about.

Professor **Levy**. Yes, sir; that is correct. That is a decision of the Court in effect saying that as long as the advocacy remains within the realm of abstract doctrine it is protected by the first amendment. Fortunately Professor Emerson is present this morning, and both he and my daughter, Wendy, who is now studying constitutional law, are far greater experts on the *Yates* case than I am. But to the extent I do know about it, what you said is accurate.

Senator **Ervin**. Is it a fair summation to say that your research shows clearly that freedom is won just a little bit at a time.

Professor LEVY. That freedom is won just a little bit at a time?

Senator ERVIN. By the people just a little bit at a time.

Professor LEVY. Yes; it is won just a little bit at a time. But the converse is also true, that we can begin to lose it a little bit at a time.

It can erode away in a kind of stealthy manner, so that we may not be conscious of the fact that it is disappearing, and that important principles are being violated. We look upon these as minor encrouchments, and think they might perhaps be justified by the hydraulic pressures of the passing moment. But there is simply too much at stake.

I would like to stress that aspect of it as well as the more positive aspects that you have mentioned. Freedom has not only been won, historically speaking, a little at a time, but it can also be lost a little at a time, and in a very serious manner.

Senator ERVIN. Would it be fair to say that freedom is hard to win, or to preserve, but mighty easy to lose?

Professor LEVY. Yes, that is correct.

Senator ERVIN. And sometimes it is lost as a result of the activities of very sincere persons who think, for example, that the exercise of freedom of speech by those who disagree with them is inimicable to the best interests of society?

Professor LEVY. Yes, sir. Justice Brandeis once made that point when he said that we perhaps have the most to fear—he didn't put it this way, but his point was that—we have the most to fear, perhaps, not from the extremists on either side, but rather than zealots, well meaning men, the best intentioned of men, who have the security of the Nation at heart, but who have very little understanding of the constitutional principles which really underlay the security of the country.

Senator ERVIN. And doesn't history show that freedoms such as freedom of speech and of the press are most imperiled in times of national stress?

Professor LEVY. Yes, sir, that is correct.

Senator ERVIN. Now, would it be fair to say that your study of the history of the First Amendment, and of the subsequent rulings on the First Amendment, shows that the framers built better than they knew, in that they used words which were susceptible of interpretations that preceded their immediate objective.

Professor LEVY. That is correct, sir. And as I think I say in the conclusion of my book *Legacy of Suppression*, the fact that they were like Blackstonians does not prevent us from being Brandeisians, because of the fact that they did bequeath to us that very bold statement in the most unqualified terms on behalf of the principle of freedom of the press. And it is a fact that because they were men who were trained in the common law, they repudiated the idea of very precise codes. They did believe in expansive comprehensive principles.

I conclude, then, by stressing once again that what counts is their bold statement of the principle which they bequeathed to us rather than their immediately narrow understanding of that principle. The Constitution, particularly in the First Amendment, must change and grow as American freedom hopefully broadens, and in fact it has grown very much. And the framers would have approved—they did believe that if you are going to make a mistake, make it on the side of liberty rather than against liberty. But I don't think they would have taken the position that an expansion of liberty was a mistake.

Senator ERVIN. In other words, the language they used is susceptible to application to present concepts which are far broader than the concept they had in mind at the time?

Professor LEVY. That is a good succinct way of summarizing what it took me quite awhile to say, yes.

Senator ERVIN. Counsel.

Mr. BASKIR. Professor, would it also be fair to say, looking back at this history, that generally freedom of speech and the press has been won by minorities who at the time were probably expressing ideas obnoxious to those who held governmental power, and perhaps very often the ideas were considered to be obnoxious by the great mass of the people.

Professor LEVY. I would say that that is about 99 percent correct. The reason I reserve the one percent is that I have in mind the fact, as I mentioned in the illustration I gave of the *Zenger* case, that there are occasions when the different branches of Government may sharply differ, so that an important principle may emerge when one branch, the legislature, may be opposing the executive, in which case the opinion which is being proposed and which is regarded as a new breakthrough is a popular opinion, it is not necessarily always the opinion or position of an unpopular minority. It almost invariably is, but there are these rare exceptions in our history.

Mr. BASKIR. The reason I ask that is because we are going to have something near a litmus test of the state of freedom of the press, which will provide an opportunity to see how those who are in the minority and expressing views obnoxious to us are being treated, rather than those expressing views of the great middle ground. That perhaps is the measurement.

Professor LEVY. It has to be the measurement. There is no use whatever in protecting the freedom of speech and the press of the great majority of the people. That would be as effective—they don't need it, they constitute the majority—that is as effective as saying that a man can say whatever he pleases so long as he goes out to some empty beaches or stands on top of some empty mountain and shouts to the sky. The real guts and meaning of freedom of speech and the press comes into play when somebody whom the majority regard as obnoxious, detestible and hateful, exercised that right before an audience which finds his views repugnant. Unless his right is protected, our right is threatened. The majority stand to lose if we don't protect the rights of those people whom we hate. Holmes had a phrase for the very thing we are talking about: We must protect "freedom for the thought that we hate" in order to protect our own freedom.

I think Adlai Stevenson once said that the price of listening to the sweet reason and music of our own voices is to listen to the dreary, dull opinions of those whom we despise.

Senator ERVIN. I believe Justice Brandeis said in a concurring opinion in the case in California——

Professor LEVY. *Whitney* v. *California?*

Senator ERVIN. *Whitney* v. *California*. Thank you. The name escaped me—that free men protect society by punishing people for crimes they commit rather than abridging the freedom of speech and freedom of the press. Don't you think that is the only sound course that the United States can afford to pursue?

Professor LEVY. Yes, sir, it has to be. What we have to realize is that however much we may deplore and even despise some of these outrageous opinions that are advanced by radicals, kooks, extremists, call them what you want, the hard fact remains that throughout the course of history opinions advanced by people so regarded in their time have often become the dominant majority view.

In the opinion to which you referred by Justice Brandeis he pointed out that there was a time when men believed that the earth was flat, and to say that it was round was an absolutely outrageous notion. Men once believed that there were witches, and to say otherwise was regarded as heresy. Indeed in England, where the church was established, and therefore the head of the church was the head of the state, an utterance that there were no such things as witches would also be regarded as seditious, an offense against the Government.

The point is that there were all kinds of seemingly absurd and fanciful and outrageous or extreme opinions which have been advanced throughout the course of history which with the passage of time became truth, became validated as literally true, or true in the pragmatic sense, that is they became accepted by the consensus, by a majority opinion.

And that is why we have to protect the rights of the unpopular minorities. It might very well be that they are saying something that we ought to listen to, some part of what they say could very well be true and helpful. And we have to expose the majority to all these conflicting and diverse viewpoints so that they can then make an intelligent choice. And we have to keep open the channels for the free flow of information so that these diverse viewpoints can circulate amongst the people. If we censor or suppress in any form any given opinion, however hateful, we cut ourselves off from the possibility that the view there being advocated may have something in it that is worthwhile that we ought to consider, and which may one day become truth. If we cut ourselves off from any opinion, the choice which we make with respect to this rather than that course of public policy may be poorly founded. We may not be making the wisest decisions.

An example would be—there are so many—but in our own time, to go back to 1964 or 1965, I myself then was somewhat hawkish in my position and regarded peaceniks as expressing the most outrageous views. It turned out that they, I think, were right, and I was wrong. And thank God that they had their opportunity to express themselves and persuade the rest of us—I hope they have persuaded the rest of us.

Senator ERVIN. When a nation grants freedom of speech and freedom of the press to all men, regardless of whether the views they express are pleasing to government or pleasing to a majority of the citizens, it enables itself ultimately to correct policies which may be detrimental to the best interests of the country, and in that way makes a violent revolution unnecessary.

Professor LEVY. Of course. One of the important arguments on behalf of unlimited political discourse is that the right of anyone to express his opinion constitutes a safety valve. If a minority feels that it is beleaguered, that it is suppressed, it will go underground, it will secretly organize. It may be forced to resort to illegal means in order to achieve its end. As long as the channels of communications are open and available and free to everybody, then the protest can be peaceable, it can be conducted within the system. And the rest of us also then have the advantage of listening and weighing and judging accordingly.

But your point is right, freedom of speech or freedom of the press are safety valves which maintain peaceable methods of change within the system.

Senator ERVIN. To paraphrase Thomas Jefferson, our Nation has nothing to fear in the long run from freedom of speech as long as it leaves truth free to combat error.

Professor LEVY. Yes, sir, that is right.

Senator ERVIN. Isn't that really the foundation stone upon which freedom of speech and freedom of the press rests?

Professor LEVY. The only reason I am hesitating, sir, despite the fact that I completely agree with what you said, is that you said the foundation, and I would say that there are several foundations, of which that is one. That is a very vital principle, yes.

Senator ERVIN. Thank you very much for a most illuminating and intriguing statement.

Professor LEVY. Thank you, sir.

(Statement of Professor Levy follows:)

STATEMENT OF PROF. LEONARD W. LEVY, PROFESSOR OF HISTORY AND CHAIRMAN OF THE GRADUATE FACULTY IN HISTORY, CLAREMONT GRADUATE SCHOOL, CALIFORNIA

THE FIRST AMENDMENT'S FREE PRESS CLAUSE: THE ORIGINAL UNDERSTANDING

I

Freedom of the press, in the words of the Continental Congress of 1774, is essential to "the advancement of truth, science, morality and arts in general" and to the maintenance of "honorable and just modes" of conducting public affairs.[1] Central to the concept of a free press is freedom of political opinion, and at the core of that freedom lies the right to criticize the government. The acquittal of John Peter Zenger in 1735, in a prosecution for seditous libel, is celebrated, deservedly or not, because it "marked a milestone in the fight for the right to criticize the government." [2]

That right is indispensable to personal liberty and is inseparable from self-government. When any avenues of political expression are closed, government by consent of the governed may be foreclosed. If any information or opinion is denied expression, the formation of public policy has not been founded on a consideration of all points of view; as a result, the will of the majority cannot really be known. Accordingly, libertarian theory, such as that advanced by Zenger's counsel, presents a fairly systematic argument that defines and defends both freedom of the press and the right to criticize the government.

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1. "To the Inhabitants of the Province of Quebec," October 24, 1774, in *Journals of the Continental Congress, 1774–1789*, eds., Worthington Chauncey Ford, *et al.* (Washington, D.C.: Government Printing Office 1904–1937), I, 108.

2. William O. Douglas, *The Right of the People* (Garden City, N.Y.: Doubleday & Company, Inc., 1958), p. 38.

A broad libertarian theory emerged toward the close of the eighteenth century, first in England and then in America. It advocated the utmost freedom of political opinion by repudiating the concept that the government can be criminally assaulted—that is, seditiously libeled—simply by the expression of critical views that have a tendency (alleged to be bad) to diminish the public's esteem for the government. The new theory also advocated the same freedom for veryone, even those whose opinions were thought to be detestable, mocking, or pernicious; this included the village atheist and the local extremist, whether radical or reactionary. But prior to the close of the eighteenth century American thought on the meaning and scope of freedom of the press was quite narrow.

II

No cause was more honored by rhetorical declamation and more dishonored in practice than the cause of freedom of expression during the Revolutionary period, from the 1760's through the War for Independence. The irony of the period might best be portrayed by a cartoon depicting the tarring and feathering of a Tory speaker or printer under a banner run up by the patriots inscribed, "In Liberty's Cause." Yankee Doodle's Liberty Boys vociferously claimed for themselves the right to freedom of expression which they denied their opponents, revealing an extraordinarily narrow understanding of the liberty of the press. But there was nothing in their heritage or experience which fitted them for a broader understanding. It is not surprising, even if ironical, that when the New York Sons of Liberty rode out to smash Tory presses they were led by Alexander McDougall, who in 1770 had been jailed for criticizing the provincial assembly. Nor is it surprising that the Continental Congress, in its Quebec Declaration in 1774, advertised as one of the virtues of freedom of the press that it made possible the "diffusion of liberal sentiments on the administration of government. . . ."[3] Illiberal—that is, loyalist—sentiments were simply suppressed during the Revolution. It was not, regrettably, an object of the Revolution "to get rid of the English common law on liberty of speech and of the press."[4]

Indeed, the Revolution wrought no change whatever in the common law, nor did it effect any breakthroughs in the field of libertarian thought on freedom of political opinion. Republican forms of government had been established; the first written constitutions had been framed; the first bills of rights, having the force of fundamental law, had been adopted; even the first constitutional guarantees of freedom of speech and press had been specified. But law and theory remained the same. They were eptiomized best in a statement by Sir William Blackstone: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity."[5]

To be sure, the principle of a free press, like flag, home, and mother, had no enemies in America after the Revolution. Only seditious libels, licentious opinions, and malicious falsehoods were condemned. The question, therefore, is not whether freedom of the press was favored, but what it meant and whether its advocates would extend it to a political opponent whose criticism cut to the bone on issues that really mattered. Jefferson once remarked that he did not care whether his neighbor said that there are twenty gods or no God, because "It neither picks my pocket nor breaks my leg."[6] But in drafting a constitu-

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3. *Journals of the Continental Congress, 1774–1879*, I, 108.

4. Henry Schofield, "Freedom of the Press in the United States," in his *Essays on Constitutional Law and Equity* (Boston: Chipman Law Publishing Co., 1921) II, 521–522. Schofield has been quoted with approval by Zechariah Chafee, Jr., in *Free Speech in the United States* (Cambridge, Mass.: Harvard University Press, 1948), p. 20; quoted by the Supreme Court, in *Bridges* v. *California*, 314 U.S. 252, 264 (1941); and endorsed by many scholars.

5. Sir William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765–1769), IV, 151–152.

6. Query XVII, "Religion," in *Notes on the State of Virginia*, ed. William Peden (Chapel Hill, N.C.: University of North Carolina Press, 1955), p. 159.

tion for Virginia in 1776 he considered proposing that freedom of religion "shall not be held to justify any seditious preaching or conversation against the authority of the civil government."[7] And in the same year he helped frame a statute on treasonous crimes, punishing anyone who "by any word" or deed defended the cause of Great Britain.[8] Apparently political opinions could break his leg or pick his pocket. What, then, did Jefferson mean by freedom of the press? He and his contemporaries supported an unrestricted public discussion of issues, but "unrestricted" meant merely the absence of censorship in advance of publication; although no one needed a government license to express himself, everyone was accountable under the criminal law for abuse of the right to speak or publish freely. Significantly, neither Jefferson himself nor anyone else in the United States, prior to 1798, extended his "overt acts" test to freedom of political opinion.

Jefferson had devised that test when seeking a way to insure the free exercise of religion. In one of his most enduring and noble achievements, the Act for Establishing Religious Freedom, which became law in Virginia in 1786, he declared that "to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles, on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order. . . ."[9] The overt-acts test applied in Jefferson's words, only to "opinions in matters of religion," although its principle should have been as relevant in cases of political opinion, and had been specifically extended to such cases by many English theorists.

Before 1798, the *avant garde* among American libertarians staked everything on the principles of the Zenger case, which they thought beyond improvement. They believed that no greater liberty could be conceived than the right to publish without restriction, if only the defendant could plead truth as a defense in a criminal prosecution for libel, and if the criminality of his words might be determined by a jury of his peers rather than by a judge. The substantive law of criminal libels was unquestioned. But libertarians who accepted Zengerian principles painted themselves into a corner. If a jury returned a verdict of "guilty" despite a defense of truth, due process had been accorded and protests were groundless, because the substance of the law that made the trial possible had not been challenged.

American acquiescence in the common-law definition of a free press was so widespread that even the frail Zengerian principles seemed daring, novel, and had few adherents. It was not until 1790 that the first state, Pennsylvania, took the then radical step of adopting the Zengerian principles,[10] which still left the common law of seditious libel intact. The Pennsylvania provision was drafted by James Wilson who, in the state convention that ratified the Constitution, declared without challenge by any of the ardent proponents of a bill of rights that "what is meant by the liberty of the press is that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government. . . ." The mode of proceeding, Wilson added, should be by prosecution.[11] The state constitutional provision of 1790 reflected this proposition, as did state trials before and after 1790.[12]

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[7] "A Bill for new modelling the form of government and for establishing the Fundamental principles of our future Constitution," dated by Boyd as "before 13 June 1776," in *The Papers of Thomas Jefferson*, ed. Julian P. Boyd (Princeton, N.J.: Princeton University Press, 1950), I, 353. Jefferson copied this provision from a similar one in an earlier draft, then bracketed it out, and omitted it from a third draft. *Ibid.*, p. 347.

[8] "That the mere utterance of a political opinion is being penalized in these cases becomes even clearer in a statute such as that in Virginia, which declared the utterance of the opinion, or action upon it, to be equally offensive, providing a fine not exceeding £ 20,000 and imprisonment not exceeding five years 'if any person residing or being within this commonwealth shall . . . by any word, open deed, or act, advisedly and willingly maintain and defend the authority, jurisdiction, or power, of the king or parliament of Great Britain, heretofore claimed and exercised within this colony, or shall attribute any such authority, jurisdiction, or power, to the king or parliament of Great Britain.'" Willard Hurst, "Treason in the United States," *Harvard Law Review*, LVIII (1944), 267, quoting *The Statutes at Large Being a Collection of All the Laws of Virginia* (1619–1792), ed. William W. Hening (J. & G. Cochran, 1821), IX, 170. For Jefferson's role, see Hurst, 251; and *The Papers of Thomas Jefferson*, ed. Boyd, I, 598.

[9] *The Papers of Thomas Jefferson*, ed. Boyd, II, 545–553.

Delaware and Kentucky followed Pennsylvania's lead in 1792,[13] but elsewhere the status quo prevailed. In 1789 William Cushing and John Adams worried about whether the guarantee of a free press in Massachusetts ought to mean that truth was a good defense to a charge of criminal libel, but they agreed that false publications against the government were punishable.[14] In 1791, when a Massachusetts editor was prosecuted for a criminal libel against a state official, the Supreme Judicial Court divided on the question of truth as a defense, but agreed, like the Pennsylvania judges,[15] that the state constitutional guarantee of a free press was merely declaratory of the common law in simply prohibiting a licensing system.[16]

The opinions of Jefferson, the acknowledged libertarian leader in America, and of Madison, the father of the Bill of Rights, are especially significant. In 1783, when proposing a new constitution for Virginia, Jefferson exempted the press from prior restraints but carefully provided for prosecution—a state trial—in cases of false publication.[17] In 1788, when urging Madison to support a bill of rights to the new federal Constitution, Jefferson made the same recommendation.[18] Madison construed it in its most favorable light, observing: "The exemption of the press from liability in every case for *true facts* is . . . an innovation and as such ought to be well considered." [19] But, on consideration, he did not add the truth-as-a-defense principle to the amendment on the press which he offered when proposing a bill of rights to Congress.[20] Yet Madison's phrasing appeared too broad for Jefferson, who stated that he would be pleased if the press provision were altered to exclude freedom to publish "false facts . . . affecting the peace of the confederacy with foreign nations" [21] —a clause whose suppressive possibilites can be imagined in the context of a foreign-policy controversy like the one on Jay's Treaty.

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[10] "That the printing-presses shall be free to every person who undertakes to examine the proceedings of the legislation, or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, *being responsible for the abuse of that liberty*. In *prosecutions* for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases." "Pennsylvania Constitution of 1790," Article IX, Section 7, in *The Federal and State Constitutions*, ed. Thorpe, V, 3100. Italics added,

[11] *Pennsylvania and the Federal Constitution*, 1787–1788, ed. John Bach McMaster and Frederick D. Stone (Philadelphia: Historical Society of Pennsylvania, 1888), pp. 308–309.

[12] *Respublica* v. *Oswald*, 1 Dallas (Penn.) Reports 319 (1788); "Trial of William Cobbett," November 1797, in *State Trials of the United States during the Administrations of Washington and Adams*, ed. Francis Wharton (Philadelphia: 1849), pp. 323–324; *Republica* v. *Dennie*, 4 Yeates' (Penn.) Reports 267 (1895).

[13] "Delaware Constitution of 1792," Article I, Section 5, in *The Federal and State Constitutions*, ed. Thrope, I, 569; and "Kentucky Constitution of 1792," Article XII, Sections 7–8, *ibid.*, III, 1274.

[14] "Hitherto Unpublished Correspondence Between Chief Justice Cushin and John Adams in 1789," ed. Frank W. Grinnell, *Massachusetts Law Quarterly*, XXVII (1942), 12–16. Adams, of course, signed the Sedition Act int law and urged its enforcement; and Cushing, as a Supreme Court judge, presided over some of the Sedition Act trials and charged juries on the Act's consitutionality. See Smith, *Freedom's Fetters*, pp. 97–98, 152, 242, 267, 268, 271 284, 311, 363, and 371.

[15] See cases cited above at note 12. The judges in Oswald's case wer Thomas McKean, then a Federalist but subsequently a Republican, and Georg Bryan, an Anti-Federalist and libertarian advcocate of a national bill o rights.

[16] *Commonwealth* v. *Freeman*, reported in the *Independent Chronicl* (Boston), February 24 and March 3, 10, 17, 24, 1791.

[17] "Draught of a Fundamental Constitution for the Commonwealth of Virginia," in *The Papers of Thomas Jefferson*, ed. Boyd. VI, 304: "Printing Pre shall be subject to no other restraint than liableness to legal prosecution f false facts printed and published." Boyd dates this document between May 1 and June 17, 1783.

Madison fortunately ignored Jefferson's proposal, but there is no warrant for the belief that he dissented from the universal American acceptance of the Blackstonian definition of a free press. In 1788, at the Virginia ratifying convention, Madison remained silent when George Nicholas, one of his closest supporters, declared that the liberty of the press was secure because there was no power to license the press;[22] Madison was silent, too, when John Marshall rose to say that Congress would never made a law punishing men of different political opinions "unless it be such a case as must satisfy the people at large." [23] In October of 1788, when replying to Jefferson's argument[24] that powers of the national government should be restricted by a bill of rights, Madison declared that "absolute restrictions in cases that are doubtful, or where emergencies may overrule them, ought to be avoided." [25] When Madison proposed an amendment in Congress guaranteeing freedom of the press, he did not employ the emphatic language of the Virginia ratifying convention's recommendation that freedom of the press should not be subject to abridgment "by any authority of the United States." [26] As Madison introduced the amendment, it omitted the important clause, "by any authority of the United States," [27] which would have covered the executive and judiciary as well as Congress; the omitted clause, in other words, would have prohibited the federal courts from exercising any common-law jurisdiction over criminal libels. As ratified, the First-Amendment declared only that Congress should make no law abridging the freedom of speech or press.

What did the amendment mean at the time of its adoption? First of all (if the amendment is analyzed by focusing on the phrase, "the freedom of the press"), it was merely an assurance that Congress was powerless to authorize restraints in advance of publication. On this point the evidence for the period from 1787 to 1791 is uniform and nonpartisan. For example, Hugh Williamson of North Carolina, a Federalist signatory of the Constitution, used freedom of the press in Blackstonian or common-law terms,[28] as did Melancthon Smith of New York, an anti-Federalist. Demanding a free-press guarantee in the new federal Constitution, despite the fact that New York's constitution lacked that guarantee, Smith argued that freedom of the press was "fully defined and secured" in New York by "the common and statute law of England," making a state constitutional provision unnecessary.[29] No other definition of freedom of the press by anyone anywhere in America before 1798 has been discovered. There was no dissent from the proposition that the punishment of a seditious libeler did not abridge the proper or lawful freedom of the press.[30]

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[18] "A declaration that the federal government will never restrain the press from printing any thing they please, will not take away the liability of the printers for false facts printed." Jefferson to Madison, July 31, 1788, in *The Papers of Thomas Jefferson*, ed. Boyd, XIII, 442.

[19] "Madison's Observations on Jefferson's Draft of a Constitution for Virginia," October 1788, *ibid.*, VI, 316.

[20] Madison's original proposal, June 8, 1787, was: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." *The Debates and Proceedings in the Congress of the United States* (Washington, D.C.: 1834), I, 451, 1st Cong., 1st Sess. Cited hereafter as *Annals of Congress*, the bookbinder's title.

[21] Jefferson to Madison, August 28, 1789, in *The Papers of Thomas Jefferson*, ed. Boyd, XV, 367.

[22] "The liberty of the press is secured. . . . In the time of King William, there passed an act for licensing the press. That was repealed. Since that time it has been looked upon as safe." *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, ed. Jonathan Elliot (2nd ed., rev.: Philadelphia: J. B. Lippincott Co. 1941), III, 247.

[23] *Ibid.*, III, 560.

[24] Jefferson to Madison, July 31, 1788, in *The Papers of Thomas Jefferson, ed. Boyd, XIII*, 422–423.

[25] Madison to Jefferson, October 17, 1788, *ibid.*, XIV, 20.

[26] *The Debates in the Several State Conventions*, ed. Elliott, III, 656.

[27] See note 20 above.

Nevertheless, the injunction of the First Amendment was not intended to imply that a sedition act might be enacted without abridging "the freedom of the press." A sedition act would not be an abridgment, but that was not the point of the amendment. To understand its framers' intentions, the amendment should not be read with the focus on the meaning of "the freedom of the press." It should not, in other words, be read merely to mean that Congress could impose no prior restraints. It should be read, rather, with the stress on the opening clause, "Congress shall make no law. . . ." The injunction, that is, was intended to prohibit any Congressional regulation of the press, whether by means of a licensing act, a tax act, or a sedition act. The framers meant Congress to be totally without power to enact legislation respecting the press. They intended a federal system in which the national government could exercise only such powers as were specifically enumerated, or were necessary and proper to carry out those enumerated. Thus James Wilson declared that, because the national government had "no power whatsoever" concerning the press, "no law . . . can possibly be enacted" against it; thus Alexander Hamilton, referring to the demand for a free-press guarantee, asked, ". . . why declare that things shall not be done which there is no power to do?"[31] The illustrations may be multiplied fiftyfold. In other words, no matter what was meant or understood by freedom of speech and press, the national government, *even in the absence of the First Amendment*, could not make speech or press a legitimate subject of restrictive legislation. The amendment itself was superfluous. To quiet public apprehension it offered an added security that Congress would be limited to the exercise of its delegated powers. The phrasing was intended to prohibit the possibility that those powers might be used to abridge speech and press. From this view of the matter, the Sedition Act of 1798 was unconstitutional.

That act was also unnecessary as a matter of law, however necessary it was as a matter of Federalist Party policy. It was unnecessary because the federal courts exercised jurisdiction over nonstaturory or common-law crimes against the United States. At the Pennsylvania ratifying convention, James Wilson had declared that, whereas Congress could enact no law against the press, a libel against the United States might be prosecuted in the state where the offense was committed—under Article III, Section two, of the Constitution, which refers to the judicial power of the United States. A variety of common-law crimes against the United States were in fact tried in the federal courts during the first decade of the court's existence.[32] There were even a couple of common-law indictments in the federal courts for the crime of seditious libel.[33] All the early Supreme Court judges, including several, who had been influential in the Philadelphia Convention, or in the state ratifying conventions, or in the Congress that passed the Judiciary Act of 1789, assumed the existence of a federal common law of crimes.[34] Ironically, it was a case originating as a federal prosecution of Connecticut editors for seditious libels against President Jefferson that finally resulted in a ruling by a divided Supreme Court, in 1812, that there was no federal common law of crimes.[35]

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[28] "There was a time in England when neither book, pamphlet, nor paper could be published without a license from government. That restraint was finally removed in the year 1694; and, by such removal, the press became perfectly free, for it is not under the restraint of any license. Certainly the new government can have no power to impose restraints." Hugh Williamson, "Remarks in the New Plan of Government," in *Essays on the Constitution of the United States*, ed. Paul Leicester Ford (Brooklyn, N.Y.: Historical Printing Club, 1891), p. 394.

[29] Melancthon Smith, "An Address to the People of the State of New York," 1788, in *Pamphlets on the Constitution of the United States*, ed. Paul Leicester Ford (Brooklyn, N.Y.: 1888), p. 114.

[30] The brief and vague statement by Oswald in 1788 may be regarded by some as an exception to this proposition. Oswald, having been indicted for a criminal libel on a private party, published an address to the public in which he stated: "The doctrine of libel being a doctrine incompatible with law and liberty, and at once destructive of the privileges of a free country, in the communication of our thoughts, has not hitherto gained any footing in *Pennsylvania*. . . ." Quoted in *Respublica* v. *Oswald*, 1 Dallas 319, at p. 320 (1788).

[31] Wilson's statement at the Pennsylvania ratifying convention, quoted in *Pennslvania and the Federal Constitution*, ed. McMaster and Stone, p. 308; Hamilton in *The Federalist*, No. 84.

There was unquestionably a federal common law of crimes at the time of the Sedition Act. Why, then, was the Act passed if it was not legally needed? Because even in England, where the criminal courts exercised an unquestioned jurisdiction over seditous libels, it was politically advisable in the 1790's to declare public policy in unmistakable terms by the enactment of sedition statutes.[36] Legislation helped ensure effective enforcement of the law, stirred public opinion against the law's intended victims, and in every way served Federalist Party objectives. The Federalists, hoping to control public opinion and elections, emulated the British model. A federal statute was expedient also because the Republicans insisted that libels against the United States might be tried only by the *state* courts, which were not so trustworthy in some states as the Federal courts.

This suggests another original purpose of the First Amendment. We have noted that a constitutional guarantee of a free press did not per se preclude a sedition act, but the prohibition on Congress did, although it left the federal courts free to try cases of seditious libel. It now appears that the prohibition on Congress was motivated far less by a desire to give immunity to political expression than by a solicitude for states' rights and the federal principle. The primary purpose of the First Amendment was to reserve to the states an ex-

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32. "Trial of Joseph Ravars" (1792), in *State Trials . . .*, ed. Wharton, pp. 90–92; "Trial of Gideon Henfield" (1793), *ibid.*, pp. 49–92; *United States* v. *Worrall*, 2 Dallas 384 (1798), *ibid.*, pp. 188–199; "Trial of the Northhampton Insurgents" (1799), *ibid.*, p. 476; "Trial of Isaac Williams" (1799), *ibid.*, pp. 652–654. See also *U.S.* v. *Smith* (1797), MS Final Record of the United States Circuit Courts of Massachusetts, 1790–1799, I, 242, 244 (Federal Records Center, Boston). Smith's case is reported in *Federal Cases* #16323, where the date is erroneously given as 1792. In Worrall's case, mentioned above, Justice Chase disagreed with his associate, Judge Peters, who supported the jurisdiction of the federal courts in cases of common-law crime. Chase, however, changed his opinion in *U.S.* v. *Sylvester* (1799), MS Final Record, I, 303, an unreported case.

33. A federal grant jury in Richmond presented Congressman Samuel J. Cabell for seditous libel in 1797. Prosecutions for seditious libel were also begun against Benjamin F. Bache of the Philadelphia *Aurora* and John Daly Burk of the New York *Time Piece*, in 1798, shortly before the enactment of the Sedition Act. See Smith, *Freedom's Fetters*, pp. 95, 183–184, and 188–220.

34. Supreme Court Justices known to have accepted jurisdiction in cases of common-law crimes included Wilson, Ellsworth, Paterson, Jay, Iredell, and Chase. See cases mentioned in note 32 above.

35. *U.S.* v. *Hudson and Goodwin*, 7 Cranch 32, at p. 34 (1812). Justice Johnson, speaking for the "majority," gave an unreasoned opinion. The case had been decided without arguments of counsel. W. W. Crosskey, *Politics and the Constitution* (Chicago: University of Chicago Press, 1953), II, 782, claims that Chief Justice Marshall and Justices Story and Washington dissented from Johnson's opinion without noting the fact of their dissent on the record.

36. On the English legislation of the 1790's, see May, *The Constitutional History of England . . .*, II, 161–174. The Parliamentary debates and the texts of the Treasonable Practices Act and of the Sedition Act of 1795, known together as "The Two Acts," were published in London in 1796 under the title, *The History of the Two Acts*, and were imported into the United States and advertised under the title, *History of the Treason and Sedition Bills lately passed in Great Britain*. For the influence of the English experience and legislation on Federalist thought, see Manning J. Dauer, *The Adams Federalist* (Baltimore: John Hopkins University Press, 1953), pp. 157–159.

clusive authority, as far as legislation was concerned, in the field of speech and press.

This is clear enough from the countless states' rights arguments advanced by the anti-Federalists during the ratification controversy; it is explicitly clear from the Republican arguments during the Sedition Act controversy. In the House debates on the bill, Albert Gallatin, Edward Livingston, John Nicholas, and Nathaniel Macon all agreed (to quote Macon on the subject of liberty of the press) that "The States have complete power on the subject. . . ."[37] Jefferson's Kentucky Resolutions of 1798 expressed the same proposition,[38] and so did Madison's "Address of the General Assembly to the People of the Commonwealth of Virginia" in 1799.[39]

It is possible that the opponents of the Sedition Act did not want or believe in state prosecutions, but argued for an exclusive state power over political libels because such an argument was tactically useful as a means of denying national jurisdiction, judical, or legislative. If so, how shall we explain the Republican prosecution in New York in 1803 against Croswell, a Federalist editor, for a seditious libel against President Jefferson?[40] How shall we explain the Blackstonian opinions of the Republican judges in that case?[41] How shall we explain Jefferson's letter to the governor of Pennsylvania in the same year? The President, enclosing a newspaper piece that attacked him unmercifully, urged a "few prosecutions" because they "would have a wholesome effect in restoring the integrity of the presses."[42] How shall we explain Jefferson's letter to Abigail Adams in 1804 in which he said: "While we deny that Congress have a right to control the freedom of the press, we have ever asserted the rights of the states, and their exclusive right to do so."[43] And if exclusive state power was advanced not as a principle but as a tactic for denying federal jurisdiction, how shall we explain what Jefferson's opponents called his "reign of terror":[44] the common-law indictments in 1806 in the United States Circuit Court in Connecticut against six men charged with seditous libel of the President?[45] How shall we explain his letter of 1807 in which he said of the "prosecutions in the Court of the U.S." that they could "not lessen the useful freedom of the press," if truth were admitted as a defense?[46]

III

Then, in 1798, there was a sudden breakthrough in American libertarian thought on freedom of political expression. The change was abrupt, radical, and transforming, like that caused by an underwater volcano erupting its lava upwards from the ocean floor to form a new island. The Sedition Act, which was a thrust in the direction of a single-party press and a monolithic party-system, triggered the libertarian surge among the Republicans. The result was the emergence of a new peak of libertarian thought, jutting out of a stagnant Blackstonian sea.

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[37] *Annals of Congress*, 5th Cong., 2nd Sess., p. 2152; see also *ibid.*, Macon at p. 2106, Gallatin at p. 2163, Nicholas at p. 2142, and Livingston at p. 2153.

[38] *The Debates in the Several State Conventions*, ed. Elliot, IV, 540–541.

[39] *The Writings of James Madison*, ed. Gaillard Hunt (New York: G. P. Putnam's Sons, 1900–1910), VI, 333–334.

[40] *People* v. *Croswell*, 3 Johnson's (N.Y.) Cases 336 (1804).

[41] Chief Justice Morgan Lewis, joined by Judge Brockholst Linvgston, whom Jefferson appointed to the United States Supreme Court in 1806, explicitly defined freedom of the press in common-law terms. In 1805 the state legislature enacted a bill allowing truth as a defense if published "with good mottives and for justifiable end," and allowing the jury to decide the whole issue. The statute is reported 3 Johnson's Cases 411–413, following the arguments of counsel and the judicial opinions.

[42] *Jefferson to Governor Thomas McKean, February 19, 1803, in The Writings of Thomas Jefferson*, ed. Paul Leicester Ford (New York: G. P. Putnam's Sons, 1892–1899), IX, 451–452.

[43] Jefferson to Abigail Adams, September 4, 1804, *ibid.*, X, 90. In the eloquent First Inaugural Address, Jefferson declared, in a deservedly much-quoted passage: "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." But in the Second Inaugural Address he spoke quite differently.

[44] "Hampdon," *A Letter to the President of the United States, touching the Prosecutions under his Patronage, before the Circuit Court in the District of Connecticut* (New Haven, Conn.: 1808), p. 28.

[45] *Ibid.*, pp. 8–12.

[46] Jefferson to Thomas Seymour, February 11, 1807, in *The Writings of Thomas Jefferson*, ed. Ford, IX, 90.

The Federalists in 1798 believed that true freedom of the press would benefit if truth—*their* truth—were the measure of freedom. Their infamous Sedition Act was, in the words of Gilbert and Sullivan, the true embodiment of everything excellent. It was, that is, the very epitome of libertarian thought since the time of Zenger's case—indicating that American libertarianism went from Zengerian principles to the Sedition Act in a single degeneration. Everything that the libertarians had ever demanded was incorporated in the Sedition Act: a requirement that criminal intent be shown; the power of the jury to decide whether the accused's statement was libelous as a matter of law as well as of fact; and truth as a defense which was an innovation not accepted in England until 1843.[47] By every standard the Sedition Act was a great victory for libertarian principles of freedom of the press—except that libertarian standards abruptly changed, because the Republicans immediately recognized a Pyrrhic victory.

The Sedition Act provoked them to develop a new libertarian theory. It began to merge when Congressmen Gallatin, John Nicholas, Nathaniel Macon, and Edward Livingston argued against the enactment of the Sedition bill.[48] It was further developed by defense counsel, most notably George Blake, in Sedition Act prosecutions.[49] It reached its most reflective and systematic expression in tracts and books that are now unfortunately rare and little known, even by historians. The main body of original Republican thought on the scope, meaning, and rationale of the First Amendment is to be found in George Hay's tract, *An Essay on the Liberty of the Press*;[50] in Madison's *Report* on the Virginia Resolutions for the Virginia House of Delegates;[51] in the book, *A*

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47. Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (London: Macmillan and Co., 1883), II, 383; and Frank Thayer, *Legal Control of the Press* (Brooklyn, N.Y.: Foundation Press, 1950), pp. 17, 25, and 178.

48. *Annals of Congress*, 5th Cong., 2nd Sess., pp. 2102–2111, 2139–2143, 2153–2154, and 2160–2166.

49. *Independent Chronicle* (Boston), issues of March 4–7, April 8–11, April 11–15, and April 29–May 2, 1799, reporting the trial of Abijah Adams, editor of the *Chronicle*, for seditious libel against the state legislature of Massachusetts.

50. "Hortensius," *An Essay on the Liberty of the Press, Respectfully Inscribed to the Republican Printers Throughout the United States* (Philadelphia: 1799), 51 pp. Reprinted in Richmond, Va., in 1803 by Samuel Pleasants, Jr., but set in small type, in an edition of 30 pages. The latter edition is cited here. Hay also published, in 1803, a different tract with a similar title, *An Essay on the Liberty of the Press, Shewing, That the Requsition of Security for Good Behaviour from Libellers, is Perfectly Compatible with the Constitution and Laws of Virginia* (Richmond, Va.: Samuel Pleasants, Jr., 1803), 48 pp.

51. The *Report* originally appeared as a tract of over 80 pages. The copy in the Langdell Treasure Room, Harvard Law Library, is bound together with the 1799 issue of Hay's *Essay*. Madison wrote the *Report* at the close of 1799; it was adopted on January 11, 1800, by the Virginia legislature, which immediately published it. It is reproduced in *The Debates in the Several State Conventions*, ed. Elliot, IV, 546–580, under the title, "Madison's Report on the Virginia Resolutions. . . . Report of the Committee to whom were referred the Communications of various States, relative to the Resolutions of the last General Assembly of this State, concerning the Alien and Sedition Laws." The *Report* is also available in *The Writings of James Madison*, ed. Hunt, VI, 341–406. The edition cited here is *The Virginia Report of 1799–1800, Touching the Alien and Sedition Laws; together with the Virginia Resolutions of December 21, 1798, The Debates and Proceedings thereon, in the House of Delegates in Virginia* (Richmond, Va.: J. W. Randolph, 1850); see pp. 189-237. This is a book of great value for its inclusion of the Virginia debates on the Sedition Act, at pp. 22–161. While those debates added little to the debates of the House of Representatives, the remarks of Republican speakers constitute another example of the new libertarianism.

Treatise Concerning Political Enquiry, and the Liberty of the Press, by Tunis Wortman of New York;[52] in John Thomson's book, *An Enquiry, Concerning the Liberty, and Licentiousness of the Press*;[53] and in St. George Tucker's appendix to his edition of Blackstone's *Commentaries*,[54] a most significant place for the repudiation of Blackstone on the liberty of the press. Of these works, Wortman's philosophical book is pre-eminent; it is an American masterpiece, the only equivalent on this side of the Atlantic to Milton and Mill.

The new libertarians abandoned the strait-jacketing doctrines of Blackstone and the common law, including the recent concept of a federal common law of crimes. They scornfully denounced the no-prior-restraints definition. Said Madison: ". . . this idea of the freedom of the press can never be admitted to be the American idea of it," because a law inflicting penalties would have the same effect as a law authorizing a prior restraint. "It would seem a mockery to say that no laws shall be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made."[55] As Hay put it, the "British definition" meant that a man might be jailed or even put to death for what he published, provided that no notice was taken of him before he published.[56]

The old yardstick for measuring the scope of freedom was also rejected by the new libertarians. "Liberty" of the press, for example, had always been differentiated from its "licentiousness," which was the object of the criminal law's sanctions. "Truth" and "facts" had always divided the realm of lawfulness from "falsehoods," and a similar distinction had been made between "good motives" and "criminal intent." All such distinctions were now discarded, on the ground that they did not distinguish and therefore were not meaningful standards that might guide a jury or a court in judging an alleged verbal crime. The term "licentiousness," wrote Thomason, "is destitute of any meaning"; it was used, according to him, by those who wished "nobody to enjoy the Liberty of the Press but such as were of their own opinion."[57] The term "malice," in Wortman's view, was invariably confused with mistaken zeal or prejudice.[58] It was merely an inference drawn from the supposed evil tendency of the publication itself, and just a further means of punishing the excitement of unfavorable sentiments against the government even when the people's contempt of the government was richly deserved. The punishment of "malice," or intent to defame the government, concluded Madison, necessarily struck at the right of free discussion, because critics intended to excite unfavorable sentiments.[59] Finding criminality in the tendency of words was merely an attempt to erect public "tranquility . . . upon the ruins of Civil Liberty," wrote Wortman.[60]

The wholesale abandonment of the common law's limitations on the press was accompanied by a withering onslaught against the constrictions and subjectivity of Zengerian principles. The Sedition Act, Hay charged, "appears to be directed against falsehood and malice only; in fact . . . there are many truths, important to society, which are not susceptible of that full, direct, and positive evidence, which alone can be exhibited before a court and a jury."[61] If, argued Gallatin, the Administration prosecuted a citizen for his opinion that the Sedition Act itself was unconstitutional, would not a jury, composed of the friends of that Administration, find the opinion "ungrounded, or, in other words, false and scandalous, and its publication malicious? And by what kind of argument or evidence, in the present temper of parties, could the accused convince them that his opinions were true?"[62] The truth of opinions, the new libertarians concluded, could not be proved. Allowing "truth" as a defense and thinking it to be a protection for freedom, Thomason declared, made as much sense as letting a jury decide which was "the most palatable food, agreeable drink, or beautiful color."[63] A jury, he asserted, could not give an impartial verdict in political trials. Madison agreed, commenting that the "baleful tendency" of prosecutions for seditious libel was "little diminished by the privilege of giving in evidence the truth of the matter contained in political writings."[64]

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[52] (New York: 1800), 296 pp.

[53] (New York: 1801), 84 pp.

[54] (5 vols.; Philadelphia: 1803), Vol. I, Part II, Note G, pp. 11–30 of Appendix.

[55] *The Virginia Report of 1799–1800*, p. 220.

[56] *An Essay on the Liberty of the Press* (1803 ed of 1799 tract), p. 29: and *An Essay on the Liberty of the Press, Shewing . . .* (1803), p. 32. See note 50 above.

[57] *An Enquiry, Concerning the Liberty, and Licentiousness of the Press*, pp. 6–7.

[58] *A Treatise Concerning Political Enquiry*, p. 173.

[59] *The Virginia Report of 1799–1800*, pp. 226–227.

[60] *A Treatise Concerning Political Enquiry*, p. 253.

[61] *An Easy on the Liberty of the Press* (1803 ed. of 1799 tract), p. 28.

The renunciation of traditional concepts reached its climax in the assault on the idea that there was such a thing as a crime of seditious libel. That crime, Wortman concluded, could "never be reconciled to the genius and constitution of a Representative Commonwealth."[65] He and the others constructed a new libertarianism, genuinely radical because it broke sharply with the past and advocated an absolute freedom of political expression. One of the major tenets of this new libertarianism was that a free government cannot be criminally attacked by the opinions of its citizens. Hay, for example, insisted that freedom of the press, like chastity, was either "absolute"[66] or did not exist. Abhorring the very concept of verbal political crimes, he declared that a citizen should have a right to "say everything which his passions suggest; he may employ all his time, and all his talents, if he is wicked enough to do so, in speaking against the government matters that are false, scandalous and malicious,"[67] and yet he should be "safe within the sanctuary of the press" even if he "condemns the principle of republican institutions . . . censures the measures of our government, and every department and officer thereof, and ascribes the measures of the former, however salutary, and the conduct of the latter, however upright, to the basest motives; even if he ascribes to them measures and acts, which never had existence; thus violating at once, every principle of decency and truth."[68]

In brief, the new libertarians advocated that only "injurious conduct," as manifested by "overt acts" or deeds, rather than words, should be criminally redressable.[69] They did not refine this proposition except to recognize that the law of libel should continue to protect private reputations against malicious falsehoods. They did not even recognize that under certain circumstances words may immediately and directly incite criminal acts.

This absolutist interpretation of the First Amendment was based on the now familiar, but then novel and democratic, theory that free government depends for its very existence and security on freedom of political discourse. The scope of the amendment, according to this theory, is determined by the nature of the government and its relationship to the people. Because the government is the people's servant, exists by their consent and for their benefit, and is constitutionally limited, responsible, and elective, it cannot, said Thomson, tell the citizen: "You shall not think this, or that upon certain subjects; or if you do, it is at your peril."[70] The concept of seditiousness can exist only in a relationship based on inferiority, when people are subjects rather than sovereigns and their criticism implies contempt of their master. "In the United States," Madison declared, "the case is altogether different."[71] Coercion or abridgment of unlimited political opinion, Wortman explained, would violate the very "principles of the social state"—by which he meant a government of the people.[72]

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62. *Annals of Congress*, 5th Cong., 2nd Sess., p. 2162.
63. *An Enquiry, Concerning the Liberty, and Licentiousness of the Press*, p. 68.
64. *The Virginia Report of 1799–1800*, p. 226.
65. *A Treatise Concerning Political Enquiry*, p. 262.
66. *An Essay on the Liberty of the Press* (1803 ed. of 1799 tract), pp. 23–24.
67. *Ibid.*, p. 25.
68. *An Essay on the Liberty of the Press, Shewing . . .* (1803 tract), p. 29.
69. Wortman, *A Treatise Concerning Political Enquiry*, pp. 140, 253; Thomason, *An Enquiry, Concerning the Liberty, and Licentiousness of the Press*, p. 79.
70. *An Enquiry, Concerning the Liberty, and the Licentiousness of the Press*, p. 22.
71. *The Virginia Report of 1799–1800*, p. 222.
72. *A Treatise Concerning Political Enquiry*, p. 29.

Because such a government depended upon popular elections, all the new libertarians agreed that the widest possible latitude must be maintained to keep the electorate free, informed, and capable of making intelligent choices. The citizen's freedom of political expression had the same scope as the legislator's, and had the same reasons behind it.[73] That freedom might be dangerously abused, but the people, if exposed to every opinion, would decide men and measures wisely.

This brief summary of the new libertarianism barely does justice to its complexity and sophistication, but should at least suggest its boldness, originality, and democratic character. The new libertarianism developed, to be sure, as an expediency of self-defense on the part of a besieged political minority that was struggling to maintain its existence and its right to function unfettered. But the new libertarians established, virtually all at once and in nearly perfect form, a theory justifying the rights of individual expression and of opposition parties. That the Jeffersonians in power did not always adhere to their new principles does not diminish the enduring nobility and rightness of those principles. It proves only that the Jeffersonians set the highest standards of freedom for themselves and posterity. Their legacy was the idea that there is an indispensable condition for the development of free men in a free society; the state must be bitted and bridled by a bill of rights that is to be construed in the most generous terms and whose protections are not to be the playthings of momentary majorities. That legacy deepened and enriched American libertarian theory, but it did not surmount the resistance of the law. Ultimate victory in the courts and statutes belonged to Alexander Hamilton's restatement of Zengerian principles.[74]

IV

Hamilton, a supporter of the Sedition Act and of prosecutions for criminal libel, believed that the law of libel should be governed by the principles of the Zenger case, in order to protect the legitimate freedom of the press. In 1804 he was permitted by his Jeffersonian opponents in New York, who were then in power, to make political capital and legal history by advocating these old principles. The state indicted Harry Croswell, an obscure Federalist editor, for the common-law crime of seditious libel against President Jefferson. Croswell's crime was his publishing of the accusation that Jefferson had paid to have Washington denounced as a traitor and Adams as an incendiary. Chief Justice Morgan Lewis, a Jeffersonian, refused Croswell the opportunity of introducing evidence to prove the truth of his statements. In instructing the jury, Lewis told the jurors that their only duty was to determine whether the defendant had in fact published the statements as charged; that they must leave to the court, as a matter of law, the determination of the statements' libelous character. Lewis, in other words, charged the jury that the law of New York was the law as laid down by Chief Justice DeLancey in the Zenger case.

On the appeal of Croswell's conviction, before the higher court of the state, Alexander Hamilton played the role of Andrew Hamilton, eloquently championing the cause of freedom of the press. That freedom, he said (in words that were even more restrictive than those of his precursor or of the Sedition Act), "consists in the right to publish, with impunity, truth, with good motives, for justifiable ends, though reflecting on government, magistracy, or individuals." The Sedition Act itself did not require proof of "good motives, for justifiable ends," but Alexander Hamilton's position, of course, seemed a shining standard of libertarianism when compared with the reactionary views of Chief Justice Lewis—or of the prosecutor, Attorney General Ambrose Spencer, another Jeffersonian. Spencer argued from Blackstone (not Tucker's version), and declared that a libel, even if true, was punishable because of its dangerous tendency. The former prosecutor became a member of the Supreme Court of Judicature by the time it decided the case. Had Spencer not been ineligible to participate in the decision, the repressive opinion re-expressed by Chief Justice Lewis would have commanded a majority. Instead, the court divided evenly, two against two. The opinion of Judge James Kent expressed Hamilton's position.

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[73] Thomson, *An Enquiry, Concerning the Liberty, and Licentiousness of the Press*, pp. 20, 22; Hay, *An Essay on the Liberty of the Press* (1803 ed. of 1799 tract), p. 26.

[74] See *People* v. *Croswell*, 3 Johnson's (N.Y.) Cases 336 (1804).

In the following year, 1805, the state legislature enacted a bill allowing the jury to decide the criminality of an alleged libel and permitting truth as a defense, if published "with good motives and for justifiable ends." It is this standard that prevailed in the United States until very recently.

V

The Framers of the First Amendment had a genius for studied imprecision. They were conscious of the need to phrase the Constitution in generalized terms and without a lexicographical guide, for they meant to outline an instrument that would serve future generations. Like Martin Chuzzlewit's grandnephew, who had no more than "the first idea and sketchy notion of a face," the Constitution was purposely made to embody first ideas and sketchy notions. Detailed codes, which become obsolete with a change in the particular circumstances for which they were adopted, are avoided by men trained in the common law. They tend rather to formulate principles that are expansive and comprehensive in character. The principles and not their framers' understanding and application of them are meant to endure. The Constitution designed by an eighteenth-century rural society, serves as well today as ever because an antiquarian historicism that would freeze its original meaning has not guided its interpretation and was not intended to.

The First Amendment's injunction, that there shall be no law abridging the freedom of speech or press, was boldly stated if narrowly understood. The bold statement, not the narrow understanding, was written into the fundamental law. "It is far better," as Tunis Worman wrote, "to err on the side of Latitude than on that of Restraint."[75] On this point the Framers would probably have agreed with Wortman. He and Blake, Hay, Madison, Gallatin, Tucker, and Thomson originated a libertarian philosophy that ought to define the content of the free speech-and-press clause. They were addressing the future, not the past. Their insistence that they were simply clarifying the past's original understanding reflected an Anglo-American habit of going forward while facing backwards: rights that should exist are established on the fictitious pretense that they have ever existed, and arguments are concocted to give to the fiction the appearance of both reality and legality. But there is no evidence to warrant the belief, nor is there valid cause or need to believe, that the Framers possessed the ultimate wisdom and best insights on the meaning of freedom of expression. It is enough that they gave constitutional recognition to the principle of freedom of speech and press in unqualified and undefined terms.

Senator ERVIN. Counsel will call the next witness.

Mr. BASKIR. Mr. Chairman, our next witness this morning is Professor Thomas Emerson, Lines Professor of Law of the Yale Law School. He is the author of many works on the First Amendment, including "The General Theory of the First Amendment," and also "The System of Freedom of Expression."

Senator ERVIN. Dr. Emerson, I am delighted to welcome you to the subcommittee. And I want to express the appreciation of the subcommittee for your willingness to appear and give us the benefit of your views on a subject on which you are most knowledgeable.

STATEMENT OF THOMAS I. EMERSON, PROFESSOR OF LAW, YALE UNIVERSITY LAW SCHOOL

Mr. EMERSON. Thank you. My testimony in a way supplements what Dean Levy has said, in that it is an attempt to formulate in terms of legal principle, and to apply to modern conditions, the absolutist theory that Madison and Jefferson had of the First Amendment.

One of the most remarkable features of the First Amendment is that, in the 180 years of its history, the courts have never developed a coherent theory of just what constitutional protection it affords. The Supreme Court did not, of course, have much occasion to interpret or apply the First Amendment until the suppression of free speech which grew out of World War I began to be challenged in the courts. The first major decision of the Supreme Court, *Schenck v. United States* (249 U.S. 47), did not come until 1919. Since that time, however, the Supreme Court has decided hundreds of first amendment cases and the lower courts many thousands.

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[75] Wortman, *Treatise Concerning Political Enquiry*, p. 205.

In the course of these decisions various legal doctrines have from time to time prevailed, or been advanced in concurring and dissenting opinions. These formulations include the bad tendency test, the clear and present danger test, ad hoc balancing of interests, an incitement test, a test of grave and irreparable danger to national security, and the so-called absolute position. But the shifting majorities and minorities have never been able to settle on any single theory by which to determine how far the first amendment protects freedom of expression. The extent of disagreement is dramatically reflected in the last Supreme Court decision, the *New York Times* and *Washington Post* cases, where nine separate opinions were rendered. A lawyer arguing a first amendment case before the Supreme Court today literally does not know where to begin or where the Court will come out.

This unfortunate state of affairs seriously jeopardizes the system of freedom of expression in this country. If the courts cannot make up their minds there is no way for the citizen to know what his rights are. This is particularly damaging to freedom of the press. In the absence of a clearcut theory of First Amendment protection the press must either take daily risks or curtail its expression. Moreover, a system of freedom of expression can only exist if the community as a whole understands that system and supports it. But little understanding or support is possible when there is no agreement upon the basic constitutional doctrines which should govern.

It is true that no one simple formula can be devised which could apply to all the varied situations in which First Amendment issues are presented. Nevertheless, I think it is possible to construct a comprehensive theory which takes into account the underlying purposes of the First Amendment and formulates the basic legal doctrines necessary to achieve those goals. I have attempted such a formulation in my book, *The System of Freedom of Expression*, and will try briefly to summarize my conclusions for the committee.

I. A GENERAL THEORY

The central idea of a system of freedom of expression is that a fundamental distinction must be drawn between conduct which consists of expression and conduct which consists of action. Expression must be freely allowed and encouraged. Action can be controlled, subject to other constitutional requirements, but not by controlling expression. A system of freedom of expression cannot exist effectively on any other foundation, and a decision to maintain such a system necessarily implies acceptance of this proposition.

The line between expression and action is often entirely clear. At other times, however, the line may be obscure and the distinction more difficult to formulate. All expression has some physical element. Moreover, a communication may take place in a contest of action, as in the familiar example of the false cry of "fire" in a crowded theater. Or, a communication may be closely linked to action, as in the gang leader's command to his triggerman. In these cases it is necessary to decide, however fine the distinction may appear to be, whether the conduct is to be classified as one or the other. This judgment must be guided by consideration of whether the conduct partakes of the essential qualities of expression or action, that is, whether expression or action is the dominant element. And the concept of expression must be related to the fundamental purposes of the system of freedom of expression and the dynamics of its operation.

Freedom of expression can flourish and the goals of the system can be realized, only if expression receives full protection under the first amendment. This principle of full protection means that the first amendment must be interpreted as embodying the following rules of law.

1. The Government may not prohibit, curtail, or restrict expression in any way for the purpose of achieving other social objectives or advancing its own interests. In such a context the expression must be given full protection regardless of its tendency, its likelihood to create a clear and present danger, or any balancing of interests. Government controls must be confined to regulation of action. Where the Government regulation is directed toward conduct consisting of action and conduct consisting of expression it must be drawn in such a way as to restrict only the action, leaving the expression uncurtailed.

2. It follows, a fortiori, that no controls can be exercised over expression by a system of prior restraint.

3. The Government may regulate the internal operations of the system of freedom of expression in order to resolve conflicts between participants in the system, such as by requiring a permit for a parade or allocating use of facilities in short supply. Such regulation must relate only to the time, place, and manner of the expression, not to its content, and must conform to the principle of fair accommodation between participants.

4. Where exercise of the right of expression involves the use of physical facilities also utilized for other purposes, such as an assembly on the streets or in a park, the Government may allocate the use of the facilities between the competing interests. Such regulations must likewise conform to the principle of fair accommodation and, so far as it relates to expression, control only time, place and manner, not content.

5. The status of an individual in a limited-purpose organization, such as a Government agency or a labor union, imposes upon him certain obligations different from those of the ordinary citizen to the general community. Hence the freedom of expression of such person, vis-a-vis the organization, may be subjected to the minimum regulation necessary to secure the specific purposes the organization is designed to achieve.

6. The Government may exercise its power to eliminate obstructions to, or to affirmatively promote, the effective functioning of the

system of freedom of expression. Regulation of this type is valid under the First Amendment provided it advances, rather than retards, the operation of the system in terms of its basic nature and functions.

Other legal doctrines are necessary to solve particular problems. These pertain to the place where First Amendment rights may be exercised, the relationship of the system of freedom of expression to the system of privacy, and similar matters. Such issues likewise must be resolved on a functional basis, taking into account the objectives and operation of the system.

The foregoing principles are applicable to the basic "system of freedom of expression" which exists in this country. They do not necessarily apply, or apply in the same way, to certain sectors of social conduct in which the rules for protecting freedom of expression must be framed in a different contest. Such areas include commercial activities, the activities of children, certain aspects of the military, and some aspects of communication with foregin countries. This does not mean that the First Amendment has no application in these sectors. It simply recognizes that the functions of expression and the principles needed to protect expression in such areas are different from those in the main system, and that different legal rules may therefore be required.

II. APPLICATION OF THE THEORY TO THE PUBLICATION OF CLASSIFIED INFORMATION

We may test the general theory by applying it to the problems involved in the publication of the Pentagon Papers. To what extent, if any, may the Government attempt to prevent or punish the publication of classified information without violating the First Amendment?

The issues must be considered in a realistic context. We must take into account both how the classification process works and the role of the press in reporting on national affairs. It is well known that there are millions of Government documents classified and that over-classification is endemic to the process. Moreover, the technique of classification is an easy way for the Government to cover up its mistakes or take dubious action behind a cloak of secrecy, and is frequently used for these purposes. In addition, large quantities of classified information are constantly being disclosed and published. Some of this is released by high Government officials to promote administration policies; some is leaked by Government officials who disagree with administration policies in order to apply pressure for their viewpoint; some is revealed to a favorite reporter or disclosed in an off-the-record briefing session in order to put a reporter under obligation to the official; some appears in memoirs. The fact is that the government and its officials allow a continuous flow of classified information to become public in order to advance their own interests. Disclosure is part of the government process.

The other half of the picture is equally significant. The function of the press is not limited to the mere reporting of official handouts. Its great role is to probe behind the scenes and inform the public of what is going on back of closed official doors. The press must be skeptical, critical, and above all informative. There is no other way by which the American people can obtain the information necessary to understand public issues and control its public servants. This is particularly important in an era of mounting Government secrecy and massive credibility gaps. In performing this vital function the press has the duty to dig out all the information it can, classified or unclassified. Disclosure is part of the democratic process.

Under these circumstances, the imposition of sanctions for the publication of classified materials would simply operate to give the Government a one-way opportunity to use the classification system to conceal its mistakes and to promote its own interests, while throttling the press as a major countervailing source of information. The only way in which our system of freedom of expression can operate effectively is to treat all so-called classified material which escapes from Government possession as part of the pool of information available to the whole community in the conduct of its public affairs.

Against this background we can proceed to a more detailed analysis of the constitutional issues. The first step is to determine what conduct connected with the publication of classified material involves "action" and what involves "expression." It would seem that stealing classified information from Government files or obtaining it through fraud or deception of the government would constitute "action."[1]

In securing physical possession in this way the "action" element of the conduct appears predominant. Similarly, obtaining or divulging classified information as part of an espionage operation would also appear to be "action," not "expression." Surreptitious conveyance of information to the agent of a foreign country, in the context of an espionage apparatus, is not part of the system of communicating ideas protected by the First Amendment. But publication of the material, after the "action" had terminated, would plainly constitute "expression." This would certainly hold as to publication by the press or by any third party who obtained information from the person who originally took possession. I think it would also apply to publication of the material by the very person who obtained illegal possession. At that point the "action" is completed and the "expression" commences.

Under this analysis the Government could apply sanctions to the theft of classified information, or other illegal procurement, as well as to espionage. But subsequent publication of the material, after it had escaped the Government's possession and thereby became part of the general pool of information, could not be prevented or punished. As "expression," the conduct would be fully protected.

Two other aspects of First Amendment theory are also relevant. First, what about the conduct of an employee in a Government agency who, having authorized possession of classified material, conveys this information to a third party in violation of a lawful regulation? One might consider this conduct as engaging in "expression." Even so, obligations necessary to the effective achievement of the agency function could be imposed upon members of that organization, Hence, assuming the regulation was in fact necessary, the Government could apply sanctions to the Government employee. Second, the legal doctrines applicable to classified information relating to military operations in an actual theater of war might be different. A reporter in a battle zone is not governed by the same principles as pertain to the civilian world. Hence, without attempting to formulate the rules applicable to military operations, it is sufficient to say that ordinary first amendment principles would not necessarily control.

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[1] I am not attempting to deal here with the question whether the "right to know" features of the first amendment might in some circumstances justify the obtaining of classified information by these methods.

The question may be raised at this point whether it would not be possible to prevent or punish the publication of only that part of classified materials which might do serious damage to our national security. The issue is a crucial one in First Amendment theory. The basis of the full protection theory and, I believe, of an effective system of free expression is that partial suppression of expression is wrong in principle and destructive of the system in practice. In the case of classified materials, with which we are here concerned, I think it can be demonstrated that anything short of full protection would lead to a degree of press repression that would far outweigh any gains to national security.

One way for the Government to proceed would be, as in the *New York Times* and *Washington Post* cases, by attempting to enjoin or otherwise prevent in advance the publication of classified material. This mode of procedure calls into play the most repressive of all methods of control—advance censorship or prior restraint. I have elsewhere attempted to summarize the impact of prior restraint upon freedom of expression:

> A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under Government scrutiny a far wider range of expression; it shuts off communications before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows.[2]

If a free press is to survive, all forms of prior restraint without qualification or exception, must be rejected.[3]

Indeed, it is not possible as a practical matter to introduce qualifications or exceptions to the rule against prior restraint without undermining the rule altogether. In the *Times-Post* case, for example, the Government argued that a prior restraint should be permissible where the publication of classified material might "gravely and irreparably" damage national security. Should the courts accept such a doctrine all the government would need do in any case would be to allege "grave and irreparable damage" and ask the court for a restraining order. In order to consider the Government's contention the court would be constrained to issue such an order, hold a hearing (probably in secret), and ultimately decide whether or not the newspaper could publish the material. The very process of determining whether the exception to the prior restraint rule should apply would itself constitute a prior restraint. This is exactly what happened in the *Times-Post* case. In short, no rule other than the rule of full protection is feasible when the government attempts to cut off expression before it has occurred.

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[2] The System of Freedom of Expression (1970), p. 506.

[3] As noted above, the same rules would not necessarily apply to the sphere of military operations in an actual theater of war.

The other method of control—sanctions applied after publication has taken place—presents similar difficulties. None of the legal tests proposed, other than full protection, affords any real safeguard to the press. The "grave and irreparable damage" test is wide open and impossible to reduce to specific terms. The same is true of the clear and present danger test, the balancing test, or any other that can be devised. There is no way to define precisely in advance where the cutoff point is to be. The best those legal doctrines can do is to determine after trial that the point has been passed.

As a result, the press can never know beforehand what is criminal and what is not. Not can it ever be sure when the Government may claim the publication is criminal and start a prosecution. Hence the press is put under intolerable pressure. Its function is to criticize and expose. In doing this it often causes embarrassment, arouses hostility, or provokes vengeance. It is not possible to perform such a function if the Government is able to institute a criminal proceeding whenever in its judgment the publication might create a danger to "national security." In the end the press would be put under a form of control very similar to prior restraint. In order to be certain there would be no retaliation it would have to make sure that the Government did not oppose publication.

We conclude, therefore, that there is no way to preserve a free and vigorous press except by a rule which extends to publication of classified material that has entered the public domain the full protection of the First Amendment. It has been argued that such a doctrine will jeopardize our national security. The history of this country, however, affords no support for such fear. On the contrary, an independent press, encouraged to perform its traditional role, is a far better instrument than repression for preserving our national security.

I have confined myself here to application of the full [illegible] theory of the First Amendment to the single instance of [illegible]tion of classified material. I believe that a similar analysis [illegible] other areas would lead to similar conclusions. The major [illegible] amendment cases should be to determine what is expression [illegible] tinct from action, and to give expression complete protection [illegible] doctrines which attempt to afford expression only partial [illegible] are inconsistent with the purposes of the first amendment [illegible] practice defeat its objectives. It is true that the First [illegible] thus applied may entail some risks. But there is no [illegible] all risks. And the attempt to do so leads only to a [illegible] the other hand I know of no society that has [illegible] because of overprotection of freedom of expression.

Senator **Ervin**. I infer from the closing paragraph [illegible] ment that if a society is going to be free it [illegible] some risks.

Mr. **Emerson**. Yes, Senator, I think that is clearly so. There is no such thing as total security. And the effort to achieve total security can only result in a system of restraint which is equivalent to a totalitarian system and which will ultimately break apart.

Senator **Ervin**. There can be no doubt of the fact, can there, that a nation which extends freedom of speech or freedom of the press to its people must take the risk that on occasions such freedoms will be abused in their exercise?

Mr. **Emerson**. Yes, I think that is part of what was contemplated by the theory from the very beginning. As James Madison said many years ago, there will always be abuses or excesses, but the important thing is to be sure that by trimming off the abuses one doesn't destroy the tree.

Senator **Ervin**. Isn't it an inescapable truth that a government can not prevent all abuses of freedoms without destroying the freedoms themselves?

Mr. **Emerson**. That is correct, Senator. There is no way by which one can have a perfect or an ideal system, or complete politeness or complete moderation, if there is freedom to express oneself. Freedom of expression necessarily involves a clash of ideas, and it necessarily involves a conflict. In fact, the whole purpose of freedom of expression is to have a kind of a conflict, but within bounds. If the conflict in terms of what one says is restricted, the conflict can then take place only in terms of violence.

Senator **Ervin**. Is it correct to say that the freedoms which the First Amendment undertakes to protect against abridgement, either explicitly or implicitly, include freedom of thought, freedom of speech, freedom of the press, freedom of assembly, freedom of petition, or freedom of dissent?

Mr. **Emerson**. I am sorry, I didn't understand you.

Senator **Ervin**. Cannot it be said that the freedoms which the first amendment undertakes to protect against abridgement by government may be defined or summarized as freedom of thought, freedom of speech, freedom of the press, freedom of assembly, freedom of petition, and freedom of dissent and freedom of religion.

Mr. **Emerson**. Yes, Senator. I think that the First Amendment covers all those areas. And that embodies in essence the purposes which have to be served; I agree with you.

Senator **Ervin**. Are not these freedoms designed to make Americans politically, intellectually, and spiritually free; isn't that the overall objective?

Mr. **Emerson**. Yes; that is the purpose. And I think the accomplishment of that purpose has never been more necessary than it is today. It seems to me that as we face a more complicated society, and as our problems get more intricate, and as our institutions get larger and more rigid, we are only going to be able to solve our problems if people understand what those problems are and are able to communicate about them, receive new ideas, and give their ideas. The whole tendency of modern government is to close in and keep information to itself. There is a certain power in withholding information from the public. But that is a very shortsighted position, because ultimately it is only if the public understands what is involved, and can express its ideas about it, that these problems are going to be solved. So that I think there has never been a time when the basic ideas of the first amendment are more applicable than at the present time.

Senator **Ervin**. Some people, such as the late Justice Black, and Justice Douglas, have maintained the position that the first amendment freedoms are absolute. I believe that is valid with respect to freedom of thought which doesn't culminate in utterances or any action. But is it your opinion that the other first amendment freedoms outside of the freedom of thought are absolute or may they be described as limited?

Mr. **Emerson**. No; my position is that all aspects of freedom of expression which go beyond freedom of thought or freedom of belief, but include freedom to express opinions, freedom to attempt to persuade others, all of those should receive full and unqualified protection. I don't like the term "absolute," because it doesn't seem to quite express the idea. But there should be no qualifications. The dividing line that I would establish is between what can be called expression on the one hand and other forms of conduct, action, on the other. The basic notion behind the system as I view it is that if you are to have any freedom, if you are to have freedom of thought or freedom of belief, or freedom to express yourself, you must permit that in an unlimited form. Once you start to try to limit it, as a practical matter, or as the dynamics of the situation work out, you become repressive. If you want to make an analogy with the history that Dr. Levy has just told us about, I think there is one. He pointed out that the liberals at the time of the adoption of the Constitution took the position that freedom of expression would be possible provided there were adequate legal rules with respect to intent, and provided that the defense of truth was allowed, and provided that the jury made the basic decision as to whether a statement was libelous or not. And then they found in the administration of the Sedition Act that that didn't work. I think the same is true in modern times with respect to the efforts that have been made to formulate principles by which to qualify the first amendment. At the time it was adopted the clear and present danger test was an advance, at least an advance in terms of the theories that might have been applied, and therefore was accepted by the liberals. But I think as time has gone on we have discovered that the application of the clear and present danger as a test, or the application of balancing as a test, does not in practice give the necessary protection, and that it is only by moving to a more objective position, namely, that anything that can be described as an expression is protected, and only action can be punished; only by moving to that position can you really have an effective protection.

Senator **Ervin**. I want to say that I think that you express the limitation of governmental power in this respect far better than those who use the terms "absolute" and "limited" in referring to rights under the First Amendment. In other words, your position is that insofar as activity consists only of the expression of ideas, there is an absolute right to make that expression, and that the governmental power to place any kind of limitation on an activity of this nature arises only when that activity passes beyond the realm of expression and enters the realm of action.

Mr. EMERSON. That is correct, Senator, yes.

Senator ERVIN. And as you point out, sometimes it is difficult to point out correctly the line of demarcation which separates expression on the one hand and action on the other.

Mr. EMERSON. That is right. The problem is to define that area in terms of the basic theory of freedom of expression, which is that expression is so fundamental to freedom, or to a democratic system, that it must be permitted, that one can by allowing expression solve a great many problems, that one can sort of try things out by arguing back and forth and expressing different points of view, and that society solves its problems and makes advances by undertaking and encouraging within it that kind of conflict, that kind of disagreement. And as long as that conduct remains within the area of speech or expression, it must be fully protected. Only if it goes beyond that into the area of action can the Government step in.

Senator ERVIN. I take it that the distinction you make between expression and action is illustrated by the Court's decisions which say in effect that a person can advocate the violation of criminal law, or even the overthrow of the Government by unlawful means, as long as they confine their activities to the expression of those ideas and do not urge action to accomplish it.

Mr. EMERSON. That is right. As long as it is confined to communicating an idea, it should be protected. If it is part of the action—if a speaker gets up, and after a long harangue says, "All right, now let's march on city hall," then the speech has become part of the action in marching on city hall, and that is no longer an expression, that is part of an action. But up to the point that it reaches action it must be protected.

Senator ERVIN. And the power of Government can only be invoked when a stage of action that threatens some other social interest beyond the public interest and freedom of expression is reached?

Mr. EMERSON. That is correct, yes.

Senator ERVIN. I am glad you discussed the Pentagon Papers. You take the position, as I understand it, that the press has a public duty to perform. When the Government suppresses some information in order to prevent the truth from being known, and discloses other information at its discretion to serve some of its other ends, the press has a duty to try to get the facts concerning the suppressed information and inform the public by presenting information it obtained which would show whether the information which the Government disclosed for its own purposes is accurate and dependable.

Mr. EMERSON. That is correct. The basic function of the press should not be to simply take the handouts that government gives it. And the press has fortunately never limited itself in this country t that role. Its function is to dig beneath the surface and find out what is going on and convey that information to the American people. Now, in order to do that it necessarily at times will be publishing information which the Government has classified as confi dential or secret or top secret, because the classification system is s overdone, and so much classification information is given out, tha part of the pool of information that the American people mus know if they are to act in their role of citizens is always available and should be reported. And to try to say that the press either can be prevented from publishing classified material which gets into its hands or can be published afterward is to shut off all communication except what the government decides to give out. And that would be an ingrown system which would be far worse for our national security than to allow the publication of some material which might embarrass us in one way or another.

Senator ERVIN. With regard to that aspect of the issue, Senator Roth of Delaware has introduced a bill, which I co-sponsored, to appoint a commission to study this whole question of government classification of information. It is our hope that the commission would make recommendations to Congress which would enable Congress to establish definite rules in respect to the kinds of information to be classified, and how that information is declassified, including appropriate time limitations. Do you think that a commission of that kind could serve a useful purpose at this time?

Mr. EMERSON. Yes, I think it could. It seems to me quite clear that the classification system needs overhauling. There is a lot to be done by a study of how it works and what rules can be established. I don't think that is a complete answer. I think it must still be true that you can never keep the government from overclassifying. The tendency of any bureaucracy is to withhold information to itself, and not allow it to become available. The classification scheme is one way of doing that. And it is one that is very frequently used. I think there is no way by which you can prevent government agencies from using the classification system that way.

Therefore, I think that whatever happens, the rule still must be that if the classified material gets outside the Government, if the Government loses control, if the material gets into the public domain, it simply can be published. And to try to prevent the publication of classified material at that point is to seriously curtail the function of the free press.

Senator ERVIN. You take the position, as I interpret your statement, that prior restraint is absolutely incompatible with freedom of speech and freedom of the press?

Mr. EMERSON. Yes; I do.

Senator ERVIN. And that there is no more effective way to destroy those freedoms than for the Government to exercise prior censorship and prior restraint?

Mr. EMERSON. That is right, Senator.

Senator ERVIN. Therefore, you draw the conclusion that any information accumulated by the Government, which becomes available to the press, is information which the press has the liberty of publishing, regardless of how they obtained it.

Mr. EMERSON. That is right. The Government can protect itself by keeping the information to itself. But once it loses that control, there is no way to get it back. And there is no way to punish the press for printing it without destroying the function that the press is supposed to perform.

Senator ERVIN. History indicates that the press has, in times past, exercised a commendable voluntary restraint in publishing information which was likely to "endanger the national security," if I may use that kind of loose expression.

Mr. EMERSON. Yes; they certainly have. I think at times they have overdone it. But as I said in my written testimony, I know of no case in which what the press has published has seriously endangered our national security. And that includes during the last two wars.

Senator ERVIN. You also take the position that stealing information from the Government is action rather than expression.

Mr. EMERSON. Yes, sir.

Senator ERVIN. And therefore can be punished by the Government quite legitimately.

Mr. EMERSON. That is right. The theft of the information seems to me to be in the category of action, and punishable.

Senator ERVIN. Not making this question applicable to any specific case, can the Government punish the press for receiving information that it knows was stolen from the Government.

Mr. EMERSON. I think the knowledge of the fact that it was stolen does not change the basic rule that once it gets out into the public domain, it can't be called back, and one can't attempt to rectify the situation by preventing publication or punishing publication. I would say that the Government must limit its sanctions to controlling classified material in the first place, and to try to retrieve the situation after the material has gotten out by punishing those who are publishing it is simply destructive of a free press.

Incidentally, it probably will not work. Even if the government had secured an injunction in the *New York Times* case, I do not believe that it would have prevented the publication of that material in one form or another. So that it is a futile—in the end it is a somewhat futile—gesture, if the press is willing to take the chance. The only way that the Government can keep that material secret is by really intensive police measures, which brings us almost to a totalitarian kind of press control.

Senator ERVIN. I appreciate your remarks on that point. I am frank to state that that was one problem which troubled me a great deal. I had been unable to arrive at any positive conclusion, one way or another, in respect to it. Your position is that the value of the freedom of the press is so great to public interest that if the press could be criminally punished for receiving information which had been stolen from the Government the power of the press to inform the public would be seriously restricted.

Mr. EMERSON. That is correct; yes.

Senator ERVIN. In other words, your position is—and I'm not sure you would express it this way—that you have two public interests which come into conflict, the public interest in punishing the receipt of stolen goods or stolen information, and the public interest in the publication of information regardless of how it is acquired; that the interest of society in the publication of the truth is so far greater than the other interest with which it conflicts that it should prevail; and that its prevailing is essential to the complete benefit of freedom of the press.

Mr. EMERSON. That is correct. And that as a practical matter there is no way to attempt to sift out material between what is really dangerous and what is not really dangerous, and so forth; there is no way of doing that which wouldn't destroy the freedom of the press. So one has to have a rule of full protection.

Senator ERVIN. Your conclusion is that thus far the courts have never been able to devise a rule to fit all cases. Consequently each case must be decided more or less on its own basis despite the fact that the courts have attempted to lay down general principles on various aspects of this subject?

Mr. EMERSON. I don't think it is possible to adopt a single formulation for all cases; no. And I attempted to spell out a series of basic formulations which start off from the position of attempting to define what is expression and what is action, and protecting the expression, start off with that fundamental premise, and then deal with certain other kinds of problems. And there are problems, for instance, of permits for parades that raise different questions, because there the issue is a shortage of facilities. You can't have two parades on the same street at the same time. And if you have a parade you have to shut off traffic. There is a use of physical facilities involved, one use of which is for expression, and another use of which is for traffic. And the Government has to reconcile that conflict. But that is not too difficult a problem. It can accommodate both interests by having the parade at a certain time, and so on, or giving a permit to the first one who applies. There are fairly objective rules for that. So you have to have rules for situations of that sort too. But those I think can be developed into a comprehensive theory that will be understandable to people so that people will know what their rights are.

Senator ERVIN. The regulations that are designed to take care of those situations are subject to the limitation that the manner in which they are applied must not interfere with the expression of ideas.

Mr. EMERSON. That is correct. Those are regulations as to time, place, and manner, and not as to content.

Senator ERVIN. I owe you an apology for interpreting your position inaccurately. You think there is a fundamental principle that there can be no Government regulation or prohibition or punishment for the expression of ideas, and that the Government can only act where those ideas go beyond mere expression and into the realm of action?

Mr. EMERSON. That is exactly it.

Senator ERVIN. And that all of the tests which have been laid down in the various cases have been tests which the courts have employed to try to fit that general principle to specific instances?

Mr. EMERSON. Well, the tests the courts have employed, with the exception of Justice Black and Justice Douglas, and to some extent Justice Brennan, they have attempted to determine when the Government may cut off expression even though it is expression. That is to say, they have said, expression is permissible, but if it creates a clear and present danger to a governmental interest it can be cut off at that point. Or they have said, expression is permissible, but if the interest in freedom of speech is outweighed by another Government interest, then the expression can be cut off. They have been looking for formulations as to at what point you cut it off, even though it might be considered expression. I think those formulations should be abandoned, that it is impossible to put them on a basis which is sufficiently objective so that anyone knows what his rights are, and that these principles cut off free speech at a point where it ought not to be. And in the place of those formulations as to at what point you cut expression off, the courts should focus on the question whether the conduct is what is intended to be protected, that is, expression, and having found that, give it full protection, not partial protection.

Senator ERVIN. Thank you for clarifying that aspect. In other words, your position is that as long as you are merely expressing ideas, the Government has no power to interfere.

Mr. EMERSON. That is right.

Senator ERVIN. In enforcing the right of freedom of the press, the principle that the Government can only regulate action, as distinguished from an expression of ideas, is the principle that should control in each case. At the same time, you recognize the difficulty of applying that principle in every given factual situation. As a result, not only does the free society have to take certain risks, but a free press has to take certain risks under certain circumstances?

Mr. EMERSON. That is true, yes.

Senator ERVIN. I thank you for a most illuminating presentation of your viewpoint. I would like to say that I think you have rendered a great service to our society. In my opinion your recent book contains as enlightening a discussion of this somewhat baffling problem as anything I have found.

Mr. EMERSON. Thank you, sir.

Senator ERVIN. Senator Hruska.

Senator HRUSKA. I have no questions. I am sorry I was not here for your testimony, Professor. I assure you, I shall read the record very carefully, because we know of your interest and your accomplishments in this field. I shall study your statement and your replies to Senator Ervin's questions.

Senator ERVIN. Senator Thurmond.

Senator THURMOND. Professor Emerson, it is a great pleasure to have you with us. And I have enjoyed what you had to say very much.

The big question, as I understand, in your opinion is determining what is expression and what is action. Once that is determined, most of the questions would be solved without too much trouble. If it is expression it is allowed, and if it is action, it may or may not be allowed; is that more or less it, broadly?

Mr. EMERSON. That is correct, yes.

Senator THURMOND. Now, if it is expression—for instance, if it was a matter that the Defense Department would feel if exposed would be very detrimental to the welfare of our country, and they might go into court and ask for a restraining order on that basis, then is it your position that they would have to prove to the court that there is a case, otherwise the expression would be allowed. They couldn't just say that it is of grave interest to our national defense if it were allowed, they would have to prove that to a court, is that correct? Or would you go further than that and say it would be allowed even though they convince a court that it would be detrimental to our national interest?

Mr. EMERSON. I would say that even if the Government was able to persuade the court that it would be detrimental to national interest the court should not restrain the publication, that once you start using that test, that one cannot say anything that is detrimental to the national interests, it destroys the whole system of freedom of speech and freedom of the press. So that would not be the issue, Senator. I would say in that situation of publication of classified materials, the court should look at the question of whether there was any action involved, and if the materials have been stolen from government files, then I think that would be considered as action and punishable. But when the material became a part of the general pool of information, and a newspaper published it, I don't think it could be restrained, no matter what the Government said about injury to national interests.

Senator THURMOND. As I understand your position, then, if someone obtained information, even though it was classified, and was stolen information, and even though it might be against the national interest, and it reaches the public domain, it could be published, and the first amendment would protect that.

Mr. EMERSON. That is correct.

Senator THURMOND. But the fellow who stole it of course he committed an action there when he stole it. And therefore if it is a violation of law, then he might be prosecuted under that theory, under the theory of the action that he took rather than the full expression of the first amendment?

Mr. EMERSON. Correct. Of course, I am not talking about any particular case. And I suppose there might be cases where, although action, the action would not be punishable. But as a general proposition, that would be the basis on which I think that that particular question should be settled, yes.

Senator THURMOND. If a matter should be detrimental to the national interest, even though it could be published under the theory of free expression, there is a big responsibility on the free press in a case like that, then, as to whether they would publish something if it was well known that it would be against the national interest, would there not?

Mr. EMERSON. That is correct. And it would be a judgment that the press would have to make. I think that the theory of our Government is that we would trust our citizens to make judgments that would advance the interests of the country, even though they might disagree with the Government's view of what was in the national interest.

Senator THURMOND. A great deal of material is held by Government agencies, specially the Defense Department and the State Department, that they have never released. And I had a fight on this in 1961 and 1962 in muzzling of the military. I tried to get from the Government at that time—Kennedy was President, Mr. McNamara was Secretary of Defense, and Mr. Rusk was Secretary of State—I tried to get from them the policies of our Government. And it was impossible to get its policies. The President sent down a letter claiming immunity, that the executive branch was immune from providing that information. And the Secretary of Defense came in and presented that letter, and therefore he wouldn't testify and would not present that information to the committee. And the Secretary of State did the same thing. Do you feel that the information concerning our policies is of such a nature that it should have been withheld that way?

Mr. EMERSON. That raises a different question, I think, Senator. The question we have been talking about previously was the right of the press to publish information which came into its hands. Now, there is another question which you raise, and that is the right of a member of the legislature to know the basis of the policy adopted by the executive branch, or the right of the general public to know the basis on which the executive branch is operating. That is a very difficult and complicated area. It does seem to me that the Executive does have the privilege to retain certain information and not make it public, information which would damage a person individually, information in the Government investigating files, and various kinds of information which are mentioned in the Freedom of Information Act. And therefore I don't think one can take the position that there is an absolute right of a member of the legislature or a member of the public to obtain any information in the hands of the Exeutive. That position seems to me would be untenable.

Senator THURMOND. Wouldn't the Congress have a right, though, to know the policies of our Government, since they have to legislate.

Mr. EMERSON. Certainly, without a doubt. And I think the Executive withholds far more material from Congress than it should. I am simply saying that this situation is not the one I was talking about in which I would apply an absolute rule or full protection rule to the acquiring of information. I was talking about the publication.

Senator THURMOND. It is a different theory, I understand.

Mr. EMERSON. Yes.

Senator THURMOND. The right of the legislative branch to know the policies of our Government, or else how can they legislate properly unless they do?

Mr. EMERSON. That is correct. And on that I would say that by and large the legislature and the public should be able to obtain all information from the Executive. I would start out with that proposition. And then I think you have to make some sort of exceptions in certain kinds, in limited kinds of situations, where it would damage a person individually, or where negotiations may be going on in a diplomatic area that would at the moment be interfered with, or some exceptions of that sort. I would start out with the proposition that everybody has a right to know everything, as a starting point, and then try to formulate some exceptions to that. This is an area where I think it is necessary to formulate some qualification.

Senator THURMOND. Now, the matter of pornographic material has been discussed a great deal, and just what Congress can do about that. And the pornographic publishers have claimed that they have a right to publish anything, and so forth. I would like to ask you this question. Do you classify the publication of pornographic material as action or expression, and to what extent can pornographic material be regulated without violating the First Amendment?

Mr. **Emerson**. My position is that the publication of pornographic material is expression. I don't see how one can say that it is not a communication of ideas or that it does not qualify in every other way as being expression. I would say, therefore, that under the first amendment there cannot be any restrictions on the publication of pornographic material. The only point at which it seems to me that there could be limitations under the First Amendment would be if under certain circumstances the publication of pornographic material could have the effect of action in the sense that it was forced upon someone. I don't think anyone should be forced to read or look at pornographic material. And consequently, in a situation where it can be said that it was not the voluntary act of the person in reading the pornographic material, but the material was forced upon him against his will, in that limited situation, which doesn't come up very often, then I would consider that within the category of action which could be regulated.

There might also be a qualification as to children. I don't know much about the psychology of this, but certainly the system of freedom of expression implies a certain maturity, it implies a certain sophistication. It implies an ability to accept ideas and reject ideas, and to make up your own mind. Thus it involves a maturity which at some point I suppose a young child who is growing up doesn't have. And consequently I would not necessarily apply the same rules to children as to adults, because I think the system of freedom of expression is adult, is a very difficult system to operate, and is meant for adults, not for children. I don't mean by that to say that children have no rights under the First Amendment. I am not saying that at all. I am saying that a full fledged system of free expression in which you can look at anything, see anything, and say anything, is not necessarily one that is meant for a society that isn't mature.

Senator **Thurmond**. Many, many Senators, and House Members too, have received communications objecting to the publication of filthy material, obscene material, which indicates that the public is strongly opposed to that kind of material being made available to the young people and others. You don't feel that Congress would have the power to take some action to prevent material of a filthy or obscene nature from being made available to the young people and others?

Mr. **Emerson**. No, Senator. The mere fact that the public felt that pornographic material should be suppressed I think would not permit Congress to suppress it if that violated the Constitution. And I think it would. In fact, the Constitution and the Bill of Rights are intended to a very substantial extent to be for the protection of a minority against the majority. So that the mere fact that there would be a majority vote in favor of a certain action would not permit the Government to take that action if it would violate the Constitution.

Now, I recognize the significance of the public feeling about pornography. But I think that problem is best met by trying to convince the public that it is the right of any individual to read pornography if he wants to, but that it should not be forced upon him. The public view is not that the pornography will harm them, the public view is that pornography will harm other people. I don't think that is a sound position. I think we could convince them that if anyone wants to read pornography in his home, for instance, the Government has no business interfering with that. And the controls, therefore, should be confined to situations where pornography is forced upon one's perception against one's will.

Senator **Thurmond**. Do you feel that Congress could pass a law to prevent the sale of it to minors?

Mr. **Emerson**. If that could be done without also preventing the sale of materials to adults, then I think it could be argued that Congress could. As I say, I consider the rule as to children to be different, and it could be argued—and I am not really passing an opinion one way or another about children, because I have never gone into this adequately—but it could be argued that you could limit it as to children. But the problem there, Senator, is that it is almost impossible to curtail or punish the distribution of pornographic material only with respect to children. The restriction would inevitably spread over and prevent general distribution, or else it is ineffective. So that as a practical matter I am not sure that is the solution.

Senator **Thurmond**. If a man should be prosecuted for selling materials in a community in violation of the law, and a jury of that community acts on the matter, as they have in many cases, you don't feel that such a law as that should be sustained?

Mr. **Emerson**. No. The basic principle here is a constitutional one, Senator, it is not a question for the jury to decide. It is not a question for the majority to decide. It is a question of the application of the constitutional principle that expression should be free. And pornography may be some people's kind of expression and not other people's kind of expression. The whole history of the first amendment, I think, has shown that you can't cut off one kind of expression and not another. The suppression of pornography as it works out is actually very much of a class matter. High class pornography is art, and is protected. And low class pornography is pornography and is not protected. But the Government shouldn't be making judgments of that kind, even though a jury might feel it was wrong.

Senator **Thurmond**. Of course lawyers and judges in this country differ a great deal on this question.

Thank you very much.

Thank you, Mr. Chairman.

Senator **Ervin**. As a matter of fact, the courts originally held that the First Amendment didn't protect obscenity at all, didn't they?

Mr. **Emerson**. Yes, the original holding was that obscenity simply was exempt—they didn't put it in those words, but they said it was not expression and not protected. But I think the court has moved from that position.

Senator **Ervin**. Its present position is an illustration, it seems to me, of the thesis that Dr. Levy expressed, that the words of the First Amendment are susceptible to interpretation which goes beyond what the original objectives of those who phrased it were. And beginning with the *Roth* case, I think in 1958, we have had a series of new decisions dealing with the question of pornography. And I am glad Senator Thurmond asked some questions about it, because that is another area of this field that troubles me. The courts have held in respect to matters that are considered seditious that while the Government can't punish or prohibit expression, that it can punish the advocacy of action to make ideas effective. It seems to me that there might be some room for the application of that principle to pornography. If pornography, for example, is presented in such a fashion that, as an example, amounts to urging a man to go out and commit rape, or to go out and commit fornication and adultery, which are crimes, would it be possible for the Government to reach that on the theory that it has ceased to be expression and has become action.

Mr. **Emerson**. I don't think so, Senator. In the first place, I think the evidence indicates perhaps the opposite, that pornography tends to make it less likely that a person would go out and commit action. But even if it were so, I don't see how one can avoid the conclusion that pornography is expression.

Now, the Supreme Court has never been able to define what pornography is. And none of its attempts——

Senator **Ervin**. One of the judges said he couldn't define hard pornography, but he knew what it was when he saw it.

Mr. **Emerson**. Well, that is the best definition that has been advanced so far. But that isn't much of a definition, because if the material is a hundred years old, then it is historical, and it is permissible. If it is in good taste, it is permissible as a work of art. If it is scientific, it is permissible for that reason. So really only one kind of appeal to erotic interests is punished as pornographic. And that is a discrimination against those people who like that kind of expression. The only sensible rule for the Supreme Court to take is my rule, that pornography is expression, and permissible, except insofar as it is forced down somebody's throat. And at that point it becomes action, and could be regulated.

Senator **Ervin**. Is this correct? Your position is that even if such material has any effect on the individual who reads it or observes it, that the material merely engendered lascivious ideas in his mind but does not spur him to action?

Mr. **Emerson**. The effect cannot be the test—that is right, Senator—because all ideas have an effect, otherwise there would be no point in trying to persuade someone of something. That is the whole point about expression, that it does attempt to persuade one to take action, and it has the great advantage that one can sort of try out in advance this course of action or that course of action without committing himself. And one can have a conflict between this course of action and that course of action in a public forum without having to engage in violence to settle the issue. But one cannot draw a line on the basis that expression has no effect on people. It certainly does, and was intended to. And any theory must accept that fact and operate on that basis.

Senator **Ervin**. Any ideas whether they are good or whether they are bad have some effect, do they not?

Mr. **Emerson**. The fact that an idea is good or bad is for this purpose irrelevant. As Dr. Levy said, many ideas that have been considered very bad have turned out to be good. And even if an idea is bad, it is a good thing to have people arguing against it. And even if there is nothing to be said for it whatever discussion of it arouses in the community an understanding of what should be the proper solution. So that even bad ideas make their contribution. That is the basic theory on which the amendment is framed.

Senator **Ervin**. There is just one other matter that I haven't alluded to but about which I think you made a very cogent statement and that is that there should be no more prior restraint allowed against partial publication than there is against complete publication. This is based on the fact that all publication is designed to enable the public ultimately to know the truth, and that a partial publication conceals or withholds a part of the truth, making it more difficult for the public to reach the true conclusion, is that correct?

Mr. **Emerson**. Yes, that is correct, that one doesn't know the truth unless one has all the facts at one's disposal; one cannot make as good a judgment on the basis of partial facts, yes.

Senator **Ervin**. For that reason a partial prior restraint is ultimately as injurious to the public interest as a total prior restraint?

Mr. **Emerson**. Yes, that is right, Senator. And also a partial prior restraint becomes a full prior restraint while you are trying to figure out whether the Government can impose a partial restraint. That is, if you have a rule that prior restraint can be imposed, if there is a likelihood of a grave injury to national security, then the very process of finding out whether or not the publication is going to do that means that it is held up while it goes through court. And the Government then makes the decision as to whether it can be published. So that a partial prior restraint becomes in effect a full prior restraint.

Senator **Ervin**. When I first learned of the decision, as they call it—there are nine separate opinions, in the *Times* case and the *Post* case—I welcomed it. But when I read all of the opinions I was left with some very substantial misgivings, because some of those opinions intimated to me that perhaps some of the judges did favor prior restraint. This indicates to me the possibility of future court decisions sustaining a prior restraint on publication. I would be glad to have any comments you might care to make on that.

Mr. **Emerson**. I would agree with you, Senator. I think there are only three of the Justices whose opinions indicated that they would reject any kind of restraint as illegal, or would consider it only in narrow and precise circumstances. The other Justices indicated that the rule was that some prior restraint could be used, that under some circumstances a newspaper could be enjoined. Now, as I say, that seems to me wrong on two grounds. One, on the matter of principle, that under no circumstances should publication be enjoined. And the second is that you cannot apply that rule, as I just said, without actually instituting a system of prior restraint, because the very effort to apply a partial prior restraint means that for a certain period of time, the period of time during which the Court is acting on the question, there is a prior restraint. So that the only rule that is consistent with the First Amendment idea, that prior restraint was totally abolished by the First Amendment, is a rule of no prior restraint under any circumstances.

Senator **Ervin**. Thank you very much. We are very grateful to you for helping us understand those issues.

Senator Hruska will introduce the next witness.

Senator **Hruska**. Mr. Chairman, the next witness is Harold Andersen, president of the World Publishing Co. which publishes the *Omaha World-Herald*. The *World-Herald* is Nebraska's only statewide daily paper with a circulation of more than 250,000.

Prior to his elevation to that post 5 years ago, Mr. Andersen had spent 6 years in general management positions with the newspaper.

Of more importance to our considerations today, however, is the fact that Mr. Andersen is a veteran newsman with 13 years of experience in a variety of news capacities.

My own acquaintance with him goes back to 1946 when he was doing a most enviable job of covering city and county government in Omaha.

Omaha is the county seat of Douglas County. And at that time I was both the source of his information and the source of some of his news service, because I was the chairman of the Douglas County commission.

He later served as head of the *World-Herald's* state capitol bureau in Lincoln.

Mr. Andersen is a director of the American Newspaper Publishers Association and a trustee of its foundation.

We welcome you here, Mr. Andersen.

Senator **Ervin**. We are delighted to have you. Thank you for your willingness to come and give the committee the benefit of your observations in a field in which you have had such experience.

STATEMENT OF HAROLD ANDERSEN, PRESIDENT, OMAHA WORLD-HERALD, OMAHA, NEBRASKA

Mr. **Andersen**. Thank you, Mr. Chairman. And thank you, Senator Hruska, for that gracious introduction.

Our acquaintance does indeed go back a good many years. And it has been one of great respect and admiration on my part over those years.

I was pleased to see Senator Hruska move from his important job on the Douglas County board to an even more important position in the House and then the U.S. Senate.

Senator **Ervin**. He has rendered magnificent services for his country in the U.S. Senate.

Mr. **Andersen**. I commend this committee for addressing itself to this extremely important subject and I appreciate the opportunity to testify.

I will try not to repeat a good many of the things which have been said by previous witnesses from the news media. I will instead try to point out where I might differ and where I would place stronger emphasis.

I would, for example, place stronger emphasis on the responsibilities of the news media. Senator Hruska very properly pointed out, in his statement during the first week of these hearings, that among the most crucial issues of the day are the rights and responsibilities of the press.

Freedom of the press is not a newspaper's right, really, but the people's right to know, to be accurately informed. We are guardians of that right—and this is a very heavy responsibility indeed.

On the whole, the Nation's newspapers do an admirable job of fulfilling the obligations which go with our First Amendment protections. But to do a better job should be our constant objective. These hearings, I think, should encourage us in our efforts to do that better job.

At the start of these hearings, both Senator Ervin and Senator Hruska indicated their feeling that the First Amendment should not be used as a shield against valid criticism of the news media. I wholeheartedly concur in that viewpoint.

Good newspapers—that is, the great majority of the Nation's newspaper—are consistent self critics. We regularly examine our own performance and work to improve it.

When we are so committed to the principle of critical self appraisal, why should we bridle at critical appraisal from the outside? We should welcome such criticism and respond to it in a positive way.

I believe that, happily, relatively few of the Nation's news media are unduly sensitive to criticism. (Perhaps I should add that while few in number, some of these thin-skinned newsmen are quite loud of voice.) Most of us know that if we are to dish it out, we should also be prepared to take it.

Speaking of criticism, let me say I reject the conspiracy theory—you know—the allegation that the Nixon administration is trying to intimidate the news media by a calculated campaign of criticism and thinly-veiled threats. Hogwash.

Let me illustrate.

Assistant Secretary of Defense Daniel Henkin is a highly-placed member of the Nixon administration. Mr. Henkin and his associates had, in my opinion, a very legitimate complaint against the distortions and slanting in the CBS program, "The Selling of the Pentagon." But when it came to the issue of whether CBS should be subpenaed by a congressional committee to produce certain materials connected with the program, Mr. Henkin sided with CBS. Just as the Pentagon is not for sale, he said, "not for sale either is the right of a free press to criticize the Pentagon."

Now there is a real conspirator for you! If Mr. Henkin is supposed to be part of an administration plot to muzzle hostile newsmen, someone at the White House, had better fill him in on the game plan.

Speaking still of criticism, let me say I feel that some of Vice President Agnew's criticisms of the media have been justified. I fail to understand the almost hysterical reaction to those criticisms in some quarters.

So far as I know, Mr. Agnew hasn't dismantled a single TV network or cost a single TV commentator his job. And at last report the *New York Times* was still publishing daily.

As for intimidation, any news medium that is intimidated by criticism—from the Vice President of the United States or anyone else—was a pretty timid news medium to begin with and doesn't merit much sympathy, in my opinion.

Speaking of "The Selling of the Pentagon," as I was earlier, our newspaper commented in an editorial entitled, "The Smearing of the Pentagon," but we joined other newspapers in editorially opposing the effort to subpena CBS officials. In this case, you might say, some of us were defending CBS's right to be wrong.

I agree with an earlier witness, Walter Cronkite, who, while confessing imperfections, said: "How could we be improved by outside monitors without destroying the independence which is so essential to a free press?"

Now as to the specific issue of whether first amendment guarantees apply to radio and TV:

An earlier witness told this committee that he has no doubt whatsoever that those wise Founding Fathers intended to describe all means of communicating ideas when they assured "freedom of the press."

I must confess that my ability to divine other people's intentions does not go back beyond the grave. It certainly doesn't reach back 180 years. But I have serious reservations about the proposition that a heavily regulated, licensed industry like broadcasting has automatically and inevitably the same First Amendment protections afforded the Nation's newspapers.

Certainly our courts have taken a contrary view in a number of significant cases. It is possible, of course, that future court decisions will throw a different light on this matter. But court decisions to date in a number of cases have cast serious doubt on the ultimate application of first amendment guarantees to the electronic media.

So much for the constitutional issue. As a matter of public policy, I think a case might well be made for some kind of legislative emancipation for at least the news and public affairs operations of the broadcast media. Call it an electronic bill of rights or whatever, some kind of legislative relief may well be in order.

As to the Pearson bill pending before this committee:

The intent is certainly laudable, and we are grateful to Senator Pearson for helping bring this problem into congressional focus. But the subpena issue is pending in three cases before the Supreme Court. I join other witnesses who have suggested action be deferred until the Supreme Court has ruled.

In passing, I might say I see no reason for the special consideration which S. 1311 would give to the proceedings of Federal grand juries.

As to publication of the Pentagon papers and prior restraint:

I think a potentially very dangerous precedent was established when the United States Government took the step of attempting to establish prior restraint. Ours was among the newspapers which questioned the judgment of the *New York Times* and other newspapers which published the Pentagon papers. But I certainly defend the right of these papers to make that judgment and take the consequences—to publish at their peril.

It seems to me that the danger of abuse by publication in such cases is much less than the danger of censorship or prior restraint.

An earlier witness, Representative Reid, has suggested the need for legislation forbidding prior restraint.

I am not sure that legislation is needed, but I suggest the subject certainly is a proper one for most careful consideration by this committee.

Incidentally, I think the least defensible performance in this whole matter of the Pentagon papers was not so much publication, or overzealous classification of documents, but the Government's failure to maintain security and some semblance of control over documents that were classified.

If the papers were as sensitive as the Government alleged, handling of them by the responsible agencies was incredibly slipshod, in my opinion.

I certainly do not agree with those critics who say that the press has virtually no restraints upon it, that it is above the law, and therefore some kind of regulatory curbs are needed.

Libel laws, contempt citations, criminal action if criminal violations are involved—we face all of these potentially restraining influences. We do indeed publish at our legal peril.

But, ultimately, the most effective safeguards against abuses are not legal restraints. They are the press' own sense of professionalism and responsibility and, finally, public approval or disapproval—the public's right to stop reading us.

Mr. Chairman, in your letter inviting me to testify, you said: "We will be seeking to create a better appreciation of the First Amendment's purpose and its crucial importance to a free society."

I am pleased and proud to have had the opportunity to join with you and your associates in your effort to advance that vital objective —better understanding of the first amendment and its crucial importance.

Thank you.

Senator Ervin. I want to commend you for the frankness of your statement.

I take it from your statement that you agree with me that the First Amendment extends its freedoms to all people within the borders of our country regardless of whether they are wise or foolish, whether they are profound or shallow, whether they are devout or ungodly, and whether they love our country and its institutions or hate them.

Mr. Andersen. Indeed I would agree with that, Senator.

Senator Ervin. And you express the opinion that you are very doubtful as to whether any legislation is needed in this field.

Mr. Andersen. Yes. I do have reservations. We have fared pretty well to date without specific legislation, and I think that perhaps we can continue to fare well.

Senator Ervin. You expressed an opinion with respect to the proposed bill to create a new confidential relationship between newsmen and their sources, that it would be better to wait until the three cases that are now pending for hearing in the Supreme Court are decided.

Mr. Andersen. Yes, sir.

Senator Ervin. I am inclined—I have not made a final decision on the subject—to agree with you that perhaps the First Amendment itself may afford a far better protection in this field than anything that Congress can write.

Mr. Andersen. I think that may well prove to be the case.

Senator Ervin. In other words, Congress can undoubtedly pass laws which further the purposes of the First Amendment, and it cannot pass laws which retard those purposes. There is always danger in a legislative act which retards rather than advances.

Mr. Andersen. Even if the intention is to the contrary.

Senator Ervin. I am sure you are familiar with the opinion of the appeals court in the *Caldwell* case, which is one of the cases pending before the Supreme Court.

That opinion, in my judgment, recognizes that society has many interests, and that sometimes one of its interests comes into conflict with another of its interests, and must be reconciled. In the *Caldwell* case the interest of society in having the public informed came into conflict with the interest of society in enforcing the law.

I hope you agree with me that the court did a pretty good job of reconciling these two conflicting interests. They held that under the peculiar facts of that case the reporter could not be compelled to go before a grand jury to testify since there was no overriding necessity for a government to have his personal testimony. The government could obtain the information from other sources.

Mr. Andersen. Yes, sir. As you know, there are some who say that the *Caldwell* decision didn't go far enough, and that we should have the absolutely unqualified right not to testify. I think the circuit court of appeals did a good job of distinguishing when it would be appropriate to allow newsmen to be subpenaed and when it would not be appropriate.

Senator Ervin. I certainly agree with you. and I would be inclined to think that if the Supreme Court goes along with the substance of that decision, there is no need for legislation in that field.

Mr. Andersen. I think so too.

Senator Ervin. I am intrigued by your comments regarding Vice President Agnew's statements. I had some students from Yale University who came to see me about a year ago to discuss the Vietnam war. They were very much offended by the Vice President's remarks and did not like the kind of speeches he was making. I pointed out to them that they all had been exercising their right of freedom of speech quite freely during our meeting for at least an hour and a half to 2 hours, and that I believed Vice President Agnew had just as much right to freedom of speech as they had. I will defend their right of freedom of speech as well as the Vice President's right of freedom of speech.

As I stated in my opening statement I do not think that every criticism of the press by any public figure is an attack on the first amendment. And I think it is essential to good government in this country that any public official has the right to speak out. My criticism of most public officials is that some of them have more discretion than valor, and don't come out and speak as frankly or freely on public issues as they should.

Mr. Andersen. I think it is unfortunately true in the whole area of public discussion and controversy in our country today that many people seem to almost automatically ascribe ulterior motives to their critics or to people on the other side of the issues. It seems to me that there is a possibility that those critics or those on the other side may be right or may have as good motives as we do. I don't say that Vice President Agnew has been right on every utterance, but I am not one of those who would allege that he doesn't believe in the freedom of the press.

Senator **Ervin**. I am impressed by another one of your observations, and that is that people have the right to be wrong. That is the whole concept, I think, that underlies freedom of speech, freedom of the press, and all other freedoms. If a man doesn't have the right to be foolish as well as wise, he really doesn't have any freedom at all.

I also want to commend you for emphasizing the fact that the press not only has rights, but it has responsibilities. I think if there is any one tendency in our Nation today that should be decried it is that we lay too much stress on rights and too little stress on responsibilities.

Mr. **Andersen**. I would agree with that.

Senator **Ervin**. Is it your feeling also that the best way to get the press to discharge its responsibilities properly is to leave the press free?

Mr. **Andersen**. Yes, sir.

Senator **Hruska**. Along that same line, Mr. Andersen, this portion of your statement is very interesting. "Freedom of the press is not a newspaper's right, really, but the people's right to know, to be accurately informed."

After all, the freedom of the press isn't exercised only for the gesture that it constitutes. Whatever press there is, the object of the press is to inform people and to have an impact on people. So we have to go that step further. The freedom of the press is only an instrumentality by which the people may be informed. Isn't that the thrust of that statement that you made?

Mr. **Andersen**. It is. And this makes it therefore all the more important that we think of our responsibilities, because we are in this respect representing all the people, and the responsibility is therefore all the heavier on us.

Senator **Hruska**. You reject this conspiracy theory which some people hold that the Nixon administration is trying to intimidate the news media by a calculated campaign of criticism and thinly veiled threats.

One of the witnesses, however, suggested that there was a difference as to who might do the criticizing, not so much in the press as it would be in radio and TV. And it is outside criticism of the press. Sometimes it is the substance of the criticism, and sometimes it is the identity of the person who makes it. Certainly if the Chairman of the Federal Communications Commission were heard to say that it was well to remind the holders of licenses that they do place their licenses in jeopardy if they don't perform properly, that is one set of criticisms. On the other hand, if some person without the power that a Federal Communications Commission Chairman has would make that criticism, it would be very easy to accept and to deal with. Do you see some merit to that type of situation as a basis for intimidation or unjust criticism?

Mr. **Andersen**. Yes; I do. It seems to me that in Mr. Agnew's case specifically, I doubt very much if he could get the FCC to lift the license of a TV station that displeased him, or that he could effectively exert influence to get a commentator or a network somehow disciplined. I don't think he could get that job done.

Senator **Hruska**. Thank you very much for appearing here. You have a very splendid statement, as the voice of one of the great newspapers of the Middle West.

Mr. **Andersen**. Thank you. It is my privilege to appear.

Senator **Ervin**. Thank you very much for your willingness to appear.

Counsel will call the next witness.

Senator **Hruska**. May I have the privilege of introducing Mr. Reutzel.

He has had a long career in Nebraska newspapering. For many years he has been associated in the publication of several weekly newspapers in my State.

For the past 10 years he has been editor of the *Norfolk Daily News*, a publication with a circulation of 21,000 serving the northeast part of Nebraska.

He also edits the *Livestock Market Digest*, a weekly publication which serves livestock interests throughout the Nation.

Mr. Reutzel is a past president of the Nebraska Press Association.

He is also a gentleman who can look at the relationship of the press and government with a balanced perspective. He spent 7 years in executive positions with the Federal Civil Defense Administration and later with the Office of Civil and Defense Mobilization.

So he spent some time in Washington and in Government. But he is basically a newspaperman.

Senator **Ervin**. Mr. Reutzel, I am delighted to welcome you to the subcommittee, and to say on behalf of the subcommittee that we deeply appreciate your willingness to appear and give us your observations on what I consider one of the most important aspects of our national life.

STATEMENT OF EMIL REUTZEL, JR., EDITOR, NORFOLK, NEBRASKA, DAILY NEWS

Mr. **Reutzel**. Mr. Chairman, your invitation to appear before this subcommittee and present opinions on matters concerning the guarantees contained in the First Amendment, the performance of the press and its relationship to government and the legal system is very much appreciated.

There is much to criticize about the news media today; much about government. The problem is to apply ourselves to doing this freely and in constructive ways that will create a better informed public, and not try to outline new rules which seek to attain an ideal relationship between the press and the government that cannot exist and should not.

Reference is made by both representatives of the press and of government at every level to the deterioration of relationships between these two vital elements of society.

I wonder if the relationship has not been characterized as deteriorating since the Continental Congress?

For the public's benefit, they must retain an arm's length relationship. There is inherent conflict because the press must be watchful of what government does.

There can be nothing but informal ground rules about disclosure of confidential information on the part of a free press; no firm guarantees and no prior restraints. The press cannot be guaranteed that it will have access to all information at all times, because confidentiality needs to exist between a President and his close advisers, for instance; between a Senate committee and its informants: between a newspaper and its sources of information. The job of the press under such circumstances is to keep digging.

It is helpful to have the duty of the press to dig and probe acknowledged and reaffirmed in Washington as in city hall, whatever the embarrassment caused. It is also helpful to acknowledge the duty of government's officials occasionally to criticize this performance, just as readers ought to, without overdrawn charges about repression.

Freedom of the press and freedom of speech have been well served in America for nearly 200 years because the first amendment protection was simply stated and, for the most part, wisely interpreted. This makes me doubtful of the merit of prescribing in new law that a newsman shall be protected and provided certain formal legal privileges against the disclosure of confidential information and the sources of that information.

The extent of this problem ought to be clearer after the Supreme Court's rulings this session in *Caldwell* v. *US* and *Branzburg* v. *Pound*. Especially is this so when the broad exceptions suggested in S. 1311 are included. For instance, the validity of a privilege claim could remain subject to determination by a U.S. district court, which would subject the newsman to legal formalities even if he was then sustained in his nondisclosure claims. The protection for the newsman would not be absolute, nor do I believe it should be.

A related matter of vast importance—the free press-fair trial issue—has thus far been satisfactorily dealt with by the voluntary adoption of guidelines in some cases, by commonsense practices in others.

The latter includes recognition that it is the retention of a fair-minded juror—one who can close his mind to what has gone before and judge the merits of a case solely on presentations in the court—which guarantees a fair trial. Under that condition—and no less than fair-minded jurors should be accepted in the legal process—pretrial publicity is relegated to its rightfully minor place as an influence of jurymen.

In these days of increasing activism and involvement among some elements of the press, it will be more tempting to require a reporter's testimony, the revelation of his sources and information. But, hopefully, this along with excesses of interpretive reporting, is a passing phenomenon, and objectivity will continue to be served with increasing diligence as has been the case in the past. The danger here from journalism's standpoint is that its activists might become so involved as to prejudice inherent rights now recognized, for the most part informally, to keep confidences and protect sources. The argument on the issue centers not so much on a journalist's right to do so in most cases as on the matters that should be exceptions. The era of the activist will pass just as the era of the circulation-building muckrakers did.

Despite the reams of publicity given to Daniel Ellsberg and the Pentagon papers, that according Vice President Agnew's comments about the objectivity of the media and those who suggest they have been repressed because he has criticized their performance, to the issue of fair trial and its supposed conflict with the rights and responsibilities of a free press, to the rights of newsmen to maintain a privileged relationship with their sources, the greatest danger in existence today to the principles contained so briefly and eloquently in the first amendment is in another area. It is the attempt on the part of the Government, through the Federal Communications Commission, to impose special judgment on radio and television.

Both of these media are capable of influence in ways which the writers of the Constitution could not have envisioned when they set forth the doctrine on the press and on speech. They could not have been aware of the instant communications available to the press and to all media, either; to the use of photographs or the detailed reporting of events of all kinds. Yet the doctrine has proved of inestimable value to the newspapers, to magazines and to all forms of the printed press. Vast amounts of information have been produced—most of it factual, some conjecture, portions of it, unfortunately, fiction and damaging publicity. But the net effect has been good service—and constantly improving service—to a well informed, free society which the press has had a great part in molding.

But when the Government took leave of its licensing powers for the media and determined that someone should go a step further and determine if the licensees were presenting things "fairly," then at that instant it began to encroach upon freedom of the press and of speech in a literal sense.

It was for a good purpose, of course. Who doesn't want fairness? Who has insured it in the newspapers?

Readers and critics have, because there have been competing sources for the news; because the excesses of a prejudiced reporter and an unprincipled editor or publisher will generally reveal themselves. But those unworthy people are so few in number and so lacking in sustained influence in a free society as to be of no danger. Certainly they cannot be dealt within any way through law unless their activities are criminal in nature or become libelous.

If on subscribes to some of Mr. Agnew's criticism of the media—as I do—and admits that Edith Efron might have a small point with her word count on bias in political coverage of the television networks, does it follow that the solution is in a better administration of the fairness doctrine and equal time rulings?

Not at all. These things have already been in existence long enough to prove their worthlessness. The time has come to tell the broadcasters they are on their own; to tell the people, too, who are apt to become more healthily skeptical because they would then know that a broadcaster would be bound only by his conscience about "fairness." He would not mechanically be meeting guidelines to please an agency of the government which can only do as Edith Efron did, and count words or time.

Summing up one editor's views on the free press matter: The less enactments the better, including those which would dictate to candidates how much they can spend on advertising and the rates that can be paid. Proof of the worth of this hands-off approach can be found in an economically independent and thriving press which assures that the *News* and the *Mail* will be able to confront the *Times* and the *Post* with what are believed to be errors in fact-gathering and in treatment of the news.

Similarly, without fear of equal time rulings, radio and television ought to be free to point out the errors in fact or judgments which it finds apparent, within fear of intervention by regulatory third parties. This competitive interchange is needed. It exists. It is threatened only when competitors fail to regard each other skeptically; when reporters do not do their jobs and editors fail to demand truth and fairness.

But no legislation and no licensing requirements can overcome such errors—only a press free of any but its own restraints can.

Thank you.

Senator ERVIN. You have a most excellent statement. I am glad you touched on one thing that troubles me—decisions like the one rendered in the *Sheppard* case in Ohio, where the Court, years after the trial, set aside a conviction and punishment on its ex post facto judgment that the press had in effect denied the defendant a fair trial.

I know that people who serve on juries are fallible human beings, like the rest of us, but I believe it is absolutely necessary for us to base the administration of justice on the theory that people who are called to serve as jurors have sufficient character and intelliegence to decide a case on the evidence that is produced in the courtroom. I question the capacity of members of the Supreme Court to take a dive, years after, into the innermost recesses of a juror's mind and determine that he had been influenced by publications in the newspaper which the juror in fact may never have read.

Mr. REUTZEL. I certainly agree with you.

Senator ERVIN. Judges in most cases where there is great deal of publicity, based on my observation in many trials, always go into this question very thoroughly with those who are called to serve on the jury before they accept those persons as jurors.

And of course I think it is all right to set aside testimony which shows positively that a juror was influenced by something other than the evidence in the case.

But despite the great knowledge of Supreme Court justices, I just think they are mentally incapable of diving into the innermost recesses of the minds of other men who have served on juries 8 or 9 or 10 years after the case was tried and deciding that these people were influenced by something other than the evidence.

I don't know any way than for people to go in and seek justice on the procedures already there. So I think that setting aside the verdict and punishment years after the trial, I think a remedy like that is like using an atom bomb to getting rid of what you might suspect you are mistaken about.

I am much intrigued with your views, which coincide with those expressed by some of the broadcasters, that the First Amendment freedoms were intended to cover all media of communications, including those which are not in existence at the time the first amendment was written. Therefore, the best way to deal with this subject is to ultimately depend upon self regulation—self restraint on the part of those who exercise the right to inform the public through any media.

Mr. **Reutzel.** I think they should be really turned free, Mr. Chairman. And I hesitate to think what would be done today to write an amendment protecting the freedom of speech and the press knowing about television and radio broadcasting.

I have the tendency to think it would be made so hopelessly complicated that we would need a much vaster legal system to try all the cases. I simply think that the first amendment protection should cover it, and I think it does cover it, but it has not been made to apply in this way. We should not allow licensing procedures to influence judgment in this field.

Senator **Ervin.** You believe as I do that there is always danger in attempting to regulate freedoms, and that for some reason people who exercise governmental authority as regulators are always subject to the temptation to over regulate, are they not?

Mr. **Reutzel.** The temptation has not been passed up.

Senator **Ervin.** Your position is that you want a very minimum of regulation to ensure individuals their rights of freedom of speech and the right to be informed?

Mr. **Reutzel.** Yes, Mr. Chairman.

Senator **Ervin.** I want to commend you for the excellence of your statement, with which I find myself in much agreement.

Mr. **Reutzel.** Thank you, sir.

Senator **Ervin.** Senator Hruska.

Senator **Hruska.** Thank you, Mr. Chairman. I join you in expressing commendation to this witness for the common sense of the prairie which asserts itself in the pages of his testimony.

He comes from an area that is quite typical of midwestern American, where the number of people is small and where the number of square miles is relatively numerous. And yet it is that type of environment which does generate a lot of independence and a lot of vigor which are worthy attributes to anyone, especially in the newspaper field.

In your statement, Mr. Reutzel, you indicated that you had grave doubts about the merit of prescribing a new law that a newspaperman should be protected and provided certain formal legal privileges against the disclosure of confidential information and the sources of that information. And at another part in your statement you say, there can be nothing but informal ground rules about disclosure of confidential information on the part of a free press. And of course you point properly to the history of the free press in the last 200 years to back up those conclusions and those statements. Now, part of the self criticism of news media undoubtedly involves the examination into the sources of information and its means of procurement. Could we have your thoughts on how you would handle information coming into your possession in the form of documents which you knew to be stolen, and improperly so.

Mr. REUTZEL. In the remote chance that a newspaper in our category received documents, we would judge simply by the nature of the documents themselves about disclosure. And we might in some instances feel that it warrented going directly to the authorities and prosecuting the individual who had the document.

I don't think we need to be afforded any special protection. If we don't want to disclose the source, then the reason is urgent enough for us to take whatever punishment there may be because of this refusal. And there can be a deep sense of dedication, perhaps. But simply to give us blanket authority to be protected against disclosure I don't think is warranted.

I wouldn't know how to relate what we would do about the documents—if they were stolen—what we would do with them without knowing what they contained.

Senator HRUSKA. The nature of the documents, and whether they infringe upon national security, for example, would that enter into the picture.

Mr. REUTZEL. Certainly it would.

And we might feel so deeply involved with such an issue that we would publish them and publish the sources of the information, or we might conclude that the information they contain can be paraphrased without revealing the sources, which is and has been possible in the past in many revelations of confidential information—simply not describing the source. So there are many ways that those things can be handled.

Senator HRUSKA. Thank you very much. Again I want to commend you for your statement and its substance, and the trouble that you have taken to come all the way from Nebraska to Washington to testify before our subcommittee.

Mr. REUTZEL. Thank you.

Senator ERVIN. On the point Senator Hruska raised, you say that a lot of these problems can be solved in an informal fashion. Now, normally a newspaperman is not an eyewitness to the events that he describes, especially where it involves crime, although there may be exceptions.

So most of the information he gets is hearsay information, which would not be admissible in a court of law, because it is not information of which he has personal knowledge having come to him through the information given him by others. Is it your belief that a newspaperman, for example, who receives information about crime having been committed might feel that he has some obligation to go to law enforcement officials and tell them what he knows in an informal fashion, and that normally it is unwise for law enforcement officials to summon a newspaperman to go before a grand jury when the only information he has about the investigation is hearsay evidence derived from other people whose credibility he knows very little about. Isn't this an area where the interests of society as well as the interests of free press can be reconciled by some kind of informal relationship between the press and the law enforcement offices?

Mr. REUTZEL. I think there exists today, really, an informal relationship between police authorities, for instance, and knowledgeable reporters who use their judgment in such matters. And I think this works as well as we can have anything work in a free society.

If we start to prescribe by law that the newsman shall be in a protected category, then I think we have made a mistake and we are attempting to define a relationship that can't be defined and obtain basically a free press.

Senator ERVIN. Certainly if you go into defining it you would include testimony about all sources of information, including a source of information which may have not seen the crime committed, which would be a great blow to the administration of justice.

Mr. REUTZEL. Yes.

Senator ERVIN. Thank you very much. I commend you on the excellence of the statement.

The subcommittee will stand in recess until 10 o'clock tomorrow.

And we will meet in 2228.

(Whereupon, at 1:30 p.m., the committee was adjourned to reconvene at 10 a.m., Thursday, October 14, 1971, in room 2228.)

FREEDOM OF THE PRESS

THURSDAY, OCTOBER 14, 1971

U.S. Senate,
Subcommittee on Constitutional Rights of the
Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the subcommittee) presiding.

Present: Senator Ervin.

Also present: Lawrence M. Baskir, chief counsel; Bill Pursley, counsel; and Stanley Ebner, minority counsel.

Senator **Ervin**. The subcommittee will come to order.

Counsel will call the first witness.

Mr. **Baskir**. Mr. Chairman, our first witness this morning is Mr. Elmer Lower, president of ABC news.

Senator **Ervin**. I am delighted to welcome you to this subcommittee. I wish to express to you the appreciation of the subcommittee for your willingness to appear and give us the benefit of your views in a field in which you have had much practical experience.

STATEMENT OF ELMER W. LOWER, PRESIDENT, ABC NEWS, AMERICAN BROADCASTING CO.

Mr. **Lower**. Thank you very much, Senator.

My name is Elmer W. Lower, vice president of American Broadcasting Co. and president of the ABC news department. We in the news profession owe a debt of gratitude to Senator Ervin as chairman and to the other members of this subcommittee for their foresight and concern in initiating and conducting this inquiry into the state of freedom of the press in America, and I am personally grateful for the opportunity to be present today to give you my views.

Before addressing myself to some particular dangers to freedom of the press which I have seen emerge in recent years, I would like to make some general observations.

The American system of government was founded upon a predominantly agrarian and homogeneous society. In the early days of the Republic, participatory democracy was a reality. Individuals could have a very direct impact on the decisions of government which affected their lives.

Today, America is a huge, highly complex, predominantly urban society. We are all aware of the feeling of frustration among millions of people who believe that our government today is distant and impersonal and indifferent to their needs and interests. President Nixon, in his state of the Union address this year, called for a new American revolution in which Americans would have a new chance to participate in their government.

Participation in government depends upon an informed public. An informed public requires a free press, a press free to ascertain what government does, and to explain, to evaluate and to criticize. Today we find cynicism about the press among minority groups and the youth in America. They see the press as the handmaiden of a monolithic establishment, reporting only what the establishment wants people to see and hear, incapable of telling it like it is. This mistrust of the press engenders a feeling of hopelessness, which raises the potential for violence in our society. Any attempt by the Government to intrude upon the editorial prerogative of the press contributes to this mistrust, to the view that the press is controlled by the vested interests.

We in broadcast journalism are keenly aware of this mistrust. The minority groups and the young people have not been reticent to criticize us. We have heard the criticism and we are emboldened by it to increase our vigilance as the eyes and the ears of the people in relation to their government.

We have also heard the criticism from many Americans who believe that we have been too responsive to dissent, that we have given too much exposure to the critics of American society, that we have contributed to a too-rapid, too-chaotic whirlwind of social change. Although I have not seen empirical data on the effects of broadcast journalism on social change, I have no doubt that radio and television have accelerated the pace of change. The term "future shock" applies to ideas as well as technology. The fact that we transmit the words, the pictures and the ideas that set in motion social change enhances our responsibility, but it does not alter the job of journalism. Our job is, and remains, to report what we see and hear as accurately, objectively, and fairly as we know how.

There are those who believe that because of the impact of television, television journalism should be controlled by the Government. I draw quite the opposite conclusion. It is precisely because television is the medium that most Americans turn to for most of their news that broadcast journalism must enjoy the fullest freedom from Government interference.

I am not one of those who thinks that the Founding Fathers meant by freedom of the press that only the machines—the hardware—which print words were to be free. Just as our Constitution has been construed as a flexible, organic document and has grown with our Nation, so must freedom of the press grow to meet the electronic revolution.

Freedom of the press does not mean that broadcasters should be immune from criticism. Quite the contrary. We recognize the need for criticism and the need for constant self-analysis. If we did not hear criticism, the silence would be a sure sign that we were not doing our job, that we were avoiding controversy. Controversy is the stuff of the social process and journalists are dutybound to report it, and to report it fairly. We journalists, by our very choice of profession, have a commitment to fairness. Even if fairness were not FCC doctrine, it would be my personal doctrine—and I would implement it at ABC News. Fairness does not mean sitting down with a stopwatch and balancing newscasts on a minute-by-minute basis. It does not mean that every statement which is not incontrovertible fact must be balanced with alternative interpretation. If that were the case, television news would be run by accountants, not journalists. Fairness does mean that to cover a controversy intelligently and responsibly requires that the major contending viewpoints be aired.

Fairness does not mean that the Government, whether the FCC, Congress or the courts, has the right to substitute its editorial judgment for that of the broadcaster. If broadcast journalism is to be free, it must be free to criticize Government. It cannot be free if Government reserves the power to penalize the broadcaster for the way he reports the news. Even if the broadcaster's editorial judgment were wrong, the remedy—Government interference—is far worse than the disease.

It is the prospect of Government interference into editorial judgment which disturbs me most about the recent controversy concerning "The Selling of the Pentagon." The use of the congressional subpena power to compel production of untelevised material is the first specific danger to freedom of the press which I would like to discuss.

I do not question the motives of the Congressmen who investigated "The Selling of the Pentagon." In fact, I am sure they were sincere in their convictions. I do question the wisdom of Government investigating journalistic efforts which criticize Government. If journalists were required time and again to troop down to Washington, lawyers in tow, to justify news reports and editorial judgments, I could envision a process by which fear and excessive caution would enter the news gathering process. The reporter would tend not to report unless he could back it up with affidavits at some future congressional inquiry.

The plain fact is that the journalist and newsmakers, whether they be administration officials, Congressmen, critics or whomever, are adversaries in a very real sense. The newsmaker may be a salesman for a viewpoint. The journalist is trained to strip away sales talk and report the facts as he sees them, not necessarily as the newsmaker would like them to be reported. The journalist is the guardian of the public's right to a free flow of information. It is the public that suffers if the congressional subpena becomes a condition to exercising freedom of the press.

We recognize that the First Amendment was not designed to create a privileged profession of writers and speakers. It was designed to insure that the public would receive the information it must have for public opinion to function intelligently. The rights of newsmen are not personal rights. They are rights held in trust to the public. We recognize the enormous responsibility of this public trust. We recognize that the information we transmit and the views we expose are the foundation on which opinions are reached and social action is predicated. Our responsibility is to report accurately and objectively and to give fair exposure to the conflicting views that contend for public support. Our responsibility is to be ever on guard that our personal bias—since we all have personal bias—does not obstruct our professional dedication to this task. My experience has been that in the vast majority of cases newsmen have been true to this responsibility. Of course, there have been and there always will be exceptions. But in my view, reliance on a free press to act responsibly is far better than reliance on an agency of Government to say what can or cannot be printed or broadcast.

A second danger to free press, related to the congressional subpena power, is the potential power of the courts if used to compel disclosure of unpublished information or sources of information.

The journalist must preserve his confidential sources of information. He relies heavily on sources and contacts who will only speak off-the-record and only under the pledge of anonymity. It is no secret that the journalist, especially the journalist who covers politics, often has to fight for information. Newsmakers in many instances like to keep the lid on embarrassing information, regardless of the public interest in disclosure. Without the confidential source, the journalist would often be relegated to reading between the lines of self-serving handouts. The confidential source also multiplies the journalist's eyes and ears. If he had to personally ferret out every story from scratch, the journalist would gather much less information. The confidential source also provides the journalist background information which is invaluable in evaluating the events he reports. Often, the source risks his job, his status, perhaps his life, if his identity is revealed. Our foreign correspondents report from many countries where the flow of information is regulated in greater or lesser degree. Confidential sources become even more crucial in reporting the news from countries where news is regulated.

If the journalist is forced to betray information obtained in confidence, whatever the immediate short-term gain for law enforcement, the long-term effect is to dry up valuable sources of information and to severely restrict the flow of information to the public. One or two instances of forced disclosure can have a snowball effect. If a source has to wonder whether a reporter will protect his identity, it does not stretch the imagination to foresee the damaging consequences to the flow of information. The source will simply cease to be a source.

There is another reason why we oppose the subpenaing of unpublished material. When outtakes are used in court to prosecute a news subject, the broadcaster becomes identified with the law. It does not matter that he is acting under court order. In the eyes of his sources, he has betrayed his objectivity and has become an arm of the law. He is not to be trusted. He is a tool of the establishment. The danger here again is a drying up of news sources. The danger is a breakdown of lines of communication to the disaffected groups in our society—members of minority groups, young people, and people from all walks of life who hold unpopular views. We at ABC News have had experience on at least one occasion when a news source told us it would not cooperate for fear that outtakes would be subpoenaed and used against it. For every source who tells us why he will not cooperate, there are I'm certain many more who don't tell us why, but who clam up out of the same fears.

Defendants in criminal actions also use the subpena power to compel unpublished information and this is equally troubling to us because it has the same effect of compromising the objectivity of the journalist. Our believability suffers when we appear to the public to be supporting or opposing an individual or a cause.

There may be limited circumstances in which the interest in the fair administration of justice outweighs the harmful effect of free press. An example would be evidence of a violent crime directly bearing on guilt or innocence which is unavailable from nonpress sources. Absent unusual circumstances such as these, we believe that the first amendment protection for untrammeled communication should prevail.

A third area of danger to free press which I would like to address myself to is the use of press credentials as a "cover" by investigators and others. We have found that this practice is widespread, and is used not only by law enforcement authorities but also by members of radical groups who use it for their own purposes to obtain access to meetings, rallies and other forums. When phony press representatives act irresponsibly, the reputation of the press suffers, and so does the believability of what we report. It becomes more difficult to gather information and more difficult to communicate it. Once the newsmaker is burned by granting access to the phony journalist, he may in the future deny access to the legitimate journalist. Any practice. such as the use of phony credentials, which undermines confidence in the medium of communication will in the long run aggravate social conflict.

Finally, I would like to comment on the limitations on free press which arise out of national security classification, a problem which was brought into focus by the Pentagon papers controversy. I will not comment on the facts of that particular case except to say that I was personally gratified by the conclusion of the Supreme Court that the unproven potential damage to national security did not justify prior restraint. The lesson to be gained from the Pentagon papers controversy is that our security classification system is in many ways antiquated and subject to abuse. A system which overclassifies as a rule and which makes no real effort at regular declassification review is inconsistent with a participatory democracy. It removes from public scrutiny and debate more than is required by national security interests. It is contemptuous of the public's right to know.

Statistics give us a good idea of the magnitude of the problem. We have been informed by an authoritative source that 125 million pages of World War II documents and 25 million pages of Korean War documents are still classified secret or higher.

It is no surprise that one widespread reaction to the Pentagon papers controversy was cynical distrust of government. In my view, this reaction was based as much on the Government attempt to prevent publication as on what the Pentagon papers had to say. After all, how many people read even part of the voluminous documents. The attempt to prevent publication confirmed the belief held by many of our citizens that the Government had something to hide, that it suppressed the truth. This belief aggravates the feelings of frustration that the President spoke about in his State of the Union address.

Most often in this country it seems that we assign priorities on the basis of the immediate, highly visible crises we confront. In the need for reform of the classification system, there is no immediate crisis. There is, however, the overriding need that the public be fully informed, consistent with national security interests, on issues as crucial as war and peace which profoundly influence their lives. I would suggest that there be a periodic review of all classified material to determine what documents do not realistically imperil national security and can therefore be removed from classified listings.

In closing, I would like to paraphrase the President, again from his State of the Union address. Let us have a government in which citizens can have confidence that not only their votes count but also their ideas count. I hope I have succeeded in communicating to you today my view that this can only be accomplished by a strong and free press and a better understanding of the role that the press plays in preserving and enhancing our freedoms.

Mr. Chairman, I appreciate the committee's invitation to make this statement, and I will be happy to answer any questions the committee may have.

Senator Ervin. Is it not true that the forebears of the American people suffered much at the hands of the Government in their efforts to secure freedom of thought, freedom of religion, and particularly freedom of the press, especially because of the system of licensing which existed in England after 1694?

Mr. Lower. That is correct, Senator. I believe it was a crime to publish except under license of the King.

Senator Ervin. That is correct. Do you not concede that the First Amendment was drafted to reflect the philosophy of the Founding Fathers that freedom of speech and freedom of the press were necessary to assure that the American people would be free of what I think is the worst kind of tyranny, that is, tyranny over the mind?

Mr. Lower. Yes, I do. I think it is the basis of a participatory democracy.

Senator Ervin. And your statement, I think, sets forth in very eloquent fashion the fact that the First Amendment commitment to freedom of speech and freedom of the press was made because of the realization of its drafters that freedom of speech and freedom of the press is absolutely essential to the proper functioning of the institutions which our Constitution establishes for the Government of America?

Mr. Lower. Yes, sir.

Senator Ervin. Do you not believe that the interests of good government are best served by the freest possible flow of information?

Mr. Lower. I do, sir. And I have believed that for the 38 years that I have worked in journalism.

Senator Ervin. And do you not believe that it is inducive to good government for the people to have a confidence in the truthfulness of government.

Mr. Lower. I think this is essential.

Senator Ervin. And do you not believe that that confidence is impaired by the overclassification of information and the withholding of information which really does not affect in any way national security. These tactics merely protect the security of the political fortunes of those who make mistakes and then seek by overclassification to conceal them from the people.

Mr. Lower. We have had a few examples of that in the last few years.

Senator Ervin. I was impressed with your discussion of overclassification. Senator Roth, of Delaware, has introduced a bill, which I and some other Senators have cosponsored, to establish a commission to study the whole question of classification and how it has been used for purposes other than what it was intended, to see if the commission cannot make some recommendations to Congress which would permit Congress to prescribe some sensible guidelines for what is to be classified, and some sensible guidelines as to who is to do the classifying.

Mr. Lower. Yes, sir.

Senator Ervin. Do you believe such a commission can render a real solution to this problem of overclassification?

Mr. Lower. I do. And I would like to see one set up. If it is not done on a systematic basis I don't think it will ever be done.

Senator Ervin. You stated that you disapprove of the demand of the House Commerce Committee that CBS produce some of the documents which underlay the "The Selling of the Pentagon" program, but do not question the good motives of the congressmen who made that demand. Isn't it the truth that good motives which prompt unwise actions can do as much harm to our country as bad motives?

Mr. Lower. I think that is true. But I didn't want to question their motives.

Senator Ervin. I don't question their motives as I don't question the good motives of those people who thought it was better to place a man on the rack than to have him adopt a radical belief. I don't think there was any doubt about their good motives, they were trying to save his soul from what they believed was eternal damnation. But as Justice Brandeis stated in one of his opinions, the worst dangers to society come from people of good motives, who are perfectly sincere, but who are very zealous to enforce their views upon other people.

Now, the free flow of information, I infer from your statement, demands that those who gather and disseminate the news should have access to all kinds of sources of information, including the sources of information which can only be obtained from contacts with persons or groups which may be extremely unpopular in society, and which society may deem to be very dangerous to the Nation, is that not true?

Mr. Lower. Yes, sir.

Senator Ervin. And so that is one of the several reasons which prompt your misgivings about the increased use of subpenas to compel testimony from those who gather the news?

Mr. Lower. Yes; I do.

Senator Ervin. So it is not only desirable for the Government to enjoy the confidence of the people, but it is also essential for news gatherers to enjoy the confidence of these groups whose activities and whose philosophy are unpopular but who constitute a very important segment of the American people?

Mr. Lower. I firmly believe that.

Senator Ervin. I am sure you are familiar with the decision of the circuit court of appeals in the *Caldwell* case.

Mr. Lower. Yes, sir.

Senator Ervin. I infer from your statement that you do not champion the cause of an absolute privilege in the gathering of news, but take the view that under certain circumstances the desirability of giving a newsman access to news from unpopular groups must yield to the necessity for society to enforce its criminal laws.

Mr. Lower. In certain cases.

Senator Ervin. Is it not a fact, however, that most of the information which newsmen gather from such organizations or groups is information which would not be admissible in courts of law because it is based on hearsay rather than personal knowledge. Only in rare instances would the information that the newsmen gather be admissible in a court of law.

Mr. Lower. Yes; much of it falls in that category. And much of it falls in the field of ideas that people hold rather than in the normal type of traditional crimes that are committed.

Senator Ervin. Now, with specific reference to the broadcast medium, there has been some testimony before the subcommittee to the effect that there is some distinction between those who use the printed page and those who engage in radio or television broadcasting. This is based, theoretically at least, on the supposition that any person can go into the newspaper business but only those who obtain a license from the Government can go into the radio or television broadcasting.

Mr. Lower. Correct.

Senator Ervin. Do you recognize this distinction?

Mr. Lower. Yes; I do.

Senator Ervin. Of course by the very nature of things it is incumbent on the Government, in our present state of technology, to allocate the broadcast frequencies among persons or groups who desire to participate in radio or television broadcasting.

Mr. Lower. Well, there are not many of them still to be allocated. but they have been allocated by the Federal Communications Commission.

Senator Ervin. The nature of technology makes it necessary that some people be licensed to engage in such broadcasting, and that others be denied that right or that privilege, because free access to the airways would make the use of the airways virtually valueless. would it not?

Mr. Lower. I believe that was the theory of the original Federal Radio Act back in the twenties.

Senator Ervin. I am glad that you emphasize the fact that every right carries with it a responsibility, and that the right of freedom of speech and freedom of the press carries with it a responsibility that those rights be exercised in a responsible manner to achieve their real objective, which is to inform the public concerning the truth as it is found.

Mr. Lower. Yes, sir.

Senator Ervin. I would like to have your comments on the so-called fairness doctrine. I think you would agree with me, because I think it is one of the plainest teachings of history, that whenever government resorts to regulation of any kind, that government tends to overregulate. For some strange reason the Government has an insatiable thirst for power, and when you give it a little power there is always a tendency to exert more power. One of the most difficult things is for men who exercise governmental power to resist the temptation to over regulate. What restrictions outside of the licensing restraints would you think Government would be justified in imposing upon the broadcast medium?

Mr. Lower. Senator, I have stated for many years that even if the FCC hadn't established a fairness doctrine in 1949, my personal belief has been for all the time I have been a journalist, either in the print media or in broadcasting—and it is today, and this is the way we try to operate—has been in favor of it. So there I am not in disagreement with the fairness doctrine. I do recognize that there is a potential for overcontrol in its administration.

Senator **Ervin.** You certainly maintain, however, that under no circumstances should the Government undertake to control the content of, for example, the news which radio and television broadcasters disseminate?

Mr. Lower. No, it should not.

Senator. **Ervin.** I have an abiding faith in the great majority of the American people, and also in American businessmen. It has always been my conviction that the chief value of any business, whether it is to disseminate the news or anything else, is the good will it acquires, which I think has been legally defined as the habit of satisfying customers to return for further trade.

Mr. Lower. Yes.

Senator **Ervin.** I infer from your statement that you believe that with the exception of a minimum regulation of the broadcast medium, it is better in the long run to leave broadcasters free from a system of strict Government regulation.

Mr. Lower. Very much so, Senator. Minimum regulation in news gathering and news dissemination is what we seek.

Senator **Ervin.** In other words, we share the view that the responsible people in the broadcasting business will be essentially fair.

Mr. Lower. Yes, sir.

Senator **Ervin.** And discharge to the best of their ability, with rare exceptions on rare occasions, their obligation to try to give the American people information that is as objective as possible and as accurate as possible.

Mr. Lower. Yes, sir, they are.

Senator **Ervin.** It is undoubtedly true, I think, and I am sure you agree, that most of the things which prompt our good conduct are not so much legal restraints but the necessity of enjoying the good will of other people and our own sense of responsibility.

Mr. Lower. Yes, sir. And I believe that we are out in the open. The American people are not fools. I don't think any broadcaster today could maintain a continual degree of bias, I just think it would be impossible. What you call good will—I think he would use up his good will in a shorter or longer term depending on how blatant he was in pursuing a biased policy.

Senator **Ervin.** Counsel has a question.

Mr. Baskir. Mr. Lower, from the testimony of some of our earlier witnesses and some recent commentary, there seems to me to be a pattern in recent Government action. There is an indication that the criticism and what sometimes has been described as thinly veiled threats by the Vice President, the increasing use of subpenas on newsmen particularly in what appear to be political situations, the *New York Times* injunctions and the prosecutions now being considered, to mention a few, all fall into a pattern, and that this pattern is an attempt by Government to undercut the credibility of the press, or to frighten the press, or to otherwise shift the balance between the press and the Government. I wonder if you would comment on this position.

Mr. LOWER. I think we all know that there have been numerous statements made and actions taken which haven't exactly resulted in greater credibility for the mass media. I have not seen a systematic campaign here to do this, although I believe there has been more of it in the last 3 or 4 years than I have experienced in my previous years as a journalist.

Mr. BASKIR. Do you see an effect upon primarily broadcast journalists, an effect to, shall we say, cut back or moderate? We have had a variety of testimony as to the impact of this campaign or non-campaign, actually, on broadcast journalists.

Mr. LOWER. No, I have not. I have not given any instructions to our own staff, and I am not aware, from my colleagues and my competitors, of any instructions to change the way they operate or what they are doing.

Mr. BASKIR. Outside of formal instructions do you see some sort of tacit drawing back?

Mr. LOWER. Well, I have thought about this at some length and discussed it. And I think that the principal result that I see of frequent criticism and attacks, shall we call them, is that people in the media perhaps ask themselves a second time on controversial stories, have we really been fair in our presentations.

Mr. BASKIR. I would like to move to another area. With respect to broadcasting and Government control, we have had some past witnesses, and will have some future witnesses, maintain that because of the limited access that broadcasting affords persons with differing points of view, there should be some sort of regulation, formal official regulation, to require the owners of radio-television to open their facilities to differing points of view. Would you please comment on that, and then I would like to move on to future developments with cable TV.

Mr. LOWER. Well, I don't think any rules are needed for limited access. I think it is a pretty well established fact now that licensees of radio and television stations have an obligation to seek out differing points of view. I know that you can go back a number of years and say that minority groups didn't get as much attention. But I think we have made a good deal of progress on this in the last few years. And I think it is progress which we were perhaps a little slow in making, but we are doing better at it.

Mr. BASKIR. There has also been some testimony to the effect that if cable television comes into general use that as a practical matter you might have an unlimited number of channels, and that with full utilization of cable television, where perhaps the price of time would be very, very low, this would enable many different groups to get on and to put their half-hour program or their 15-minute speech on television. Therefore, the arguments for some sort of Government regulation as to restricted access would disappear; indeed much of the theory behind FCC regulations would disappear. Would you agree with that and would you encourage expanded use of cable television?

Mr. **Lower**. I am a little out of my field here, but I will try to answer it nevertheless.

I am not sure that pay television is the panacea to the problem that you outline. If you consider that the same minority groups would like to have the widest possible audience to state their positions, then I think that a series of programs like we did last summer on the Puerto Ricans, the Chicanos and the blacks, which appeared perhaps on 180 stations, or something of that order, would be of greater impact and of value to those particular people than getting their message across on cable television.

Mr. **Baskir**. Nobody can ever guarantee an audience, but you can guarantee a television camera.

Mr. **Lower**. I know any exposure is good. I don't particularly disagree with those people getting their message across through any media.

Mr. **Baskir**. Just one last item. You mentioned the problem of over-enthusiastic enforcement of the fairness doctrine. I wonder if it would be possible for you to submit to this subcommittee some examples of the over-zealous enforcement of the doctrine.

Mr. **Lower**. I am not sure I used the word over-enthusiastic.

Mr. **Baskir**. That is my word.

Mr. **Lower**. I think I said there was a potential danger. At the present moment we haven't felt that the number of inquiries about the fairness doctrine were onerous. I believe in the last year we have noted nine or 12, something in that order. But the potential is there, in that the achievement of fairness and balance, particularly in the hard news program, is something that has to extend over a reasonable time, in some cases perhaps even a year. You can't achieve fairness every night on the programs that are going to be on the air tonight, but you can achieve it over the period of a week, a month, or a year in our overall programing. But if people are going to protest everyday, should the time come when a regulatory body should query us about this everyday, this would be a rather untenable situation, I think.

Mr. **Baskir**. Would it be too difficult to submit a list of those inquiries over the years?

Mr. **Lower**. I think we can do that.

Mr. **Baskir**. Thank you very much.

Senator **Ervin**. Thank you very much, Mr. Lower. I want to commend you for a statement that is not only excellent in its content, but also excellent in its manner of presentation.

Mr. **Lower**. Thank you very much.

Senator **Ervin**. Counsel will call the next witness.

Mr. **Baskir**. The next witnesses are Judge Robert B. Williamson, former Chief Justice of the State of Maine, and Fred Graham, chief reporter for the *New York Times*. Judge Williamson is the chairman of the Task Force on Governmental Power and Press Freedom organized by the 20th Century Fund of New York City. Mr. Graham is the rapporteur.

Senator ERVIN. Judge Williamson and Mr. Graham, I am delighted to welcome you to the subcommittee, and I express to both of you the appreciation of the subcommittee for your willingness to give us the benefit of your views on what I think is one of the most basic constitutional provisions, the First Amendment.

Mr. WILLIAMSON. Thank you, Mr. Chairman.

Mr. GRAHAM. Before we start, may I introduce Mr. Matthew Fox, who is a staff member of the 20th Century Fund, and has been the liaison man between the Fund and this task force.

Senator ERVIN. We are delighted to welcome you also to the subcommittee.

STATEMENT OF ROBERT B. WILLIAMSON, CHAIRMAN, TASK FORCE ON GOVERNMENT POWER AND PRESS FREEDOM OF THE 20TH CENTURY FUND OF NEW YORK CITY

Mr. WILLIAMSON. Mr. Chairman, my name is Robert B. Williamson. I reside in Augusta, Maine. I welcome the opportunity of appearing before you as the chairman and the representative of a Task Force on Government Power and Press Freedom organized by the 20th Century Fund of New York City.

The task force selected by the Fund is drawn eight from journalism and three from the law. The members, you will note from the list herewith, cover in particular a wide range of activity in journalism and related fields:

Jack Bass, South Carolina bureau chief, *Charlotte Observer*, Columbia, S.C.

Ralph de Toledano, columnist, author, Washington, D.C.

Thomas King Forcade, Washington representative, Underground Press Syndicate, Washington, D.C.

Bert H. Early, executive director, American Bar Association, Chicago, Ill.

Norman Isaacs, editor in residence, Columbia University, New York, N.Y.; also vice chairman of our task force.

L. F. Palmer, Jr., columnist, *Chicago Daily News*, Chicago, Ill.

George E. Reedy, author, Woodrow Wilson Center, Smithsonian Institution, Washington, D.C., and formerly, I believe, press secretary to President Johnson.

Roger Rook, district attorney, Oregon City, Oreg.

Mike Wallace, correspondent, CBS News, New York, N.Y.

Howard B. Woods, editor and publisher, *St. Louis Sentinel*, St. Louis, Mo.

The Honorable Shirley Hufstedler, judge of the Court of Appeals (ninth circuit), a most valuable member, felt it necessary to resign in August because of the likelihood of issues in this area arising in the ninth circuit.

We stand absolutely independent of the Fund. We are requested to study the problem, and to report thereon with recommendations. Our discussions in nine meetings since January last, have been free, frank, instructive, and often spirited and long. Difficulties at the outset in communication between newsman and lawyer dissolved in large measure as we came to understand the problems before us.

We hope to complete and publish our report by mid-November. There remains, even now, the possibility of changes in our draft but none, I think of major consequence.

The Pentagon Papers issue arose literally as we are going to a meeting in June. To complete the report for publication in September than became impossible.

We have considered five areas in the relationship between Government and the press—and by press we include broadcasting and television:

1. The newsmen's privilege (subject of S. 1311);
2. Investigation of editorial judgment in the regulated broadcast media;
3. Police posing as journalists;
4. The underground press; and
5. The Pentagon papers. (Mr. Graham took no part in drafting the report in this area.)

We were not concerned with Fair Trial—Free Press.

I shall confine my remarks chiefly to the newsmen's privilege and the Pentagon Papers, in accordance with your invitation. I shall attempt to give the views of the task force in these areas, and beyond this, my personal views.

All agreed on the fundamental propositions. Freedom of the press under the Constitution is designed to protect and advance the freedom of the people. The public need for information is obtained only through a free press. Freedom of the press is a means to reach the objective, and is not an end in itself.

From the evidence before us, a majority of the task force are satisfied that a newsmen's privilege, so-called, under a shield of law is desirable.

There are those who reject the concept of a "shield" and who believe a shield tampers with the administration of justice or may lead to restrictions upon the press.

Without a shield, the newsmen in general vigorously assert that news sources will "dry up", and their confidential lines of communication will be broken, with consequent damage to the public's information.

Obviously a privilege against giving testimony suppresses evidence—and truth. The privilege of newsmen (as indeed the privilege of attorney and client) must be weighed against the public's right to everyman's testimony.

We favor a limited or qualified privilege, covering news media, such as newspapers, periodicals, radio and television, newsletters and news services.

The common law recognizes no privilege for the news-gatherer. Any privilege, therefore, must be based on the first amendment or on shield statutes. We express no view on the constitutional issues now before the court in the *Caldwell*, *Pappas*, and *Branzburg* cases. Whatever the decision on constitutional issues, statute law will very likely be necessary to implement the shield.

What should the privilege cover? To what extent should a privilege broadly stated be qualified?

In our view—the majority view—a newsmen's privilege should prevent the compelled disclosure of confidences that might reduce the flow of information through the press to the public. It should protect against disclosure of confidential sources and of information given in confidence, including notes, tape recordings, and other records of confidential communications and newsmen's records leading to such disclosures.

Further, we would extend the privilege beyond the bounds of confidence to protect news organizations from compulsory production of unpublished photographs or unused television films of public events. Such protection, we believe, is not presently given in any shield law.

Such a privilege (qualified or limited as later discussed) is designed to protect and to preserve the contacts of the newsman. with persons or groups, who would otherwise cease in significant degree, to be a source of news. We recognize, of course, that such sources desire that the news be published. It is the protection of confidentiality which is necessary to the full functioning of the press.

The privilege also prevents use of the newsman in the role of an unwilling investigative arm of the State.

Our suggested privilege goes beyond protection not merely against disclosure of the confidential source, but against disclosure also of confidential information including records that would lead to violation of the desired protected confidences.

This protection is included in S. 1311 and, for example, in the New York statute, and, I believe, the Pennsylvania case law.

We believe that legal controls over press subpenas would discourage their use. We note that since the Attorney General issued guidelines governing such subpenas by his Department, there has been a marked decline in subpoenas over the previous year. The example of the Attorney General, important and constructive as it is, does not solve the problem in its entire breadth.

What is the press to which we would grant the newsmen's privilege for the benefit of the public? The task force has attempted no narrow definition. We make no distinction, for example, between the newspaper, the underground press, or the collegiate press. Radio and television as well are the press.

In recommending the extension of the shield to cover against the compelled production of unpublished photographs and unused film of public events, we go beyond any statute called to our attention. It is to be noted that such a privilege cannot rest upon information given in confidence. The reason for our suggestion has a quite different base, but is nonetheless of value in the carrying out of the usual duties of the man with the camera.

The newsman should not be compelled to be ready source of evidence for the benefit of either the State or the accused, and thus to destroy his standing as a "neutral observer." He should not be a sitting duck for a subpoena.

We are advised that one or more news organizations do now destroy routinely such material, and that others are considering adopting a like policy. The published photograph and film should be sufficient. The "neutral observer" status deserves protection.

We do not include writers of books within the newsmen's privilege. Authorship of a book is not part of the continuing news process.

The values in a shield for the reporter in this instance are outweighed by the values of full disclosures of relevant evidence in proper proceedings.

Limitations or qualifications upon the privilege, while necessary, should be as sharply marked as possible. Certainty in the relationship between the newsman and his sources in this respect is plainly an important factor in continuance of the confidence. The source will wish to know the protection available. He must be satisfied that the reporter may lawfully not disclose the confidences.

In some States, a qualification is expressed in terms of public interest or equivalent language, and in others there is no limitation. In S. 1311 the privilege is divested "if the Court . . . . determines that there is substantial evidence that disclosure of the information is required to prevent a threat to human life, espionage or foreign aggression." In the *Caldwell* case, a protective order was worded, "compelling and overriding national interest that cannot be served by any alternative means." The *New York Times* in an editorial on September 26th says, "Only proof of the most overriding and pressing public necessity could justify subpena of information gathered by newsmen in the performance of their duties."

There are several approaches that may be taken in determining the scope of a privilege and qualifications. They are:

First: A privilege without qualification;

Second: A privilege with a "public necessity" qualification;

Third: A privilege qualified by exclusion of certain offenses, as in S. 1311.

Perhaps a fourth approach should be added, that is, a privilege with both the exclusion of certain offenses and a "public necessity" clause.

We considered the qualification problem from every angle. We are unable to come up with a recommendation specifically setting forth a line that should be drawn, between privilege and no privilege.

Appealing to some, was a qualification eliminating from the privilege evidence involving past or present crimes of violence. Several of the majority favoring a "shield," support a privilege without qualification. Any line short of total privilege raises important issues of policy as well as of certainty in application.

In my view—shared, I believe, by only one other—a privilege however broad or qualified, should include a "safety valve" against the operation of the privilege when the court or other body finds a compelling or overriding national interest or public necessity that cannot be served or met by alternative means.

The "safety valve" is not a definite clear-cut rule. The source may balk at the possibility of compelled disclosure. The courts may err. But on balance it seems to me, that the privilege, insofar as it may not be found to rest on the Constitution, should cease when the line stated is reached.

The privilege should extend, in the view of the task force, to grand jury proceedings, preliminary hearings, trials, administrative hearings, legislative hearings, and investigations. It should extend wherever evidence may be compelled under sanction of contempt by the Government or any agency and at every level.

In civil matters, the privilege should be limited to prevent its use by the newsman to avoid liability for defamatory publications. The shield is designed to protect the newsman for the benefit of the public. and not for his own good.

The task force is further satisfied that under some circumstances the entry of a newsman into a grand jury room or other secret hearing may, quite apart from his testimony, seriously affect his news gathering capacity. We believe he should be protected against such injury on a showing of such harm, in the absence of a "compelling need" that his evidence, otherwise compellable, be taken in the grand jury or other secret hearing. Thus we would meet the double threat to the newsman—confidential source relationship from the giving of any testimony in secret until the need therefor should be established under the shield law.

S. 1311 reaches the heart of the matter in the sections on nondisclosure of confidential information and nondisclosure of sources. The definitions seem adequate.

Under S. 1311, as I read it, the newsmen's privilege is unqualified except in relation to details of grand jury or other proceedings required to be kept secret under law, or unless divested by court order, when the information is required to prevent a threat to human life, espionage or foreign aggression.

For my part, I wish to see in a shield law a "public necessity" safety valve, carefully drawn and limited, but present. Such a provision I prefer to the limited language of S. 1311.

In summary, a majority of the task force recommend shield laws for newsmen to meet the needs of the public in the full flow of information.

I turn now, Mr. Chairman, to the Pentagon papers and the issues arising therefrom on which you invited comment.

The Pentagon papers were not within the scope of the studies of the task force until June. Our obligation and duty to consider the issues were at once apparent. This we have done.

Our report—in which Mr. Graham took no part—will include a study, carefully drawn, of the issues in controversy. The position of the majority is persuasively set forth in the report. We do not undertake, however, to make recommendations.

The journalists in general—and the majority of the task force—stand for the absolute right of the press to publish with no prior restraints whatsoever. The lawyers do not accept the "absolute" approach, without, however, agreeing upon a particular rule.

The arguments are well-known if not thoroughly understood. Discussions of the rights and obligations of the press and government altered, as I recall it, no opinions. Division in thinking between the journalist and the lawyer was apparent from the start.

I am unable to agree with the position taken by the majority of the task force. I am not an "absolutist." Within the Constitution there is room, I believe, to establish protection against disclosure of top secret, classified papers, or state secrets, if you will.

I assume there is no question of the right to declare unlawful the publication of such material with suitable penalties.

My concern is with the right to create and the desirability of creating prior publication restraints. I speak as an individual, and in this I do not represent the task force, or any members, whether in the majority or in the minority.

Clearly an injunction to prevent publication will rarely be a useful tool. Papers will be published before the courts will be approached or action taken. In the Pentagon Papers, publication over several days gave the opportunity to seek an injunction looking to tomorrow's newspaper.

The judgment of the Supreme Court does no more, I suggest, than determine that an injunction did not lie on the facts. A majority of the Justices, as I read the opinions, did not say that the First Amendment absolutely prohibits prior restraint on publications.

If I am correct in this view, the constitutional issue remains open.

The classification system, it seems to me, has broken down. Congress or the Executive, or both, should repair it promptly to provide effective and meaningful procedures for classification and for early declassification.

From the news and general reading—I have not read far beyond the introduction of the *New York Times* paperback—I gain the impression that a substantial portion of the Pentagon Papers should not have been classified, or if so, only for a period some years ended. This impression is strengthened by the recent publication by the government of portions of the Pentagon Papers.

It is good news that declassification is underway.

In the dissenting opinion of Justice Harlan in which the Chief Justice and Justice Blackmun joined, I find the reasoning which appeals to me. I pass the decision of no injunction on the Pentagon Papers, for that is in the past. It is the present and future which interest me.

In the end, it comes, as I see it, to a question of trust. Granted that top secrets ought not to be published to protect vital national or state interests, and granted that officers of government must be the ones to stamp "top secret," who is to be the judge of publication? Is the judge to be the press or the Government? Whichever way we turn, men and women it may be, equal in ability, and alike in devotion to a free press under the Constitution, and in awareness of the necessity of security, must make for us the decision—perhaps fateful.

With deep belief in the freedom of the press, with full recognition of its value in a free society, with the First Amendment before me, I am unable to place my ultimate trust in the editor, not directly responsible to, and not selected by, the people. I choose, rather, to trust the officers of government charged with the responsibility, not unlike that of the President, if you will, for the security of the nation.

Thank you, Mr. Chairman.

Senator Ervin. Judge, I wish to commend you on your statement, which certainly points up in a most effective way the diverse interests which the Government has in this particular field, which often conflict. Also I think your statement points up the difficulty of phrasing the shield, statutory shield. You take the position, as I understand it, that any statutory shield that should be erected couldn't be based on the confidential nature of the disclosures received by the newsmen, as is true in respect to the disclosures which a lawyer receives in order that he may represent his client, or that a physician receives in order that he may treat his patient. Your position, as I understand it, and a position of the majority of the task force on that specific point, is that this statutory shield, or any other shield raised by the Constitution, is based on the desirability, or even to go beyond that, the necessity for the public to have information on the matter, which are of crucial importance to society.

Mr. WILLIAMSON. Yes, indeed.

Senator ERVIN. I infer from your statement that the task force was divided on the question of whether this problem should be solved by the enactment of a law or statute or by leaving the matter to be determined by the courts on the basis of the provisions of the first amendment.

Mr. WILLIAMSON. Yes. Not all of the task force believe in shield law.

Senator ERVIN. I haven't any fixed conclusions on this point. You confess that it gives rise in the task force to a difference of opinion, and I will have to say that it creates a certain amount of intellectual chaos in our minds.

Mr. WILLIAMSON. It did in ours.

Senator ERVIN. I don't belittle the linguistic abilities of my colleagues in Congress in phrasing a statute, but I have a profound confidence in the First Amendment. And I am not certain that in drawing a statute we might not "raise up more snakes than we wish to kill."

I am very much impressed by the judicial statement by the circuit court of appeals in the *Caldwell* case which you cite and from which you quote. I just wonder if, recognizing as you and I do the two public interests, the public interest in the right to make information available and also the public interest in the desirability of law enforcement. As you, I am not an absolutist on the First Amendment's guarantees except as it applies to freedom of thought. I believe in absolute freedom of thought, but I think the other freedoms are not absolute. However, I wonder whether the decision in the *Caldwell* case, if sustained by the Supreme Court, doesn't provide an effective protection both to the writer, the interests of the public in securing information, and the interests of the public in law enforcement. As I construe the rather narrow holding in that case, it is to the effect that a news gatherer cannot be required to go before a grand jury, certainly not to reveal the sources of his information or his unpublished information, unless there is an overriding public interest requiring him to do so and unless, also, it appears that the law enforcement officers cannot secure the same information from any other source. I wonder if that protection is not sufficient, if it is affirmed by the Supreme Court. And of course, we don't know what they are going to do yet. I am sure that despite judicial certainty, in the writing of an opinion there will be a great deal of uncertainty in the thought that precedes the opinion.

Mr. WILLIAMSON. It seems to us that you couldn't really anticipate what they might do. But I think we could go this far, that probably a statute of law would be necessary or desirable to implement whatever might be the case law.

Senator ERVIN. I take it, however, you agree with me that there is a question as to whether we should go the statutory route or whether we should go to the Constitution and rely on future interpretation by the Supreme Court upon which reasonable men can disagree.

Mr. WILLIAMSON. Certainly. And certainly any statute law would come necessarily after the Supreme Court has spoken.

Senator ERVIN. You have stated some very interesting views in respect to the general problem posed by the publication of the Pentagon Papers. which is quite different from the position taken by some of the news people before the subcommittee. Their position is that under no circumstances should there be any prior restraint, and that the question of what should be published in the areas which might affect the national security or state secrets, which come into the possession of the press, is a matter that should be determined by the publishers themselves, and that they can be safely trusted with acting in the national interest. As I understand, you take the position that under certain circumstances there should be prior restraint in respect to information concerning national security, or state secrets. And I would infer that your definition of state secrets would include among other things diplomatic negotiations in which are engaged with other countries. You take the position that the best interests of the Nation in the long run may, in certain circumstances, require prior restraint in respect to this restricted area, and that the determination of that question necessarily must be left to government rather than those who exercise the privileges of a free press.

Mr. WILLIAMSON. I do. I should say, Senator, that that is my personal view. The lawyers in the group might have a little different view.

Senator ERVIN. Yes; I should have mentioned that, because you did make it clear that in expressing an opinion on this point you were speaking for yourself and neither for a majority or a minority of the task force.

Mr. WILLIAMSON. Yes.

Mr. BASKIR. Justice Williamson, have you in the course of your study collected any statistics with respect to the issuance of subpenas by U.S. attorneys in recent years as compared to times past?

Mr. WILLIAMSON. We have had them through Mr. Graham, but I have not personally.

Mr. BASKIR. If the committee has them, do you think it would be possible to make them available to the subcommittee?

Mr. GRAHAM. We will make available what we have. It is very limited prior to 2 years ago, because the Justice Department kept no records based on who the subject of the subpena was.

Mr. BASKIR. I wonder if you have also done an analysis of the Attorney General's guidelines in the course of your study.

Mr. WILLIAMSON. No more really than I have given here.

Mr. BASKIR. I would like to ask one question. If the Supreme Court should, let us say, merely support the *Caldwell* rule, the very narrow rule, and if Congress should not see fit to adopt a shield law, what would be wrong with leaving the situation as it apparently has existed to date, that is to rely upon informal understandings or arrangements between the Justice Department on the one hand and the press on the other hand, letting them work out difficulties on a sort of ad hoc basis as apparently they have in the past.

Mr. WILLIAMSON. It seems to me from the discussions with the newsmen that that would leave it open. The source wants to know, as I understand it, whether the reporter can be compelled to disclose—obviously he has to rely on the newsman not to disclose voluntarily. But the newsman may disclose voluntarily, it is his privilege. But as I understand the shield law, disclosure cannot be forced from the newsman.

Mr. BASKIR. If a source at the present time has to rely upon his confidence in the honor of the newsman not to do it voluntarily, and if journalism as a whole feels very strongly about this, why not just let the situation remain as it is and have the newsman defend what he sees as his first amendment right or his journalism right and go to jail under contempt?

Mr. WILLIAMSON. If a man is ordered to testify, I like to have him testify. I think if I were in such a situation I would want to know that I was protected by law and not simply beating against the law.

Mr. GRAHAM. May I address myself to that for a minute, Mr. Baskir?

One of the things we discovered was that the situation has changed in the last 2 or 3 years. I notice that the Government's brief in the *Branzburg* and *Pappas* cases, the companion cases to the *Caldwell* case in the Supreme Court, is based largely upon the assertion that, well, we have had the First Amendment for 180 years, and no one has ever said that it should protect a newsman from having to disclose his source, why all the concern now, why can't the newsmen live with this as they did in prior history? And in our discussions I think we all agree that the situation has changed in several respects in the last 2 or 3 years. It is true, as Attorney General Mitchell has said, that the press gave information to the Justice Department on a number of occasions in the 1950's and 1960's. I know that is so because I was down in the South where a lot of that happened, and I observed it, and I was a part of some of that. In most of those cases we were giving information against the Ku Klux Klan and other terrorist groups of that nature for which we had no confidential sources at all. That was based on observation, from being around. We had no feeling that it was a violation of the First Amendment, or that we would cut the public off from any information by doing that. In the other cases that we know about primarily, the cases that you see in the reports, prior to the 1970's almost all of those had to do with local prosecutors going against the local paper, where the power is quite often distinctly on the side of the press, and it can take care of itself very well. What seems to have happened in the last couple of years is that you have the Federal Government now or you did prior to the Attorney General's guidelines, issuing a number of subpenas. And it was for information that was based on confidential sources. In many instances, the *Caldwell* case and others, what they knew was what had been told to them in confidence, not what they had seen. And we concluded that the situation was changed, and that where perhaps this casual, informal way of handling a problem in the past worked, that that situation may now change to the point that the law needs to step in.

Mr. Baskir. Every once in awhile one reads in the newspaper about some local conflict such as you describe. I recall a few instances having to do with college newspaper reporters and editors who have refused to accede to the demands of the local prosecutor or the local judge. Standing on what they see as the requirements of journalism and the First Amendment, they refused to cooperate, and suffered the penalties as a price they feel they have to pay, and are willing to pay, to preserve both journalism and the first amendment. Despite the changes in the use and the frequency of subpoenas, if this is such a serious situation, why shouldn't reporters go to jail for a limited period of time for the contempt generally involved and rely upon public pressure in case after case brought under the Attorney General's guidelines so that there would be no need for legislation?

Mr. Graham. I agree with the Judge that that is essentially a lawless way for dealing with the problem that our country should deal with through law. And as he said, sources want to be assured that you can't be made to tell. Now, several journalists who I know in this town have had contact with the people who stole the documents from the Media, Pa., FBI office. And there have been negotiations about interviewing those people to find out why they did it, what was behind it. I think that is something that the public might well profit from knowing. And yet I know in the case that I know of, which I have personal knowledge of, we could not give assurances that the law wouldn't have a right to get the identity of those people. And nothing came of it.

Mr. Baskir. Of course, you could give them the personal assurance that you would go to jail for contempt rather than to accede to the subpena.

Senator Ervin. If I may interject myself at this point, you haven't said this expressly, but I assume that this is the case; you feel that a news gatherer, who gathers news from members of groups considered intellectually dangerous or physically dangerous to society, render a public service in gathering such news, and that he should not be penalized by sending him to jail because in rendering this public service he acts on the basis of his conscience. Isn't that fundamentally the argument for making this certain by law?

Mr. Graham. I agree with that, Senator.

Senator Ervin. Excuse the interruption.

Mr. Baskir. I should have prefaced my series of questions by saying that this is the position which has been expressed to the subcommittee, it is not necessarily my own, and I just wanted to find your views about it.

Senator **Ervin**. I wonder if this problem has not been accentuated of late by a change in the nature of crimes that excite public apprehension. In other words, a few years ago when I practiced law, grand juries usually passed upon specific cases. Proposed indictments sent by the prosecuting attorney contained the names of the witnesses who could identify the culprits. During the last few years we have had an increased tendency on the part of certain individuals and organizations whose membership is not clearly defined or identified publicly to resort to violence, such as the bombing, the destruction of property and the like. In order to perform its duty, a grand jury is often called on to conduct what we used to call something in the nature of a "dragnet investigation." These crimes are committed in secret. In many cases they were committed by men whose identities are more or less concealed and unknown, and under circumstances which are concealed. That requires a much more far-reaching investigation by grand juries than we normally have. Is that not true, Judge?

Mr. **Williamson**. I think it is.

Senator **Ervin**. So the issuing of subpenas for newsmen, and the effort to convert newsmen into an army of law enforcement officers has become more intense during recent times than it ever was in the past.

Mr. **Graham**. Yes.

And, Senator Ervin, you may know that one of the amicus curiae briefs that we filed recently in the *Caldwell* case disclosed that in the last 2½ years 124 subpenas have been served on CBS and NBC and their affiliated and wholly owned stations. Now, we don't have accurate statistics as to what the situation was, say, prior to that 2½ year period, but we are told, and I am sure it is true, that there was nothing like that.

Senator **Ervin**. Judge, I want to commend you on your statement on behalf of the majority task force, and for expressing your personal viewpoint as well.

Mr. **Williamson**. Thank you very much.

(The prepared Statement of Mr. Williamson follows:)

STATEMENT OF ROBERT B. WILLIAMSON ON BEHALF OF THE TASK FORCE ON GOVERNMENT POWER AND PRESS FREEDOM ORGANIZED BY THE TWENTIETH CENTURY FUND OF NEW YORK CITY.

Mr. Chairman and Members of the Committee: My name is Robert B. Williamson. I reside in Augusta, Maine. I welcome the opportunity of appearing before you as the chairman and the representative of a Task Force on Government Power and Press Freedom organized by the Twentieth Century Fund of New York City.

With me is Mr. Fred P. Graham, rapporteur of the Task Force, who is chiefly responsible for our Report, except upon the Pentagon Papers.

The Task Force selected by the Fund is drawn eight from Journalism and three from the Law. The members, you will note from the list herewith, cover in particular a wide range of activity in journalism and related fields.

The Honorable Shirley Hufstedler, Judge of the Court of Appeals (9th Circuit), a most valuable member, felt it necessary to resign in August because of the likelihood of issues in this area arising in the 9th Circuit.

We stand absolutely independent of the Fund. We were requested to study the problem, and to report thereon with recommendations. Our discussions in nine meetings since January last, have been free, frank, instructive, and often spirited and long. Difficulties at the outset in communication between newsman and lawyer dissolved in large measure as we came to understand the problems before us.

We hope to complete and publish our report by mid-November. There remains, even now, the possibility of changes in our draft, but none, I think of major consequence.

The Pentagon Papers issue arose as we were in our June meeting. To complete the report for publication in September then became impossible.

We have considered five areas in the relationship between Government and the Press—and by Press we include Broadcasting and Television:

(1) The Newsmen's Privilege (subject of S 1311);

(2) Investigation of editorial judgment in the regulated broadcast media;

(3) Police posing as journalists;

(4) The underground Press; and

(5) The Pentagon Papers. (Mr. Graham took no part in drafting the report in this area.)

We were not concerned with Fair Trial—Free Press.

I shall confine my remarks chiefly to the newsmen's privilege and the Pentagon Papers, in accordance with your invitation. I shall attempt to give the views of the Task Force in these areas, and beyond this, my personal views.

There is a wide difference between the newsmen's privilege and the privilege, for example, of attorney-client. It is the client's privilege; he alone may waive it. In the newsmen's privilege, it is the privilege of the newsman and not of the source. The newsman may choose whether or not to exercise his privilege. No waiver from the source is required to permit the newsman to give his testimony. The option to testify lies with the newsman.

All agreed on the fundamental propositions. Freedom of the press under the Constitution is designed to protect and advance the freedom of the people. The public need for information is obtained only through a free press. Freedom of the press is a means to reach the objective, and is not an end in itself.

From the evidence before us, a majority of the Task Force are satisfied that a newsmen's privilege, so-called, under a shield law is desirable.

There are those who reject the concept of a "shield" and who believe a shield tampers with the administration of Justice or may lead to restrictions upon the press.

Without a shield, the newsmen in general vigorously assert that news sources will "dry up", and their confidential lines of communication will be broken, with consequent damage to the public's information.

Obviously a privilege against giving testimony suppresses evidence—and truth. The privilege of newsmen (as indeed the privilege of attorney and client) must be weighed against the public's right to everyman's testimony.

We favor a limited or qualified privilege, covering news media, such as newspapers, periodicals, radio and television, news letters and news services.

The common law recognizes no privilege for the newsgatherer. Any privilege, therefore, must be based on the First Amendment or on shield statutes. We express no view on the constitutional issues now before the Court in the Caldwell, Pappas, and Branzburg cases. Whatever the decision on constitutional issues, statute law will very likely be necessary to implement the shield.

What should the privilege cover? To what extent should a privilege broadly stated be qualified?

In our view—the majority view—a newsmen's privilege should prevent the compelled disclosure of confidences that might reduce the flow of information through the press to the public. It should protect against disclosure of confidential sources and of information given in confidence, including notes, tape recordings, and other records of confidential communications and newsmen's records leading to such disclosures.

Further, we would extend the privilege beyond the bounds of confidence to protect news organizations from compulsory production of unpublished photographs or unused television films of public events. Such protection is not presently given in any shield law.

Such a privilege (qualified or limited as later discussed) is designed to protect and to preserve the contracts of the newsman, with persons or groups, who would otherwise cease in significant degree, to be a source of news. We recognize, of course, that such sources desire that the news be published. It is the protection of confidentiality which is necessary to the full functioning of the press.

The privilege also prevents use of the newsman in the role of an unwilling investigative arm of the State.

Our suggested privilege goes beyond protection not merely against disclosure of the confidential source, but against disclosure also of confidential information including records that would lead to violation of the desired protected confidences.

This protection is included in S 1311 and, for example, in the New York statute.

We believe that legal controls over press subpenas would discourage their use. We note that since the Attorney General issued guide lines governing such subpenas by his Department, there has been a marked decline in subpenas over the previous year. The example of the Attorney General, important and constructive as it is, does not solve the problem in its entire breadth.

What is the Press to which we would grant the newsmen's privilege for the benefit of the public? The Task Force has attempted no narrow definition. We make no distinction, for example, between the newspaper, the underground press, or the collegiate press. Radio and Television as well are the press.

In recommending the extension of the shield to cover against the compelled production of unpublished photographs and unused film of public events, we go beyond any statute called to our attention. It is to be noted that such a privilege cannot rest upon information given in confidence. The reason for our suggestion has a quite different base, but is nonetheless of value in the carrying out of the usual duties of the man with the camera.

The newsman should not be compelled to be a ready source of evidence for the benefit of either the State or the accused, and thus to destroy his standing as a "neutral observer." He should not be a sitting duck for a subpena.

We are advised that one or more news organizations do now destroy routinely such material, and that others are considering adopting a like policy. The published photograph and film should be sufficient. The "neutral observer" status deserves protection.

We do not include writers of books within the newsmen's privilege. Authorship of a book is not part of the continuing news process.

The values in a shield for the reporter are here outweighed by the values of full disclosures of relevant evidence in proper proceedings.

Limitations or qualifications upon the privilege, while necessary, should be as sharply marked as possible. Certainty in the relationship between the newsman and his sources in this respect is plainly an important factor in continuance of the confidence. The source will wish to know the protection available. He must be satisfied that the reporter may lawfully not disclose the confidences.

In some states, a qualification is expressed in terms of public interest or equivalent language, and in others there is no limitation. In S. 1311 the privilege is diverted "if the Court . . . determines that there is substantial evidence that disclosure of the information is required to prevent a threat to human life, espionage or foreign aggression". In the *Caldwell* case, a protective order was worded, "compelling and overriding national interest that cannot be served by any alternative means." The New York Times in an editorial on September 26th says, "Only proof of the most overriding and pressing public necessity could justify subpena of information gathered by newsmen in the performance of their duties."

There are several approaches that may be taken in determining the scope of a privilege and qualifications. They are:

First: A privilege without qualification;

Second: A privilege with a "public necessity" qualification;

Third: A privilege qualified by exclusion of certain offenses, as in S 1311.

Perhaps a fourth approach should be added, that is, a privilege with both the exclusion of certain offenses and a "public necessity" clause.

We considered the qualification problem from every angle. We are unable to come up with a recommendation specifically setting forth a line that should be drawn, between privilege and no privilege.

Appealing to some, was a qualification eliminating from the privilege evidence involving past or present crimes of violence. Several of the majority favoring a "shield", support a privilege without qualification. Any line short of total privilege raises important issues of policy as well as of certainty in application.

In my view—shared, I believe, by only one other—a privilege however broad or qualified, should include a "safety valve" against the operation of the privilege when the Court or other body finds a compelling or overriding national interest or public necessity that cannot be served or met by alternative means.

In short, in my view, there comes a time when the needs of Justice outweigh the needs of the privileged newsman.

The "safety valve" is not a definite clear-cut rule. The source may balk at the possibility of compelled disclosure. The Courts may err. But on balance it seems to me, that the privilege, insofar as it may not be found to rest on the Constitution, should cease when the line stated is reached.

The privilege should extend, in the view of the Task Force, to grand jury proceedings, preliminary hearing, trials, administrative hearings, trials, administrative hearings, legislative hearings and investigations. It should extend wherever evidence may be compelled under sanction of contempt by the Government or any agency and at every level.

In civil matters, the privilege should be limited to prevent its use by the newsman to avoid liability for defamatory publications. The shield is designed to protect the newsman for the benefit of the public, and not for his own good.

The Task Force is further satisfied that under some circumstances the entry of a newsman into a grand jury room or other secret hearing may, quite a part from his testimony, seriously affect his news gathering capacity. We believe he should be protected against such injury on a showing of such harm, in the absence of a "compelling need" that his evidence, otherwise compellable, be taken in the grand jury or other secret hearing. Thus we would meet the double threat to the newsman—confidential source relationship from the giving of any testimony in secret until the need therefor should be established under the shield law.

S 1311 reaches the heart of the matter in the sections on non-disclosure of confidential information and non-disclosure of sources. The definitions seem adequate.

Under S 1311, as I read it, the newsmen's privilege is unqualified except in relation to details of grand jury or other proceedings required to be kept secret under law, or unless divested by Court Order, when the information is required to prevent a threat to human life, espionage or foreign aggression.

For my part, I wish to see in a shield law a "public necessity" safety valve, carefully drawn and limited, but present. Such a provision I prefer to the limited language of S 1311.

In summary, a majority of the Task Force recommend shield laws for newsmen to meet the needs of the public in the full flow of information.

I turn to the Pentagon Papers and the issues arising therefrom on which you invited comment.

The Pentagon Papers were not within the scope of the studies of the Task Force until June. Our obligation and duty to consider the issues were at once apparent. This we have done.

Our report (in which Mr. Graham took no part) will include a study, carefully drawn, of the issues in controversy. The position of the majority is persuasively set forth in the report. We do not undertake, however, to make recommendations.

The journalists in general—and the majority of the Task Force—stand for the absolute right of the press to publish with no prior restriants whatsoever. The lawyers do not accept the "absolute" approach, without, however, agreeing upon a particular rule.

The arguments are well-known if not thoroughly understood. Discussions of the rights and obligations of the Press and Government altered, as I recall it, no opinions. Division in thinking between the journalist and the lawyer was apparent from the start.

I am unable to agree with the position taken by the majority of the Task Force. I am not an "absolutist". Within the Constitution there is room, I believe to establish protection against disclosure of top secret, classified papers, or state secrets, if you will.

I assume there is no question of the right to declare unlawful the publication of such material with suitable penalties.

My concern is with the right to create and the desirability of creating prior publication restraints. I speak as an individual, and in this I do not represent the Task Force, or any members, whether in the majority or in the minority.

Clearly an injunction to prevent publication will rarely be a useful tool. Papers will be published before the Courts will be approached or action taken. In the Pentagon Papers, publication over several days gave the opportunity to seek an injunction looking to tomorrow's newspaper.

The judgment of the Supreme Court does no more, I suggest, than determine that an injunction did not lie on the facts. A majority of the Justices, as I read the opinions, did not say that the First Amendment absolutely prohibits prior restraint on publication.

If I am correct in this view, the constitutional issue remains open.

The classification system has broken down. Congress or the Executive, or both, should repair it promptly to provide effective and meaningful procedures for classification and for early declassification.

From the news and general reading—I have not read far beyond the introduction of the New York Times paperback—I gain the impression that a substantial portion of the Pentagon Papers should not have been classified, or if so, only for a period some years ended. This impression is strengthened by the recent publication by the Government of portions of the Pentagon Papers.

It is good news that declassification is under way.

In the dissenting opinion of Justice Harlan in which the Chief Justice and Justice Blackmun joined, I find the reasoning which appeals to me. I pass the decision of no injunction on the Pentagon Papers, for that is in the past. It is the present and future which interest me.

In the end, it comes, as I see it, to a question of trust. Granted that top secrets ought not to be published to protect vital national interests, and granted that officers of Government must be the ones to stamp "top secret", who is to be the judge of publication? Is the judge to be the Press or the Government? Whichever way we turn, men and women it may be, equal in ability, and alike in devotion to a free press under the Constitution, and in awareness of the necessity of security, must make for us the decision—perhaps fateful.

With deep belief in the freedom of the Press, with full recognition of its value in a free society, with the First Amendment before me, I am unable to place my ultimate trust in the editor, not directly responsible to, and not selected by, the people. I choose, rather, to trust the officers of Government charged with the responsibility, not unlike that of the President, if you will, for the security of the nation.

Twentieth Century Fund Task Force on Governmental Power and Press Freedom

Mr. Jack Bass, South Carolina bureau chief, *Charlotte Observer*, Columbia, S.C.
Mr. Ralph de Toledano, Columnist, Author, Washington, D.C.
Mr. Thomas King Forcade, Washington Representative, Underground Press Syndicate, Washington, D.C.
Mr. Bert H. Early, Executive Director, American Bar Association, Chicago, Ill.
Hon. Shirley Hufstedler, Judge, U.S. Court of Appeals, Ninth Circuit, Los Angeles, Calif. Resigned: August 17, 1971.
Mr. Norman Isaacs (Vice Chairman), Editor in Residence, Columbia University, New York, N.Y.
Mr. L. F. Palmer, Jr., Columnist, *Chicago Daily News*, Chicago, Ill.
Mr. George E. Reedy, Author, Woodrow Wilson Center, Smithsonian Institution, Washington, D.C.
Mr. Roger Rook, District Attorney, Clackamas County Courthouse, Oregon City, Oreg.
Mr. Mike Wallace, Correspondent, CBS News, New York, N.Y.
Hon. Robert Williamson (Chairman), Former Chief Justice of Maine, Augusta, Maine
Mr. Howard B. Woods, Editor and Publisher, *St. Louis Sentinel*, St. Louis, Mo.
Mr. Fred P. Graham (Rapporteur), Washington Bureau, The New York Times, Washington, D.C.

Senator Ervin. This is an intriguing question to me. When I hear both sides of these problems presented in such an impressive fashion, I sometimes wish I could resort to the procedure of the justice of the peace down in North Carolina. When the plaintiff finished his presentation of the case the justice of the peace asked the defendant not to present his side, he said he didn't have much trouble reaching a conclusion when he heard one side, but when he heard both sides it engendered a lot of confusion in his mind.

You may proceed, Mr. Graham.

STATEMENT OF FRED P. GRAHAM, RAPPORTEUR FOR THE TWENTIETH CENTURY FUND'S TASK FORCE ON GOVERNMENTAL POWER AND PRESS FREEDOM

Mr. **GRAHAM**. Thank you, Mr. Chairman.

As you know, I am normally seated at the press table when these hearings are conducted, and I feel more comfortable over there than where I am now.

That reminds me of a story, too. William Howard Taft's great-granddaughter wrote an autobiography when she was in the third grade. It went like this:

> "My grandfather's father was President of the United States. My grandfather was a Senator. My daddy is an ambassador. And I am a Brownie."

And I feel a little bit like a "Brownie" in this company.

Senator **ERVIN**. I will elevate you to a very high rank in this company.

Mr. **GRAHAM**. The task force's chairman, Judge Williamson, has summarized for you the group's conclusions about press subpenas and the Pentagon Papers litigation. I would like to talk about several other interesting developments that came to the notice of the task force.

My testimony concerns two less obvious areas of friction between the Government and the press: a subtle and apparently growing form of governmental penetration of the news media, in which police either pose as newsmen or employ them as paid informers; and a constitutional double standard applied by some officials to the underground press, granting it a watered-down version of First Amendment protection or none at all.

In recent months a series of unrelated and apparently uncoordinated instances have come to light in which personnel of government intelligence and law enforcement agencies have posed as news reporters or photographers. In a variation of this, law enforcement agencies have paid reporters and press photographers to collect information for them, thus using journalism as a guise to obtain material for governmental use. These incidents appear to be remarkably widespread both geographically and organizationally. They have occurred from Washington to Saigon and within the Army, Federal Bureau of Investigation, and local police.

Whether such incidents were common in the past and were not discovered, is not known. What does seem significant is that a rash of these occurrences has come to light within the past 2 years—almost in rhythm with the rising tempo of dissent, violence and official concern about dissent and violence. In fact, most of the instances that have been discovered involved police investigations of political dissenters—groups about which the public should be as fully informed as possible. However, the frequency with which police have been found to be posing as newsmen in recent months has tended to raise barriers of suspicion that have made it more difficult for the press to cover many events.

No one knows, of course, how often this has actually happened. But the task force was able to verify at least a dozen instances within the past 2 years in which either sworn testimony or a responsible police official conceded that it did:

> In Saigon, two U.S. agents were found to have infiltrated the press corps.
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> The Army Security Agency painted a van with the name of a nonexistent television company and filmed demonstrators at the Democratic National Convention in 1968.
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> Army Intelligence agents also posed as TV cameramen during the Presidential inauguration activities in Washington in January 1969.
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> A female intelligence agent for the District of Columbia Police Department posed as a reporter to gain acess to a welfare rights group's meeting.
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> Army intelligence agents obtained press credentials from the New York City Police Department to cover actions of H. Rap Brown and Stokely Carmichael in New York during the summer riots of 1967.
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> In Witchita, Kans., press credentials were given to local policemen during a visit by Vice President Agnew.
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> A member of the Chicago Police Department's Intelligence Division was discovered posing as a newsman to gain information from black students at a protest rally.
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> Two plainclothes officers of the Nassau County, N.Y. police force posed as photographers for a weekly newspaper in order to photograph the audience at a veterans' antiwar rally.
>
> An Army agent masqueraded as a reporter for the *Richmond Times Dispatch* to obtain information on the Southern Christian Leadership Conference.
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> A Detroit policeman passed as a news photographer to observe a General Motors stockholders' meeting.
>
> In Albuquerque a city policeman posed as an Associated Press photographer at the University of New Mexico campus during demonstrations protesting the invasion of Cambodia in the spring of 1970.
>
> Complaints by newsmen covering July 4 ceremonies in San Juan, P.R. that police were posing as reporters led to an admission by the Commonwealth Secretary that his department had been issuing press credentials to police for about 8 years.

Senator ERVIN. If I may interject myself at this point, I can say that this subcommittee can furnish another illustration to add to that list. We conducted some investigations into the surveillance of civilians by the Army when the Army Intelligence was assigned that task in 1967 and 1968. And we had testimony from some military intelligence agents that they frequently adopted the guise of newspaper reporters or news photographers when they went to cover a rally or demonstration staged by dissidents. And we had testimony from one former military intelligence agent that on one occasion on a college campus 67 students and their friends staged a peaceful rally to protest the Vietnam War, and that this rally, the rally attended by 67 people, was covered by 52 persons, either actually newspaper men or news photographers, or military intelligence agents in disguise, which is a great example of an overkill, it seems to me, in this area of posing as newspapermen to cover rallies.

Mr. GRAHAM. Senator, we found in every case but one of the dozen we were able to verify that it was political dissent that was being watched. And that is what makes this most dangerous to the first amendment and to the public's access to information.

The Defense Department has issued an order—and of course you know this because it was done in reaction to the investigation that you made—which says:

> "There should be no covert or otherwise deceptive surveillance for penetration of civilian organizations unless specifically authorized by the Secretary of Defense or his designee."

Now, I am told, Mr. Chairman, that this is regarded by Pentagon officials as prohibiting agents from posing as journalists. But I must say that they could have certainly made it clearer.

Senator ERVIN. I might state that the Pentagon and the Department of the Army officials didn't make a lot of things clear to our Subcommittee. They dismissed some of our requests for witnesses who had personal knowledge of some of these activities by the military. They stated that they didn't think the committee needed that information and that they would select the witnesses we would hear.

Mr. GRAHAM. As I say, they say this action is taken to rule that out, although we have not been able to discover anyone who was punished as a result of any of these instances. And yet police officials in New York, Chicago, Detroit, here and some other cities have said that they disapprove of it.

As I said, the reason for this impersonation seems obvious: Law enforcement agencies tend to be ill-informed about political dissenters who do not fit the traditional "criminal" mold, and newsmen often have easy access to them. However, when policemen masquerade as newsmen, the same kind of forces come into play that arise when journalists are subpoenaed, except that the effect is more direct. And that is the target groups are usually highly suspicious of officialdom and "establishment" institutions, and are likely to freeze the press out at any indication that the media is serving law enforcement. This is compounded when the dissenters have good reason to believe that the "journalist" or "news cameraman" that take such interest in their activities may very well be reporting to city hall rather than to the city desk.

The task force has listed a series of instances of hostility and distrust demonstrated by some radical groups toward the press which appears to be due in part, at least, to these actions by the police. Newsmen have been assaulted by militants and excluded from their meetings. However, the most serious threat posed by this tactic is to the public. Its First Amendment right to be fully informed of developments within all elements of our society is threatened by this law enforcement tactic. The principal reason why it should be stopped is not that it makes the reporters' job more difficult, but that it may on occasion make that job impossible, the availability of information will be impaired.

Also, Mr. Chairman, it seems likely that the increased use of this tactic will rapidly dissipate its usefulness to the police. As such incidents come to public notice, people will become reluctant to give important information to reporters not known to them. As newsmen are increasingly frozen out of dissenters' meetings, so will the masquerading police agents. In the end law enforcement as well as the public will be shorter on information than before.

The FBI presents a special variation of this phenomenon. Its Director, J. Edgar Hoover, stated in a letter to this task force that: "FBI agents are not permitted to pose as reporters or press photographers in the course of their investigations." While there is no evidence that FBI agents actually flash press cards or use bogus television organizations as fronts there have been indications that FBI men do occasionally gain access to information by allowing others to think that they are journalists. At a draft card burning demonstration outside the Supreme Court in June of 1968, reporters for the *Washington Post* and *Boston Globe* spotted men whom they recognized as FBI agents using shiny new television cameras and tape recorders to interview the demonstrators along with the familiar faces of the Washington press. More recently, a man recognized by reporters as an FBI agent was seen taking notes with reporters at a meeting convened by Representative William Anderson of Tennessee of Congressmen who were being briefed about the celebrated Berrigan conspiracy prosecution. The agent ran away when he was asked by a congressional aide to identify himself and drove away in a car that was traced through its license number to the FBI. But such tactics, which the FBI seems to disavow, are not as damaging to press independence as the Bureau's policy of infiltrating the press by employing journalists as paid informers. During the riot-conspiracy trial of the "Chicago Seven" two journalists—Louis Salzberg and Carl Gilman, testified for the prosecution and said that they had been paid FBI informants for years. When this task force inquired about this to the Justice Department, John W. Hushen, Director of Public Information, sent the following reply which he said was prepared by Director Hoover.

> "The FBI accepts from any person information which may be of value in the course of an FBI investigation. The FBI does not now, and never has actively recruited journalists as informers. However, there is no policy against accepting information from a journalist or any news media representative if it is volunteered, which was the case with Mr. Louis Salzberg and Mr. Carl Gilman. Both of these individuals furnished information to the FBI on a voluntary basis. They were paid for their services and expenses.

It is difficult to accept the characterization of these journalists' relationship with the FBI as merely suppliers of volunteered information. Mr. Salzberg's FBI salary—$600 per month—was his principal source of income for at least 1 year. Mr. Gilman was on the FBI payroll for 2 years, receiving about $10,000 in pay and expenses. Their information may have been volunteered in the sense that they initially broached the idea of becoming paid informants to an FBI agent—rather than the other way around—but as a practical matter their work as regular paid informants meant that the FBI had infiltrated the press.

It seems logical that the same considerations that prompted Mr. Hoover to forbid his agents to pose as journalists should preclude the FBI agents from accepting journalists as paid informants. Obviously, if journalists or any other citizens volunteer information as acts of citizenship, any law enforcement agency should gratefully accept it. But an infallible test exists for determining whether information is actually being volunteered as an act of citizenship, or whether the informant has become an undercover arm of the Government—that is whether he gets paid for his information. Thus it seems that when the FBI pays journalists for their services as informants, then the journalists' profession has been infiltrated by the FBI. The task force concluded that the present FBI policy is wrong, and that journalists should not be employed as paid informants.

I would like to add here, Mr. Chairman, that I have been informed that there may be a dissent by one member of our task force from that conclusion, and that is Roger Rook, the district attorney of Clackamas County.

The task force also felt, Mr. Chairman, that the practice of news reporters accepting employment as informers is unethical and contrary to the trust required of professional journalists. The members expressed the hope in their report that the profession would condemn and discourage this practice.

Senator **Ervin**. Irrespective of specific instances, isn't it undoubtedly true that the press performs its obligations to society best when it is absolutely independent of Government?

Mr. **Graham**. Yes, sir.

Senator **Ervin**. And one of the principal obligations which rests upon the press is to point out the errors and deficiencies of Government for the purpose of enabling the public to demand that those errors and deficiencies be corrected?

Mr. **Graham**. Yes, sir.

Senator **Ervin**. And the press disables itself to some extent to perform this obligation when it places itself under obligation as employees of the Government, does it not?

Mr. **Graham**. Yes, sir. Mr. Chairman, the FBI of course has certain categories of people which it will not infiltrate. For instance, until very lately it would not recruit informers who were less than 18 years of age. I understand that that has been modified lately. But there are groups and such a policy concedes that there are—that should not be infiltrated as a matter of policy. And I feel that it would be a good policy to add reporters to those groups that should not be infiltrated.

Senator **Ervin**. In other words, the press functions better when it is not subject to constraints which prevent it from operating effectively, especially so far as Government action is concerned?

Mr. **Graham**. Yes.

Senator **Ervin**. And many things, it seems to me, have a tendency to curb the purpose of the press. For example, I have heard some Governors of various States being accused of appointing very influential newspapermen to honorary positions of one kind or the other in the hope that they would therefore get a very favorable presentation of their administration's work. I think that that is one way that is perfectly legitimate by which the press is to some extent disabled to perform its duties to the public.

Mr. **Graham**. And of course many journalists wouldn't take part in that kind of thing.

With regard to the underground press, Mr. Chairman, I know that you have heard testimony from a person who has made an extensive study of the subject. There are a few points that we saw that we would like to add.

If there is an inherent tension between the press and the Government, the friction is multiplied with regard to the underground press. It seems to have a special genius for antagonizing officialdom, yet it has little or none of the establishment press' protective political clout. As the frictions between militants of the political left and the Government have increased in the past few years, so have the occasions upon which local law enforcement officials have become aggrieved by statements in the underground press:

> The *Los Angeles Free Press* was fined $1,000 for having published a purloined list of State narcotics agents, and its publisher was placed on probation for several years.
>
> Dallas police raided an underground newspaper and hauled away 2 tons of material from an underground newspaper in an "obscenity" raid—yet failed to obtain an obscenity conviction that would stand up in Federal court.
>
> The Police Department at Buffalo, N.Y., drove the Black Panther newspaper from the streets by announcing its intention to arrest any vendors selling the publication.
>
> Officials in Los Angeles, Philadephia, Providence, and Richmond denied press credentials to the reporters of the local underground newspapers.
>
> The San Diego *Street Journal*'s office was searched by police without a warrant and its street vendors handcuffed, searched, and jailed for loitering and obstructing the sidewalk.

There have been numerous other allegations by the underground press of heavy-handed treatment by law enforcement officials. In *Orpheus*, a bimonthly publication of articles drawn from various underground newspapers, the underground press has described its situation as follows:

> Although these papers have been evicted from their offices and homes, harrassed by the police, had their street sellers arrested en masse, had their benefit parties raided, been bombed, burned, beaten, gypped, framed and lost printer after printer, the underground press continues to increase in size and number.

The list above included only those incidents that have been verified in sworn court testimony or reported in the "straight" press, but that is evidence enough that some law enforcement officials have used their officials authority against the underground press in a way in which it would never have been invoked against the establishment press. These actions seem to have been based upon an erroneous assumption that underground publications forfeit some degree of their protection under the First Amendment when they violate standards of taste, preach a tolerance of drugs and fornication and criticize the police. The result has been a double standard of treatment between the underground and the establishment press—a double standard that is inconsistent with the First Amendment's guarantee of freedom of the press.

A notable lack of attention has been given to this by the "straight" press. Of the numerous instances that were brought to the task force's attention in which elements of the underground press protested that they had been abused by the police, a majority were not mentioned in either the news or editorial columns of the establishment press. In those incidents that have developed into court cases, the underground press has been left largely to its own fragile devices by the more affluent elements of the news media. Others in the journalistic profession stood by and gave no aid in three legal actions involving the underground press that produced legal precedents damaging to all newsmen—the prosecution of the *Los Angeles Free Press* for theft, the subpenaing of the editor of the *Madison Kaleidoscope* after the bombing at the University of Wisconsin in 1970, and the denial of press credentials to the *Los Angeles Free Press*' reporters.

It might be asked, Mr. Chairman, why this has been brought to the attention of a congressional subcommittee, since the underground press' difficulties have usually been with local officials. The reason, of course, is that it is the First Amendment to the U.S. Constitution that is being violated. It is intolerable that any element of the press should be denied its protection—but if that is not enough reason to oppose this double standard, another reason is that legal precedents are being set that can come back to haunt the entire fourth estate. Last spring, the Supreme Court refused, with three Justices dissenting, to review a California decision upholding the denial of press cards to underground press personnel. The lower court's decision rejected out of hand the idea that the First Amendment gives newsmen a right of access to the scene of public disorders and upheavals. As Justice William O. Douglas noted when the Court refused to intervene in the Dallas case mentioned above:

> If this search and destroy technique (by the police) can be done against this Dallas newspaper, then it can be done to the *New York Times* (or) the *Washington Post.*

Thank you very much, Mr. Chairman.

Senator **Ervin**. Mr. Graham, do you agree with me that the first amendment grants its freedoms to all persons within the boundaries of our country?

Mr. **Graham**. Yes, sir.

Senator **Ervin**. And that, consequently, it grants its freedoms to both the wise and the foolish?

Mr. **Graham**. Yes.

Senator **Ervin**. The profound and the shallow?

Mr. **Graham**. Yes.

Senator **Ervin**. The devout and the ungodly? And those that hate our country and its institutions as well as to those who love our country and its institutions?

Mr. **Graham**. Yes; I do.

Senator **Ervin**. And do you agree with me that until the mere expression of ideas ceases and crime ensues, that the best interests of our country are served by recognizing the fact that the First Amendment protects the utterances of all kinds and conditions of men?

Mr. **Graham**. Yes, sir.

Senator **Ervin**. I thank you for a very interesting statement and for the disclosure to the subcommittee of some things that have not been brought to our attention before. I want to thank both of you gentlemen for the assistance you have given this subcommittee.

Counsel?

Mr. **Pursley**. Mr. Graham, I would like to ask you what has been the traditional basis for local officials granting or denying press credentials to members of the press corps?

Mr. **Graham**. Well, Mr. Pursley, as I understand it, in many places press credentials are viewed as worthless pieces of paper. In my previous press experience we knew all the police and they knew us in the smaller cities. And when we came running up to the scene of some disaster they let us through. However, in the major cities they have had to limit access to disasters. And the theory normally is that anyone who is a journalist should have a press pass. In Los Angeles, although the city of Los Angeles and the county of Los Angeles together had given credentials to some 3,000 newsmen, when the eight news photographers for the underground paper applied, they were told that this would be too many, and they were turned down. And the Supreme Court of the United States denied certiorari in that case.

Mr. **Pursley**. Do you know of any specific examples where local authorities have cited politically-oriented bases for denying the issuance of press credentials?

Mr. **Graham**. Well, in the Los Angeles case one of the officials was quoted as having said that he wouldn't let his daughter read that paper, that it was a vulgar sheet, and it was rabble-rousing, and he didn't think they should have press credentials. But obviously, public officials, whatever their motives, are usually able to cloak them in more respectful reasons.

I must say that in the incident at Providence there appears to have been some justification for what was done. Press passes were given to some of the underground reporters, and they came back with a platoon of others who wanted them, too. And you have to start drawing lines, I assume, at some place.

Senator **Ervin**. Thank you.

Mr. **Ebner**. Mr. Graham, one question please. In mentioning the double standard that you believe often applies to the underground press, I would certainly agree with you in a lot of the examples you mentioned. But you didn't mean to imply that the first amendment would prohibit any legitimate prosecution for a criminal act which was committed by the underground press, did you?

Mr. **Graham**. Of course I don't believe that the press can commit a criminal act under most circumstances, individuals can commit acts—unless you mean obscenity. Do you mean that?

Mr. **Ebner.** Not necessarily. I was thinking particularly of the first example you gave where the *Los Angeles Free Press* was fined $10,000 for having published a purloined list. I presume that was because they violated some criminal statute.

Mr. **Graham.** They were found guilty of having published a list of narcotics informers, and they were indicted and tried for that, and they were found guilty. To my mind that was an unconstitutional conviction. And all I can say is that if people who print information that public officials deem to be confidential because it originated in some Government office—if they are all subject to prosecution for theft—I believe all of us had better get our striped suits out, because all of us do that all the time. Because this was the underground press it was prosecuted. I don't see much difference between what the *New York Times* did in the Pentagon Papers and what the *Los Angeles Free Press* did. But the *New York Times* is too big to be prosecuted.

Mr. **Ebner.** In other words, you are drawing a distinction solely because this was an underground press and not because there might have been some specific criminal statute violated in this case? Do you know for a fact that there was not a criminal statute involved at all?

Mr. **Graham.** I am sure that there is a criminal statute which says it is a crime to steal, and to receive stolen goods. But I am just saying that all of the reporters in this room have had pieces of paper which came out of a Government office without the consent of the head of that office, and we have printed that information, and none of us have ever been prosecuted, although perhaps technically it could have been done.

Mr. **Ebner.** But you would draw a distinction between that situation and the situation where perhaps the reporter himself stole it, or an agent of the newspaper?

Mr. **Graham.** This person did not—I should have made that clear—there was no allegation that the reporters for this paper went in and did the theft. A young man who was a clerk in the State troopers' office became disenchanted with what he thought was over-zealous penetration by narcotics agents of the public, and so he handed this out to representatives of the underground press. They didn't break and enter, it was none of that.

Mr. **Ebner.** Nevertheless, you would agree that if there were a criminal act committed by a newspaper, underground or otherwise, that prosecution would not be unconstitutional in your view, that the first amendment does not protect such acts?

Mr. **Graham.** I do not believe that a newspaper can commit a criminal act, other than under our obscenity laws as they stand today. Now, individuals can commit criminal acts.

Mr. **Ebner.** Thank you, Mr. Chairman.

Senator **Ervin.** There is a question in your answer that is very intriguing to me. One thing that has bothered me about such incidents where a person, a Government employee, takes confidential information and gives it to the newspaperman—I am not talking about the legal aspects of it now—is whether there is any moral distinction being made between the act of the Government employee in giving classified information orally and the newspaperman receiving such information and the giving of information to the newspaperman, by a Government employee, that happens to be written out on a piece of Government paper and marked classified?

Mr. GRAHAM. I see no distinction.

Senator ERVIN. And isn't the prosecution in those cases fundamentally prosecution for stealing or receiving the information rather than the piece of paper that the information is on.

Mr. GRAHAM. Yes, sir.

Senator ERVIN. I am frank to state that as a lawyer I have been baffled by that kind of question. There are laws against stealing, and there are laws against receiving stolen property, knowing that it has been stolen. We had some very intriguing testimony yesterday from a great authority in this field. Professor Emerson of the Yale Law School. I asked him about that question, and he testified in substance that he didn't think that the Constitution permitted Congress or the legislature to make it a crime for a member of the press to receive a stolen Government document and publish that document. He took the position that receipt of the Government paper with the information on it was in essence, under the First Amendment, a part of the act of publication. Since publication is protected by the first amendment, the act of receiving the information for publication should not be made a crime by the Government under the first amendment. Otherwise there would be interference with the full exercise of the First Amendment. Now, the judge and myself might be troubled with that reasoning, but it is very intriguing, and was advanced here yesterday by a man whose preeminence in the field of the First Amendment is recognized throughout the United States.

Mr. GRAHAM. Apparently the Justice Department has been guided to some extent by that, because they have indicted Daniel Ellsberg for stealing, for theft—one of the two counts in connection with the Pentagon papers. And apparently either of those same pieces of paper or xeroxes of them went to a number of publications, and they have not been indicted for receiving stolen goods.

Senator ERVIN. Your protest against the course of action taken in the case of the underground newspaper in Los Angeles arises out of the fact that you thought they were really punishing the paper not for receiving a stolen piece of government paper, but for publishing the information which the Government had accumulated.

Mr. GRAHAM. Yes, sir.

Senator ERVIN. Judge, I wouldn't ask you to comment on this question unless of course you want to. It is a very intriguing area to me.

Mr. WILLIAMSON. I didn't quite hear you sir.

Senator ERVIN. I wouldn't ask you to express any opinion on these points, because I would hate to be asked myself if I hadn't given it great consideration.

Mr. WILLIAMSON. I can say that I am somewhat baffled.

Senator ERVIN. So am I. Thank you very much.

(The statement of Mr. Graham follows:)

TESTIMONY OF FRED P. GRAHAM, RAPPORTEUR FOR THE TWENTIETH CENTURY FUND'S TASK FORCE ON GOVERNMENTAL POWER AND PRESS FREEDOM

Mr. Chairman: It is a pleasure to accept the Subcommittee's invitation to testify about several particularly interesting developments that came to the notice of the Task Force on Governmental Power and Press Freedom. The Task Force's Chairman, Judge Williamson, has summarized for you the group's conclusions about press subpenas and the Pentagon Papers litigation. My testimony concerns two less obvious areas of friction between the Government and the press: a subtle and apparently growing form of governmental penetration of the news media, in which police either pose as newsmen or employ them as paid informers; and a constitutional double standard applied by some officials to the underground press, granting it a watered-down version of First Amendment protection or none at all.

POLICE POSING AS JOURNALISTS

In recent months a series of unrelated and apparently uncoordinated instances have come to light in which personnel of government intelligence and law enforcement agencies have posed as news reporters or photographers. In a variation of this, law enforcement agencies have paid reporters and press photographers to collect information for them, thus using journalism as a guise to obtain material for governmental use. These incidents appear to be remarkably widespread, both geographically and organizationally. They have occured from Washington to Saigon and within the Army, Federal Bureau of Investigation and local police.

Whether such incidents were common in the past and were not discovered, is not known. What does seem significant is that a rash of these occurences has come to light within the past two years—almost in rhythm with the rising tempo of dissent, violence and official concern about dissent and violence. In fact, most of the instances that have been discovered involved police investigations of political dissenters—groups about which the public should be as fully informed as possible. However, the frequency with which police have been found to be posing as newsmen in recent months has tended to raise barriers of suspicion that have made it more difficult for the press to cover many events.

No one knows, of course, how often this has actually happened. But the Task Force was able to verify at least a dozen instances within the past two years in which either sworn testimony or a responsible police official conceded that it did:

In Saigon, two U.S. agents were found to have infiltrated the press corps.

The Army Security Agency painted a van with the name of a nonexistent television company and filmed demonstrators at the Democratic National Convention in 1968.

Army Intelligence agents also posed as T.V. cameramen during the Presidential Inauguration activities in Washington in January 1969.

A female intelligence agent for the District of Columbia police department posed as a reporter to gain access to a welfare rights group's meeting.

Army intelligence agents obtained press credentials from the New York City Police Department to cover actions of H. Rap Brown and Stokely Carmichael in New York during the summer riots of 1967.

In Wichita, Kansas, press credentials were given to local policemen during a visit by Vice President Agnew.

A member of the Chicago Police Department's Intelligence Division was discovered posing as a newsman to gain information from black students at a protest rally.

Two plainclothes officers of the Nassau County, N.Y. police force posed as photographers for a weekly newspaper in order to photograph the audience at a veterans' antiwar rally.

An Army agent masqueraded as a reporter for the *Richmond Times Dispatch* to obtain information on the Southern Christian Leadership Conference.

A Detroit policeman posed as a news photographer to observe a General Motors stockholders' meeting.

> In Albuquerque a city policeman posed as an Associated Press photographer at the University of New Mexico campus during demonstrations protesting the invasion of Cambodia in the Spring of 1970.
>
> Complaints by newsmen covering July 4 ceremonies in San Juan, Puerto Rico that police were posing as reporters led to an admission by the commonwealth Secretary that his department had been issuing press credentials to police for about eight years.

Police officials in New York City, Chicago, Detroit and the District of Columbia have issued orders condemning the practice of police agents posing as newsmen. The Defense Department has issued an order that "there shall be no covert or otherwise deceptive surveillance or penetration of civilian organization unless specifically authorized by the Secretary of Defense or his designee." This order is regarded by Pentagon officials as prohibiting agents from posing as journalists.

All but one of the instances listed above involve police or intelligence agents masquerading as newsmen to gather information about dissident groups as to investigate other "political" matters. The reason seems obvious: Law enforcement agencies tend to be ill-informed about political dissenters who do not fit the traditional "criminal" mold, and newsmen often have easy access to them. However, when policemen masquerade as newsmen, the same kind of forces come into play that arise when journalists are subpoenaed, except that the effect is more direct. As in the subpena situation, the target groups are usually highly suspicious of officialdom and "establishment" institutions, and are likely to freeze the press out at any indication that the media is serving law enforcement. This is compounded when the dissenters have good reason to believe that the "journalist" or "news cameraman" that take such interest in their activities may very well be reporting to City Hall rather than to the city desk.

The Task Force has listed a series of instances of hostility and distrust demonstrated by some radical groups toward the press which appears to be due in part, at least, to these actions by the police. Newsmen have been assaulted by militants and excluded from their meetings. However, the most serious threat posed by this tactic is to the public. Its First Amendment right to be fully informed of developments within all elements of our society is threatened by this law enforcement tactic. The principal reason why it should be stopped is not that it makes the reporters' job more difficult, but that it may on occasion make that job impossible, the availability of information will be impaired.

Furthermore, it seems likely that the increased use of this tactic will rapidly dissipate its usefulness to the police. As such incidents come to public notice, people will become reluctant to give important information to "reporters" not known to them. As newsmen are increasingly frozen out of dissenters' meetings, so will the masquerading police agents. In the end law enforcement as well as the public will be shorter on information than before.

The F.B.I. presents a special variation of this phenomenon. Its director, J. Edgar Hoover, stated in a letter to this Task Force that "F.B.I. agents are not permitted to pose as reporters or press photographers in the course of their investigations." While there is no evidence that F.B.I. agents actually flash press cards or use bogus television organizations as "fronts" there have been indications that F.B.I. men do occasionally gain access to information by allowing others to think that they are journalists. At a draft-card burning demonstration outside the Supreme Court in June of 1968, reporters for the *Washington Post* and *Boston Globe* spotted men whom they recognized as F.B.I. agents using shiny new television cameras and tape recorders to interview the demonstrators along with the familiar faces of the Washington press. More recently, a man recognized by reporters as an F.B.I. agent was seen taking notes with reporters at a meeting convened by Rep. William Anderson of Tennessee of Congressmen who were being briefed about the celebrated Berrigan conspiracy prosecution. The agent ran away when he was asked by a Congressional aide to identify himself and drove away in a car that was traced through its license number to the F.B.I. But such tactics, which the F.B.I. seems to disavow, are not as damaging to press independence as the Bureau's policy of infiltrating the press by employing journalists as paid informers. During the riot-conspiracy trial of the "Chicago Seven" two journalists—Louis Salzberg and Carl Gilman, testified for the prosecution and said that they had been paid F.B.I. informants for years. When this Task Force enquired about this to the Justice Department, John W. Hushen, Director of Public Information, sent the following reply which he said was "prepared by Director Hoover":

> "The FBI accepts from any person information which may be of value in the course of an FBI investigation. The FBI does not now, and never has actively recruited journalists as informers. However, there is no policy against accepting information from a journalist or any news media representative if it is volunteered, which was the case with Mr. Louis Salzberg and Mr. Carl Gilman. Both of these individuals furnished information to the FBI on a voluntary bases. They were paid for their services and expenses."

It is difficult to accept the characterization of these journalists' relationship with the F.B.I. as merely suppliers of "volunteered" information. Mr. Salzberg's F.B.I. salary—$600 per month—was his principal source of income for at least one year. Mr. Gilman was on the F.B.I. payroll for two years, receiving about $10,000 in pay and expenses. Their information may have been "volunteered" in the sense that they initially broached the idea of becoming paid informants to an F.B.I. agent—rather than the other way around—but as a practical matter their work as regular paid informants meant that the F.B.I. had infiltrated the press.

It seems logical that the same considerations that prompted Mr. Hoover to forbid his agents to pose as journalists should preclude the F.B.I. agents from accepting journalists as paid informants. Obviously, if journalists or any other citizens volunteer information as acts of citizenship, any law enforcement agency should gratefully accept it. But an infallible test exists for determining whether information is actually being "volunteered" as an act of citizenship, or whether the informant has become an undercover arm of the Government—that is whether he gets paid for his information. Thus it seems that when the F.B.I. pays journalists for their "services" as informants, then the journalists' profession has been infiltrated by the F.B.I. The Task Force concluded that the present F.B.I. policy is wrong, and that journalists should not be employed as paid informants.

The Task Force also felt, Mr. Chairman, that the practice of news reporters accepting employment as informers is unethical and contrary to the trust required of professional journalists. The members expressed the hope in their report that the profession would condemn and discourage this practice.

THE UNDERGROUND PRESS

Mr. Chairman, I understand that you have heard testimony from a person who has made an extensive study of the underground press, so I will refer to it briefly, from the standpoint of the Task Force's examination of the matter.

If there is an inherent tension between the press and the government, the friction is multiplied with regard to the underground press. It seems to have a special genius for antagonizing officialdom, yet it has little or none of the establishment press' protective political power. As the frictions between militants of the political left and the Government have increased in the past few years, so have the occasions upon which local law enforcement officials have become aggrieved by statements in the underground press:

> The Los Angeles *Free Press* was fined $10,000 for having published a purloined list of state narcotics agents.
>
> Dallas police raided an underground newspaper and hauled away two tons of material from an underground newspaper in an "obscenity" raid—yet failed to obtain an obscenity conviction that would stand up in Federal Court.
>
> The Police Department of Buffalo, New York, drove the Black Panther newspaper from the streets by announcing its intention to arrest any vendors selling the publication.
>
> Officials in Los Angeles, Philadelphia, Providence and Richmond denied press credentials to the reporters of the local underground newspapers.
>
> The San Diego *Street Journal's* office was searched by police without a warrant and its street vendors handcuffed, searched and jailed for loitering and obstructing the sidewalk.

There have been numerous other allegations by the underground press of heavy-handed treatment by law enforcement officials. In *Orpheus*, a bimonthly publication of articles drawn from various underground newspapers, the underground press has described its situation as follows:

"Although these papers have been evicted from their offices and homes, harrassed by the police, had their street sellers arrested en masse, had their benefit parties raided, been bombed, burned, beaten, gypped, framed and lost printer after printer, the underground press continues to increase in size and number."

The list above included only those incidents that have been verified in sworn court testimony or reported in the "straight" press, but that is evidence enough that some law enforcement officials have used their officials authority against the underground press in a way in which it would never have been invoked against the establishment press. These actions seem to have been based upon an erroneous assumption that underground publications forfeit some degree of their protection under the First Amendment when they violate standards of taste, preach a tolerance of drugs and fornication and criticize the police. The result has been a double standard of treatment between the underground and the establishment press—a double standard that is inconsistent with the First Amendment's guarantee of freedom of the press.

A notable lack of attention has been given to this by the "straight" press. Of the numerous instances that were brought to the Task Force's attention in which elements of the underground press protested that they had been abused by the police, a majority were not mentioned in either the news or editorial columns of the establishment press. In those incidents that have developed into court cases, the underground press has been left largely to its own fragile devices by the more affluent elements of the news media. Others in the journalistic profession stood by and gave no aid in three legal actions involving the underground press that produced legal precedents damaging to all newsmen—the prosecution of the *Los Angeles Free Press* for theft, the subpoenaing of the editor or the *Madison Kaleidoscope* after the bombing at the University of Wisconsin in 1970, and the denial of press credentials to the *Los Angeles Free Press*' reporters.

It might be asked, Mr. Chairman, why this has been brought to the attention of a Congressional subcommittee, since the underground press' difficulties have usually been with local officials. The reason, of course, is that it is the First Amendment to the United States Constitution that is being violated. It is intolerable that any element of the press should be denied its protection—but if that is not enough reason to oppose this double standard, another reason is that legal precedents are being set that can come back to haunt the entire Fourth Estate. Last spring, the Supreme Court refused, with three Justices dissenting, to review a California decision upholding the denial of press cards to underground press personnel. The lower Court's decision rejected out of hand the idea that the First Amendment gives newsmen a right of access to the scene of public disorders and upheavals. As Justice William O. Douglas noted when the Court refused to intervene in the Dallas case mentioned above: "If this search and destroy technique (by the police) can be done against this Dallas newspaper, then it can be done to the *New York Times* (or) the *Washington Post*."

TASK FORCE ON GOVERNMENTAL POWER AND PRESS FREEDOM

Robert Williamson (Chairman), Former Chief Justice of Maine.
Tom Forcade, Coordinator, Underground Press Syndicate.
Jack Bass, *Charlotte Observer*.
L. F. Palmer, Jr., Columnist, *Chicago Daily News*.
Roger Rook, District Attorney, Clackamas County Courthouse.
Bert H. Early, Executive Director, American Bar Association.
Mike Wallace, CBS News.
Howard B. Woods, *St. Louis Sentinel*.
Ralph de Toledano, Columnist.
Norman Isaacs, Editor in Residence (Vice Chairman), Graduate School of Journalism, Columbia University.
Fred P. Graham, Supreme Court Correspondent, *New York Times* (rapporteur).

Senator ERVIN. Counsel will call the next witness.

Mr. BASKIR. Mr. Chairman, our next witness is Mr. William H. Fitzpatrick, editor of the *Ledger-Star*, Norfolk, Va.

William H. Fitzpatrick is vice president and executive editor of Landmark Communications, Inc. Newspapers in the Landmark group are the *Virginian-Pilot* and the *Ledger-Star* in Norfolk, (Va.); the *Greensboro* (N.C.) *Daily News* and the *Greensboro Record*; and the *Roanoke* (Va.) *Times and World-News.*

Mr. Fitzpatrick, a native of New Orleans, was awarded the Pulitzer Prize for distinguished editorial writing in 1951, while editor of the *New Orleans States*, for editorials opposing certain United Nations treaties. Under his editorship, the *States* earlier won the Sigma Delta Chi "courage in journalism" award for its contribution to the defeat in 1946 of the New Orleans arm of the Huey Long machine. He was vice president and director of the Times-Picayune Publishing Co. when he went to New York in 1952 as associate editor of the *Wall Street Journal*. He was named editor of the *Ledger-Star* in Norfolk in 1960.

Senator ERVIN. I am delighted to welcome you to the subcommittee, and I wish to express to you our deep appreciation for your willingness to come and give us the benefit of your observations in a field in which you have had much practical experience.

STATEMENT OF WILLIAM H. FITZPATRICK, EDITOR, LEDGER-STAR, NORFOLK, VA.

Mr. FITZPATRICK. Thank you very much, Senator. I am delighted to be here.

I would like first of all to make the statement that our publisher committed the egregious error of making me no longer editor of the *Ledger-Star*, but executive editor of the six Landmark newspapers. And I mention that only for the purposes of registering a disclaimer.

I speak for none of the other editors, but only for myself. And I confine my remarks to the newsman's privilege.

The subject of granting a privilege to newsmen is not a new one. In 1959, as associate editor of the *Wall Street Journal*, I took part in a panel discussion on the subject before the New York State Society of Newspaper Editors, and a great deal of what I have to say here today applies as much as it did then, in my opinion.

All of us can agree, I am sure, that those who support the so-called shield law, or newsmen's privilege, are supporting a proposal that they think to be in the public interest. Nonetheless, support for a shield law is not by any means unanimous among editors. The convention report—called *Problems of Journalism*—of the American Society of Newspaper Editors carried comment, one can hardly characterize it as debate, on the shield law. By my count, Donald Sterling of the *Oregon Journal*, George Kentera then of the *Newark News*, Robert Smith of the *Minneapolis Star*, John McMullan of the *Philadelphia Inquirer* and I expressed some doubt concerning either the wording or effectiveness of a bill almost exactly similar to S. 1311, or doubt that a need exists for the legislation it proposed. I know also that other editors question the idea, for a note on page 42 of the proceedings shows that following a request by Newbold Noyes of the *Washington Star*, then president of ASNE, for a show of hands as to the wisdom of leading a move to secure a national shield law, the official count was described as follows:

"The results appeared to indicate support for the shield law proposal in a 4 to 1 ratio."

This means of course that 20 percent of the editors present weren't convinced of the need for such a law.

Indeed, in my view, the proposition that newsmen ought to be shielded by law from revealing their sources of information deserves to be questioned on at least three levels.

One is the relation of this suggested privilege to the public good.

One is to ask whether the granting of such a privilege as envisioned in S. 1311 does not actually limit freedoms now believed to exist by creating exceptions to the privilege it claims to grant.

And one is a question that probably ought to be addressed to my colleagues in the news media, but which nonetheless has a bearing on one of the bothersome questions of the times; the credibility of the news media. That question is to ask how the Nation's press, the acknowledged champions of the right of the public to know all where the public interest is involved, can at the same time champion for itself a privilege to remain silent on matters that may also involve the public interest.

One argument goes that if the privilege is not granted, newspapers will not be able to gather news as heretofore. It is also said that a number of States have granted such a privilege. As of last April in the discussion in ASNE it was brought out that 17 have done so. The answer to that, it seems plain, is that 33 States have not granted such a privilege and newspapers in those States seem to have got along nicely without such a law.

There have been attempts in the past to justify the newspaper privilege on the ground that it is similar to privileges known in the past as the lawyer-client, doctor-patient, and husband-wife privileges.

Yet all of you gentlemen know that the so-called lawyer-client, doctor-patient, husband-wife privileges over the years have been narrowed in the interests of the administration of justice. At the same time, newspapers should remember that such privileges exact a price. Lawyers and doctors are answerable to the State, for they are licensed. I don't think any newspaper man wants to be licensed or to have his newspaper licensed.

This is not the only question to arise. There are others. They are not new; some were pointed out in 1949, when the New York State Law Revision Commission went pretty thoroughly into newsmen's privilege from the viewpoint of an absolute privilege.

Some of the questions raised then were: What sorts of newsgathering and news-dissemination would come within the scope of such a law? Who should be covered? Everybody, or if not everybody, just a few? Publishers as well as reporters? What of a crime that the reporter himself observes? And what if he participates in it? What about the nature of the news in question? Assuming that the public interest may well be served by refusal to divulge a source of information when a mayor's official misdeeds are exposed, is there a like service to the public interest in permitting a reporter to use the privilege where the private indiscretions of a private citizen are concerned? Should the privilege exist only in criminal cases? What about libel actions? What about grand juries; or legislative bodies?

John McMullan, executive editor of the *Philadelphia Inquirer*, whom I mentioned earlier in this statement, in an article in the July/August 1971 ASNE Bulletin, asked his lawyers questions about H.R. 837, which is almost identical to S. 1311, and his lawyer, Harold Kohn, replied with this criticism:

> 1. The bill does not specifically state that it covers documents.
>
> 2. The current wording of the bill leaves open the possibility that the exception for materials published will be interpreted to swallow up the general protection granted confidential information.
>
> 3. The exception for allegedly defamatory information also holds the real potential of destroying the entire purpose of the proposed bill.

The question of what constitutes a defense based on the source of such information could cause much difficulty.

Such criticisms are only a measure of the difficulty of legislating in this field. I think that my predecessor at this table, Justice Williamson pointed that out.

Senator **Ervin**. Yes, he pointed out that there were four different ways to approach this problem.

Mr. **Fitzpatrick**. Some believe as I do that a shield law's privilege cannot be an absolute and that any privilege must acknowledge that the public interest must be paramount. Where the public interest is paramount, courts should require that sources be revealed.

Let it be noted that for many newspapermen there are circumstances under which no power on earth could force them to reveal a source of information. Let us assume that as a newsman I am handed by a person in a State highway department a set of documents. These documents clearly prove that some funny business in contracts has been going on. After due checking, the story is printed, and it stands up.

A legislative investigation follows, the newspaperman, myself, is sworn as a witness and on the stand is asked the name of his informant.

The investigating legislators are not going to get this from the newsman because the name of the informant in this case isn't pertinent and the man's identity is not at all necessary to serve the ends of justice. The disclosure could, however, serve the ends of vengeful injustice. And if the State legislators should vote this newsman in contempt, the State courts uphold the contempt, and a judge sentences me, I might have to live for a time in jail. But any newsman in that condition can live with himself, at least, and he may even acquire a little instant immortality.

Now, imagine another situation. A newsman is investigating a report that the local bank is in trouble because somebody has lifted some money. So he goes to the bank president who says the cashier stole $10,000 but please don't quote him as saying so. Instead of digging further, the newsman writes a story saying that an official of the bank says Joe Johnson, the cashier, stole $10,000; and let's also assume the newspaper is foolish enough to print it as it stands. I think most newsmen will agree that this could happen.

The police grab Joe Johnson and throw him in jail and after a few days of polite police questioning, they turn him loose. He hasn't stolen the money at all, it seems. Joe Johnson sues the bank for what happened to him, and the newsman is called as a witness in a civil suit. Can it seriously be claimed this newsman would be entitled to refuse on either moral or legal grounds, to reveal the sound of his information under oath, in a trial to arrive at justice to Joe Johnson? Will anyone argue that he is not himself obstructing justice by refusing to testify?

We all recognize that the press freedom anchored in article I of the Bill of Rights of the Constitution was placed there in the public interest. The founders believed that a freedom to print was necessary to preserve most other freedoms of free men. But it should be remembered that freedom to print is not an irresponsible freedom nor an unlimited one. I need not remind any of you gentlemen or any newspaperman of Justice Holmes' remark that "freedom of speech does not include shouting fire in a crowded theater." Nor should editors need reminding that, for all the self-congratulations, newspapers were restrained from publication of the Pentagon papers by Federal judges.

Neither is press freedom all that some editors, from time to time, might like it to mean. There are other freedoms possessed by others that sometimes clash with it, and one of them is directly concerned with bearing witness.

Articles VI and VII of the Bill of Rights have to do with criminal trials and civil suits. In both criminal trials and civil suits there are constitutional requirements for compulsory process to obtain witnesses in the search for truth and justice. Compulsory process means the right to subpena and the right of trial judges to hold witnesses in contempt for refusal to testify.

I believe there is no exception to this constitutional right to summon witnesses that excludes newsmen from the same responsibility to serve the public interest that is required of everybody else.

And there is another point, an alternative point, to be sure, that perhaps the most important of all to newspapermen, that ought to be considered. Surely it should be considered by those favoring a shield law.

If newspapers support the proposition that a grant of immunity to newspapermen from testifying can be limited in any way for any purpose by act of Congress, they are supporting a proposition that grants Congress a limiting power. Once the philosophy of limitation is adopted who will dare predict when the limitations on immunity will end?

As things are now, there are no spelled out rights to refuse to testify as to the sources of information nor are there any spelled out acts of Congress that would force disclosure.

In this, newspapermen are perhaps fortunate. For it permits the individual newspapermen to choose his course, right or wrong, according to his own principles. Balanced against the individual's concepts will be the concept of the individual court as to whether the cause of justice is served or not by the refusal. And here is exactly the point that Mr. Baskir made in his question earlier to one of my predecessors.

In sum, a shield law that attempts to exempt newsmen from testifying may be unconstitutional inasmuch as the Bill of Rights guarantees defendants the right to summon witnesses in criminal cases.

A shield law that includes exceptions is a dangerous precedent to the extent that it can become, by frequent amendment, a law that does not protect newsmen from revealing their sources but a law that requires them to do so.

A shield law that attempts to grant newsmen privileges other citizens do not possess is not an altogether becoming posture for newsmen to assume. I do not think newspapermen should be proud of seeking an immunity broader than anyone else posesses under the Constitution, and I find it ironic that some of us think it proper to demand disclosure where all others are concerned but deny disclosure where we are concerned. Surely it is understandable if the public begins to wonder whose interest, the public interest or our own interest, is our chief concern.

Senator **Ervin**. You maintain, as I interpret your statement, that any rule of law which grants a privilege against testifying limits the courts in their search for truth?

Mr. **Fitzpatrick**. I maintain, Senator Ervin, that if any such law were constitutional it would. I also don't believe that it would be constitutional.

Senator **Ervin**. There can be no doubt of the fact that any law which excuses anyone from testifying as to facts within their knowledge in a litigated case, civil or criminal, tends to disable—at least deprives—the court of the full power to investigate the truth.

Mr. **Fitzpatrick**. I believe newspapermen ought to be the last people summoned in cases like this, and that justice in the case at hand should require a newsman's testimony before he is summoned. If the truth can be found without his testimony, I think it would be best not to require him to testify.

Senator **Ervin**. Now Judge Williamson stated—and I think it is undoubtedly true—that if any such privileges are granted it cannot be based on the same reasons which sustain the other privileges. Under the law we have what is called the rule which grants the patient the right to object to the introduction in evidence of confidential communications made by him to his physician to enable his physician to prescribe for his disease, that a client can object to the admission in evidence of confidential communications which he made to his lawyer for the purpose of enabling his lawyer to prepare his case or his defense, and that a husband or a wife can object to the admission in a case of a confidential communication which he or she made to the other spouse in the course of the marital relationship, and in a few States we have what is called a priest penitent privilege under which a penitent can object to a priest testifying to a confidential communication which he made to his priest in an effort to obtain some relief at the hands of the priest from some psychological problem that was bothering him.

In every one of these cases the privilege is based upon the purpose of protecting the person who made the communication. Now, if a newsman's privilege could be established it couldn't possibly rest upon the protection of that, it would have to be based on some other foundation, wouldn't it?

Mr. FITZPATRICK. I should think so, sir. I think these other privileges—I am not sure it would include the priest-penitent privilege, but they have all been limited by the law over the years in the administration of justice.

Senator ERVIN. Yes, in many States there have been statutes provided as to the physician patient relationship that the court can nevertheless require the disclosure where it is essential to the administration of justice. And of course the confidential communication between the lawyers and the client cannot be excluded where it was designed to perpetrate a fraud. So there are exceptions.

You have pointed out, I think, a very drastic and quite plausible situation in your illustration about the man Joe Johnson, who was thrown in jail on the false charge of having stolen bank funds. It is quite conceivable in that case that it would be impossible for Joe Johnson, who has been at the least slandered by or libeled by the publication, to recover damages against the real cause of his imprisonment, the official of the bank, or the bank, without the testimony of the newspaperman.

Mr. FITZPATRICK. Yes.

Senator ERVIN. I have to confess that I have many misgivings about this proposal, because I think Judge Williamson's testimony indicated the great difficulty of phrasing proper law and finding language which would express it. And as I stated to him, I don't want to belittle the linguistic capacity of my colleagues in Congress, but I am nevertheless constrained to say that I think the men that drew the first amendment probably surpassed them in capacity in that field.

Mr. FITZPATRICK. Senator, if I may observe, those men also drew the other nine.

Senator ERVIN. You point out that the sixth amendment gives a man the right to confront his accusers, and gives him the right to have compulsory process to obtain witness for his defense. Therefore your position is that a privilege of kind envisioned in S. 1311 would conflict with that provision of the Constitution.

Mr. FITZPATRICK. I am no lawyer, I am a simple newspaperman, but that is the way it seems to me, sir.

Senator ERVIN. It is a very interesting proposition that you have advanced. I believe it is original so far in these areas.

There is one thing certain. I think even though you plead not guilty to the offense of being a lawyer—to which I would have to plead guilty—I think it is clear to you and me both that any act Congress might pass in this field would be invalid if it conflicted with any provision of the Constitution. All that Congress can do is to pass laws which are in harmony with the Constitution, not laws which are inconsistent with its provisions.

Mr. FITZPATRICK. Yes, sir.

Mr. BASKIR. Mr. Fitzpatrick, let me sort of return the compliment by taking the side of Mr. Graham and Justice Williamson and ask you to respond to their point. They said that the situation today is much different from what the press has had to face, or justice has had to face, in the past; there has been a great increase in the number of subpenas issued, they are now being issued presumably by the Federal authorities, they are apparently predominantly being issued in the context of political trials, they are being used as investigative aids—not in the course of grand jury investigations and not as direct evidence in the trial, and they are seeking not first hand information such as the examples that you gave, not evidence, but intelligence work. This is a different situation which now for the first time requires some legislative resolution. I wonder if you would respond to what you might say is their case.

Mr. **Fitzpatrick.** I think that I will agree that these are areas that may have developed—these may have developed in the last few years. I am not sure that they will continue that way. This is not the first time that newspapers have been under pressure from other areas of society. I just happen to have been raised in newspapers in New Orleans when the late Senator Long ran the State.

And we had a great deal of pressure on us. But we managed to be able to continue to print without a law that granted us a privilege of this sort.

I can see areas in which conditions might be greatly improved from newspapermen in covering the news. But I think that this is a situation where a confrontation is something that should be avoided. There are certain times and places when I think some part of the Constitution comes in conflict with other parts, and the best way you can work it out is, as you have suggested, through discussion. I think Mr. Graham pointed out that there has been a cessation in the past year of the use of subpenas after Attorney General Mitchell spoke to some of his more enthusiastic underlings. And I think this probably is a better way to go about it than to pass a law the full result of which to me is just impossible to foresee.

Mr. **Baskir.** Let me ask you also about the proposition I presented to them, and that is, when a reporter's view of what the public interest requires differs from that of a judge, the reporter is held in contempt, and the objection raised to such a situation is that a contempt citation is a lawless way of resolving the problem, although your testimony suggests that you approve of it. I wonder if you would reply to that objection, is it a lawless way of handling this problem?

Mr. **Fitzpatrick.** I think that there are certain cases when, as a newsman, I would not reveal my sources of information, unless I were convinced that this information was absolutely necessary to a determination of justice, and that a determination of justice depended solely on my testimony.

Otherwise I think I would refuse, and they could find out, whoever the people who were seeking this information were, could find it out some other way.

Mr. **Baskir.** You would be willing to face a contempt citation?

Mr. **Fitzpatrick.** I would be willing to go to jail under certain circumstances. I wouldn't welcome it every weekend, but I would be willing under certain circumstances to go to jail, certainly.

Mr. **Baskir.** Thank you.

Senator **Ervin**. Don't you think that this problem of the subpena has been greatly increased by overzealous prosecuting attorneys in criminal cases.

Mr. **Fitzpatrick**. I would certainly agree with that; yes, sir.

Senator **Ervin**. Don't you believe that a confrontation could be avoided in most cases by simple discussions between the district attorney and the newsman.

Mr. **Fitzpatrick**. I have had enough experience with district attorneys not to say this as an absolute, but I think in most cases you are perfectly correct, it could be.

I think an understanding of the problem could always aid to its solution.

Senator **Ervin**. Do you agree with me that many of the ills and annoyances in a growing society are due to a lack of restraint on the part of the people who exercise public authority.

Mr. **Fitzpatrick**. I beg your pardon, sir.

Senator **Ervin**. Do you agree with me that a very large percentage of the ills and annoyances we suffer are due to a lack of restraint on the part of the persons who exercise governmental power.

Mr. **Fitzpatrick**. There is no question about that.

Senator **Ervin**. Don't you also agree with me that most of the information which newspapermen gather from individuals or groups that society regard as dangerous would be inadmissible in courts as being pure hearsay.

Mr. **Fitzpatrick**. I agree, sir.

Senator **Ervin**. So a lot of these overzealous district attorneys who have an indiscriminate practice of issuing subpenas, without making such preliminary investigations as to the admissibility of the testimony they are seeking from the persons who are subpenaed, cause a lot of the trouble.

Mr. **Fitzpatrick**. There is no question about it, sir.

Senator **Ervin**. In addition to the illustration you give about the libel suit, it occurs to me that it is possible, and quite probable, that a situation would arise where a news photographer goes out to take photographs of a rally or a demonstration where he believes violence is likely to occur, and violence does actually ensue. Suppose somebody is murdered by one of the demonstrators, who cannot be identified in any way except by a photograph taken of the demonstration at the time the homicide occurred, and that photograph has never been published.

Now, don't you think a very strong case could be made for the proposition that law enforcement officers should be permitted under those circumstances to require the news photographer to present this unpublished photograph which shows the guilty party actually committing the murder.

Mr. **Fitzpatrick**. I would wonder how they would know about it if it were unpublished. But I would like any photographer on any newspaper I am associated with to come forward with such evidence if he has it, and the necessity of the subpena would be avoided.

Senator **Ervin**. Thank you very much.

Mr. **Fitzpatrick**. Thank you, sir.

Mr. **Baskir.** Mr. Chairman, our final witness this morning is Mr. Eugene S. Duffield, who is director of the Magazine Publishers Association, and appearing on behalf of the association.

Senator **Ervin.** I am delighted to welcome you to the subcommittee, and I express to you the appreciation of the subcommittee for your willingness to come before us and give us the benefit of your experience and observations in a field in which you have had much experience.

STATEMENT OF EUGENE S. DUFFIELD, DIRECTOR OF THE MAGAZINE PUBLISHERS ASSOCIATION

Mr. **Duffield.** Thank you, Mr. Chairman.

Let me modify one thing that counsel said. The Magazine Publishers Association certainly induced me to come here this morning, but what I shall say has not been approved by the association. I am speaking, as you will see, in my own right. And that includes an official position with the association.

I am Eugene S. Duffield. I am president of Popular Science Publishing Co. We publish two magazines (*Popular Science* and *Outdoor Life*) copies of which are before you on the rostrum. I have been a director of the Magazine Publishers Association for 12 years and for the past year I have been chairman of the board. I have spent 33 years in magazine and newspaper publishing on both the editorial and the business sides.

Other witnesses have discussed First Amendment problems arising out of editorial activities. I would like to present for your consideration two interrelated First Amendment questions affecting the commercial, or business, activities of a free press.

At this point I would like to interject that this aspect of the freedom of the press has not received much attention from law professors, legislators, or even editors. But in my opinion, editorial freedom will be largely hollow rhetoric if the press does not have the economic muscle with which to exercise that freedom.

The first question I would like to discuss is this:

Under the First Amendment can anyone, including any government, dictate what must be said on the advertising pages of a free press?

The second question is: Does the First Amendment protect a free press from being starved into impotence by direct or indirect government interference with its sources of revenue?

Before I give examples of each problem and discuss them, let me dispose of the obvious. Of course, the First Amendment does not protect fraudulent selling in or by the press any more than it protects libel. What I shall be talking about is the truthful selling of lawful products and services.

The keynote of what I urge today can be expressed in two sentences. One sentence comes from an opinion by Justice Douglas. The second is from a circuit court decision that was affirmed by the Supreme Court.

Justice Douglas said: "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information, and let me stress the words, "opinion."

The Circuit Court said:

> **If the advertisement is not false, defendants have a constitutional right to utilize it even though its content and blatancy may annoy both the (Federal Trade) Commission and the General public.**

What do these two sentences mean?

To me they mean that, except for fraud, the content of advertising pages should be as thoroughly protected by the First Amendment as are editorial pages. No one, including Government, should dictate what must be said or must not be said in the advertising pages of a free press. Under the First Amendment that decision must be left to the conscience and judgment of publishers, just as are editorial decisions.

Yet in three ways, the Federal Government seems to be trying to interfere with freedom of the press to control advertising pages.

First, the Government seems to be saying that advertising must be limited to quantifiable facts. The implication is that statements not verifiable by laboratory or statistical evidence cannot be used in advertising. Opinion is to be proscribed. For example, the manufacturer of a spinning reel may not express the opinion that his reel offers the best value unless he can prove it by laboratory tests, field tests, and price comparisons.

Second, the Government shows signs of wanting to tell publishers: "If you run this advertisement, you must run that advertisement." For example, if you publish automobile advertising, you must publish clean air ads. Or, if you have published an ad saying that bread is good for kids, you must publish another ad denying the first one.

Third, the Government shows signs of saying, "If you publish ads of a certain kind, you must include in each one certain words displayed in a certain way." For example, if you publish an ad for vitamins, you must leave one-fifth of the ad white and print therein black lettering a quarter-inch-high saying: "The need for these vitamins in human nutrition has not been established."

In each of these three incipient attempts to dictate what shall or shall not appear in advertisements, the Government is not confronting the press directly. It is attempting to control the press indirectly by dictating to advertisers. Government has not said to publishers directly: "You must not publish ads unless they say thus and so." Such an attempt would produce a clear first amendment confrontation. The Government instead is proceeding toward the same end by indirection. It is saying to manufacturers, you may not offer advertisements for publication unless they say thus and so. This indirection does not avoid the first amendment, in my opinion. It changes the angle from which the first amendment must be applied, but it does not fake the First Amendment out of play, as I shall explain later.

Let me conclude the first part of my statement by expressing a hope. It is this: If the Government persists in these attempts to dictate what must be said on advertising pages, I hope some advertisers will have enough courage to prepare and offer ads that defy the Government's dictates. I know they will find publishers of equal courage who will join them in a direct First Amendment challenge to the Government.

Thus far I have discussed the question: Under the First Amendment can anyone dictate what must be said or must not be said on the advertising pages of a free press?

I turn now to the second question: Does the First Amendment protect a free press from being starved into impotence by direct or indirect Government interference with its sources or revenue? I should like to discuss direct interference and indirect interference separately.

As to Government actions that would interfere directly and materially with the income of a free press, the first amendment safeguards seem to be well established. In the courts, a leading case is *Grosjean* v. *American Press Company*, 297 U.S. 233. In the Congress, the press has been exempt twice from price control to avoid any temptation to the executive branch to tamper with the financial well being of the press. With your permission, I will leave with your committee a brief on that subject that the Magazine Publishers Association filed last week with the Cost of Living Council.

Senator ERVIN. The subcommittee would be delighted to receive that brief.

Mr. DUFFIELD. Thank you, Mr. Chairman.

Senator ERVIN. I will direct counsel to have the brief printed in the body of the record immediately after your testimony.

Mr. DUFFIELD. Thank you very much, sir. We may ask the Congress to reaffirm this exemption if and when it extends the Economic Stabilization Act of 1970.

Another congressional policy of long standing that is important to a free press is embodied in second class postage rates. These rates were established and maintained by Congress for decades to encourage the wide circulation of a free press. When Congress gave up control of postage rates, it wrote into the Postal Reorganization Act of 1970 eight standards rate making that, in our opinion, are adequate to justify special consideration for the social value of second class mail. However, the new Postal Service seems to be ignoring seven of the standards for ratemaking that Congress prescribed, concentrating only on the eighth, cost coverage. The result is a direct Government threat to a healthy, free press. Therefore, we may have to come before Congress soon to ask for a stronger and clearer statement of postal ratemaking policy.

I will not prolong this digression into postal affairs. It is sufficient to say that in the courts and in the Congress there seems to be a clear understanding that the First Amendment forbids direct Government meddling with the economic well-being of a free press.

First amendment protection against Government action that would starve the press into impotence indirectly is less well established. By indirectly I mean shutting off revenues at their source. Earlier I touched on three incipient attempts by the Government to dictate what must or must not appear in advertising pages. One of these attempts would go so far that, if it were to succeed, every advertisement for a certain product would be converted into an ad against that product. Under such Government strictures, what advertiser would continue to pay for advertising? If the Government establishes the legal right to destroy the effectiveness of advertising by regulation, the Government could move from one category of advertising to another as the predilections of officials dictate.

The result could be to dry up most of the $10 billion or $11 billion of annual advertising revenue that now makes possible the wide dissemination of publications at popular prices. The press would not cease to exist, but its editorial activities would be pinched back and its prices to readers would go so high that its circulation and its influence would dwindle to a fraction of their size. Its effectiveness as the fourth estate, balancing big government, would become miniscule. It would have been starved into impotence.

Does the First Amendment protect a free press from economic emasculation by the Government acting consciously or unconsciously to that end? We may be on the eve of testing that question unless, as I said earlier and as I prefer, the freedom to advertise legal products honestly is established by a direct first amendment confrontation between the Government on one side and the press and advertisers on the other.

Before I close, permit me to speak briefly of the responsibility that freedom imposes on the press. I have said that the advertising pages of a free press must be as completely protected by the first amendment as its editorial pages. Therefore, each publisher must feel the same responsibility for his advertising pages as he does for his editorial pages. In his day-to-day editorial operations he relies on the integrity of his editors. In advertising, he almost always can rely on the self-interest of advertisers in preserving their own credibility.

However, advertising, like editorial activities, sometimes presents a publisher with hard decisions about what he will and will not print. He must make these decisions alone, for if he consults outsiders, he probably will be guilty of illegal conspiracy. For example, you all know that some publishers will not print advertising for alcoholic beverages. Others will print ads for beer and wine, but not for hard liquor. Some publishers will not accept tobacco advertising of any kind. Others accept it only with certain conditions. Health and hygiene advertising that some publishers will accept, others will not. Within the specialities of my company's two magazines, there are types of advertising that we will not accept.

In their exercise of this responsibility for what they print, publishers are rightfully subject to exhortation and criticism by everyone, including government. A free press is not immune from criticism.

But the First Amendment says that the press shall be immune from dictation, especially from government dictation, and that freedom protects the press in its entirety. To quote from a Supreme Court decision, "The rights of free speech and free press are not confined to any field of human interest."

(The memorandum by the Magazine Publishers Association with the Cost of Living Council referred to follows:)

October 6, 1971

MEMORANDUM FOR THE HONORABLE HAROLD C. PASSER, ASSISTANT SECRETARY FOR ECONOMIC AFFAIRS, DEPARTMENT OF COMMERCE

SUBJECT: A HISTORICAL REVIEW OF THE RELATIONSHIP OF ECONOMIC CONTROLS AND THE PRINT MEDIA

ECONOMIC CONTROLS DURING WWII: THE EMERGENCY PRICE CONTROL ACT OF 1942

When spiraling inflation threatened economic devastation during the Second World War and the Korean conflict, the federal government was forced to control the national economy. During both periods of economic crisis Congress enacted legislation designed to prevent the ruination of the national currency, which would inevitably result if the runaway inflation remained unchecked.

To this end, on January 30, 1942, President Franklin D. Roosevelt signed into law the Emergency Price Control Act of 1942 (P. L. 421, 56 Stat 26), the purpose of which being clearly stated in the Act's preamble:

> An Act to further the national defense and security by checking speculative and excessive price rises, price dislocations, and inflationary tendencies, and for other purposes.

The Act was drawn to deal with the pervasive inflationary tendencies from the standpoint of prices alone. It did not of itself fix any prices, but gave to a Price Administrator, a Presidential appointee, power to establish ceilings on prices, and, in defense areas, on rents for housing accommodations. Nor did the Act as originally drawn provide for wage stabilization. Subsequent legislation was required to give the government that authority.

Both this Act and its successor during the Korean conflict, the Defense Production Act of 1950 (P.L. 774, 64 Stat 932), were carefully drawn to exclude specifically the print media, including magazines, periodicals, books, newspapers, etc., from that area of economic activity over which the Price Administrator could exercise control.

The framers of the EPCA of 1942 exempted the print media from the reach of the Act's regulatory scheme by drafting the Act in such a way that, in addition to controlling "defense-area" rents, the Price Administrator was authorized to control "commodity" prices, agricultural and otherwise. And, consequently, by drafting the Act's special definition of "commodity" to exclude the print media, an exemption from all regulation under the Act was achieved.

Under Title III of the Act at Section 302(c) this most important definition appeared:

> The term "commodity" means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: Provided, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services. (Underscoring supplied)

The legislative history of this definitional section clearly illustrates congressional penchant to promote freedom of the press and to insure that the sources of the public's information remain free from even the taint of governmental influence, indirect as well as direct. The first step toward the enactment of this legislation was taken by President Roosevelt. Motivated by the fear that inflationary price rises and increases in the cost of living would undermine the national defense effort, he transmitted a message (H. Doc. No. 332, 77th Cong., 1st sess.) to Congress on July 30, 1941, requesting legislation to prevent rising inflation by implementing certain economic controls. The President specifically requested that the "legislation should include authority to establish ceilings for prices and rents, to purchase materials and commodities when necessary to assure price stability, and to deal more effectively with excesses in the field of installment credit.

The next day a bill, H.R. 5479, embodying legislation of the character recommended in the President's message, was introduced and referred to the House Committee on Banking and Currency. As originally introduced, the bill did not exempt the print media from regulation and control. However, during the course of exhaustive hearings, it was brought to the attention of the Congress that an exemption for the print media was a necessity.

Advertisers and advertising agencies, understandably apprehensive because the literal language of the bill gave the Price Administrator nearly unfettered control over marketing and selling, including advertising, requested that the bill be amended to limit this inordinate amount of power and to insure that the power which would be placed in the hands of the government could not be used to the detriment of the free press. The amendment requested took the form of the following proviso, which was to be added to Title I of the bill containing the general provisions and authority:

> Provided, however, that nothing in this Act shall authorize the President to compel changes in the normal methods of distribution now or hereafter established in any industry which would have for its effect curtailing the services rendered by advertising, except in such cases where advertising has been wilfully used to evade the purpose of this Act.

Letters to various Congressmen advocating the adoption of this amendment were included in the hearing record immediately following the October 11, 1941, testimony. (U.S. Congress, House, Banking and Currency Committee; Hearings on Price-Control Bill H.R. 5479 (Superseded by H.R. 5990); 77th Cong. 1st sess. Washington, Government Printing Office, 1941. Pt. 2, pp 1826–31.) The following letters, found at that point in the record, are representative and clearly manifest a grave concern regarding the control of advertising and the possible effect on the print and news media:

THE LEXINGTON HERALD
Lexington, Ky., October 24, 1941.

CONGRESSMAN BRENT SPENCE,
Washington, D.C.

DEAR BRENT: I am enclosing a bulletin from the American Newspaper Publishers Association, of which Cranston Williams, formerly of Knoxville, Tenn., is now the secretary and which includes nearly all the newspapers of any size in the United States, in regard to a provision concerning advertising in price-control legislation.

I personally think that any kind of control of advertising would be very dangerous, as a start toward censorship and control of the freedom of the press.

I do not believe that there is anything that will assist in getting a favorable support for price fixing like this provision which is suggested by the American Newspaper Publishers Association and I certainly hope that you will use your influence on the committee to have this amendment inserted.

Thanking you and with all best wishes.

Very sincerely yours,

THOS. R. UNDERWOOD,
Editor, The Lexington Herald.

(The bulletin, which is included in the record immediately following this letter, is omitted here.)

OREGON NEWSPAPER PUBLISHERS
ASSOCIATION, INC.
Eugene, Oreg., October 28, 1941.

Representative WALTER PIERCE,
House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE PIERCE: The newspapers of Oregon ask you to use your good offices to see that Section 2, Paragraph (4), of House Resolution 5479, now pending before the committee, be amended as follows:

"Provided, however, That nothing in this Act shall authorize the President to compel changes in the normal methods of distribution now or hereafter established in any industry which would have for its effect curtailing the services rendered by advertising, except in such cases where advertising has been wilfully used to evade the purpose of this Act."

The newspapers of Oregon need only remind you that survival of the democratic way of life in the United States depends in a great measure upon a free press. Furthermore, a free press must be a solvent press. The newspapers stand ready and have already contributed their share to national defense and we ask that Congress pass no unwarranted acts which jeopardize the freedom of the press.

We ask your immediate and complete cooperation in the above. May I hear from you at your convenience?

Sincerely yours,

HARRY S. SCHENK, *Manager.*

The extensive hearings held on this bill were in session for nearly three months. At their conclusion the committee, in executive session, considered the bill, and adopted certain amendments thereto, including the following, which differs from the amendment requested by the advertisers only in that it is susceptible of a broader, more universal application:

> The powers granted in this section shall not be used or made to operate to compel changes in the business practices or cost practices or methods, means or aids to distribution established in any industry, except to prevent the circumvention or evasion of any ceiling established under this Act.

(This prohibition appeared under Title I as Section 2(g).)

In fact, H.R. 5479 was as a consequence of the hearings so vastly modified that the chairman introduced in the House a clean bill, H.R. 5990, representing the thoroughly amended H.R. 5479. This bill including the advertising amendment was considered by the Committee of the Whole House during the week of November 24, amended in other areas and passed on November 28.

The Committee on Banking and Currency of the Senate began consideration of this bill on December 4, 1941. Since the two volumes of House hearings were available to the members of the committee, and included almost 2,300 pages of testimony and exhibits, an effort was made, so far as practicable, to restrict the Senate hearings, which covered the period from December 9 to December 17, to new matters. After the termination of hearings, the subcommittee, which had been appointed earlier, extensively revised and strengthened the House bill in light of the hearings and the onslaught of war. And quite understandably this revised bill contained a number of very significant changes, most important of which, from the point of view of the print media, was the new definition of "commodity".

Until H.R. 5990 reached the subcommittee of the Senate Banking and Currency Committee, the definition of "commodity" was so framed as to include within its reach the print media. The original definition of "commodity" appearing in superseded H.R. 5479 at Section 302(c) remained unaltered through the comprehensive House hearings and was retained as Section 302(c) of H.R. 5990. This definition was framed as follows:

> The term "commodity," in addition to commodities, articles, products, and materials, includes services rendered otherwise than as an employee in connection with the processing, distributing, storage, installation, repair, or negotiation of purchases or sales, of a commodity, or in connection with the operation of any service establishment: Provided, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility.

But the bill prepared by the subcommittee and passed by both the full committee and the Senate contained a more restrictive definition of "commodity", which explicitly and unequivocally manifested the Senate's intention that the print media should be exempted from regulation under the provisions of the bill. Indeed, it is hardly conceivable that a definition could be drawn to make the exemption of the print media more explicit or more emphatic. The Senate's reframed definition of "commodity" was:

> The term "commodity" means commodities, articles, products, and materials (except books, magazines, motion pictures, periodicals and newspapers, and materials furnished for publication by any press association or feature service, other than as waste or scrap), and it also includes serv-

> ices rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: Provided, That nothing in this act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or motion pictures or other theater enterprise, or operating a radio-broadcasting station, or outdoor advertising facilities, or (5) rates charged for any professional services. (Underscoring supplied)

From even a cursory perusal, it is obvous that this definition is virtually identical to that finally included in the Act. The House-Senate conference committee did not add or delete a single word, nor did it alter the meaning in any way: in fact, the only change it made was to transpose two phrases, apparently for the sake of clarity alone. The conference report accompanying H.R. 5990 (H. Rept. 1658, 77–2—1) devoted only three paragraphs to the definition of "commodity", and apparently these were included not to explain the reasoning which prompted the changes, but rather to identify clearly what changes were, in fact, made.

These pertinent remarks in the conference report are:

Definition of commodity

Under both the Housee bill (sec. 302(c)) and the Senate amendment (sec. 302(c)) the powers of the Administrator with respect to commodities was limited by the definition of commodity. The House bill defines commodity to include services rendered otherwise than as an employee in connection with the processing, distribution, storage, etc., of a commodity, or in connection with the operation of any service establishment. Nothing in this bill was to be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility.

The Senate amendment excluded from the definition of commodity books, magazines, motion pictures, periodicals, and newspapers, and materials furnished for publication by any press association or feature service. It also provided, in addition to what was provided in the House bill, that nothing was to be construed to authorize the regulation of the rates charged (1) by any person selling or underwriting insurance, or (2) by any persons engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a broadcasting station or a motion picture or other theater enterprise, or outdoor advertising facilities, or (3) for professional services.

The conference agreement adopts the provisions of the Senate amendment. (Underscoring supplied)

Another important change made by the Senate and subsequently enacted into law was to rewrite Section 2(g) of Title I. As the committee print of December 9, 1941, indicates (U.S. Congress, Senate, Banking and Currency Committee. Hearings on Price-Control Bill: 77th Cong., 2nd sess., on H.R. 5990. Washington, Government Printing Office, 1941. p. 79), the members of the Senate Banking and Currency Committee tentatively considered changing the section in the following manner:

> The powers granted in this section shall not be used or made to operate to compel changes in the business practices or methods, means or aids to distribution established in any industry any business practices or cost practices, relating to advertising, which are established in any industry as means or aids to distribution, except to prevent circumvention or evasion of any ceiling established under this act.

This section, of course, had been originally requested by advertisers, advertising agencies, and newspapers to insure that the provisions of the bill would not be used in a way that would produce a curtailment of the services rendered by advertising. The section passed the House in the form of prohibition against using the bill "to compel changes in the business practices or cost practices or methods, means or aids to distribution established in any industry". However, as the section from the Senate committee print above indicates, the Senate was desirous, at least in the initial stages of considering the bill, of restricting the application of Section 2(g): and this it accomplished by inserting the limiting phrase "relating to advertising". Subsequently, the Senate receded from this limitation and ultimately passed Section 2(g) as the following broad rule-making and enforcement provision, which was not restricted in application to the field of advertising:

> Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent circumvention or evasion thereof.

Neither the Senate report (S. Rept. 931, 77–2—1), nor the conference report (H. Rept. 1658, 77–2—1) accompanying H.R. 5990 contain an explanation of this change, and no mention regarding it can be found in the Congressional Record. It does seem logical, however, to assume that the members of the Senate subcommittee concluded that advertising and advertisers were protected from government regulation by the newly framed definition of "commodity" prohibiting any construction of the Act which would authorize the regulation of "rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine . . .". Moreover, the fact that both these changes affecting the print media and advertising were made by the same subcommittee during the same session, lends credence to the inference that they were intended, or at least, arguably, could have been intended to be complementary.

The language used in the newly framed definition also can be relied on to support this inference. By proviso, the Senate made it abundantly clear that the Act was not to be construed to regulate the "rates" charged by people in the newspaper, periodical, or magazine business. "Rates", significantly plural, not singular, was used without qualification, explicit or implicit. As so used in this context, it would seem beyond argument that the Senate intended to include within the meaning of "rates" both the subscription rate and the per-page advertising rate.

The next result of this definitional change was to exempt directly the print media from regulation under the Act and to exempt indirectly the advertising industry by leaving decisions regarding advertising sales and rates within the unfettered discretion of the publishers.

Before moving forward in the chronology to a consideration of the status of the print media vis a vis economic regulation during the Korean crisis, it is necessary to investigate the language and the legislature history of Section 205(f) (1) under Title II, Administration and Enforcement, of the 1942 Act. This section was not discussed supra in conjunction with the definitional section because it merely serves to support and perhaps to amplify the degree of congressional deference accorded the First Amendment Right of Freedom of the Press. Indeed, in view of the unequivocal exemption of the print media from economic regulation and control under the provisions of the Act, it would seem hardly likely, if not altogether impossible, that even the slightest encroachment under the guise of legislative authorization, or administrative legerdemain could be made on the province of the free press.

Congress incorporated Section 205(f)(1) to insure against just such an improbability. As already indicated, Section 205 deals with enforcement of the Act's provisions. Prior to consideration by the subcommittee of the Senate Banking and Currency Committee the means of enforcing the provisions of the Act were very restricted. The Price Administrator could seek injunctive relief against violators, or, in the case of wilful violations, he was entitled to seek criminal sanctions in the form of fines, imprisonment, or both. The Senate expanded these sanctions to include actions by wronged individuals against violators for damages, sometimes treble, and licensing provisions.

Of primary importance was the addition of the licensing provisions. The Senate wisely included them because the experience of this and other democratic nations had shown that in many cases criminal prosecutions were too harsh and that suits to enjoin further violations not only were inadequate to prevent initial infractions of the law, but were too costly and too drawn out to prove effective in a period of crisis. Neither method of enforcement, moreover, provided a means for determining who was engaged in any particular trade or industry where there were numerous sellers. Nor did the Senate feel that criminal prosecutions or suits for injunctive relief were sufficiently flexible to assure substantial justice in the great majority of cases. On the other hand, the Senate felt that licensing in many cases would provide the effectiveness and speed that are so necessary to adequate enforcement of war time measures, and, in addition, the flexibility which is essential to avoid hardship to the law-abiding businessman.

On the basis of this reasoning the Senate added a licensing provision to the enforcement title of the Act. Denominated as Section 205(f)(1), it was subsequently enacted into law with only insignificant modifications. This section provides:

> Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act and to assure compliance with and provide for the effective enforcement of any regulation or order issued or which may be issued under section 2, or of any price schedule effective in accordance with the provisions of section 206, he may by regulation or order issue to or require of any person or persons subject to any regulation or order issued under section 2, or subject to any such price schedule, a license as a condition of selling any commodity or commodities with respect to which such regulation, order, or price schedule is applicable. It shall not be necessary for the Administrator to issue a separate license for each commodity or for each regulation, order, or price schedule with respect to which a license is required. No such license shall contain any provision which could not be prescribed by regulation, order, or requirement under section 2 or section 202: Provided, That no such license may be required as a condition of selling or distributing (except as waste or scrap) newspapers, periodicals, books, or other printed or written material, or motion pictures, or as a condition of selling radio time: Provided further, That no license may be required of any farmer as a condition of selling any agricultural commodity produced by him and no license may be required of any fisherman as a condition of selling any fishery commodity caught or taken by him: Provided further, That in any case in which such a license is required of any person, the Administrator shall not have power to deny to such person a license to sell any commodity or commodities, unless such person already has such a license to sell such commodity or commodities, or unless there is in effect under paragraph (2) of this subsection with respect to such person an order of suspension of a previous license to the extent that such previous license authorized such person to sell such commodity or commodities. (Underscoring supplied)

It certainly would appear to be unreasonable to conjecture that the language of the underscored proviso above could be misunderstood or misinterpreted. The language makes it crystal clear that the sanctions incorporated in the licensing provisions shall not be employed in such a way as to exert indirect control over the print media, which, by definition, is exempted from direct control.

The Senate report accompanying H.R. 5990 explained the provisos incorporated in the licensing provision as "safeguards against abuse". The pertinent language in the committee report (S. Rept. 931, 77–2—1, p. 9) is:

> Balances against the efficiency of the licensing provisions of the bill are elaborate safeguards against abuse. Thus, the bill provides that no person may be refused a license. The license cannot be used to control the number of persons in the particular trade or industry. Freedom of speech and of the press is guaranteed by a provision that no license may be required as a condition of selling and distributing written matter or radio time, and the freedom of every farmer to market his own produce without a license is guaranteed by express provision. (Underscoring supplied)

ECONOMIC CONTROLS DURING THE KOREAN CRISIS: THE DEFENSE PRODUCTION ACT OF 1950

The consideration supra of the language and legislative history of Section 205(f)(1) completes the investigation of the relationship of economic control measures and the freedom of the press during the WWII period by emphasizing that Congress intended to resist all infringements, direct and indirect, on the province protected by the First Amendment. Now attention will be focused on the Defense Production Act of 1950 (P.L. 81–774, 64 Stat. 932), which was enacted to control the economy and to redirect the nation's industrial might during the period of massive rearmament necessitated by the Korean crisis.

By the spring of 1950, the Truman Administration, in response to the increasing tendency of the cold war to turn hot, was committing itself to a large-scale rearmament program. The unprovoked aggression in Korea appeared to confirm fears of Soviet intentions and prompted a decision to proceed forthwith. However, with the economy running at close to capacity, it was clear that defense requirements could not be met without some limitation on production of civilian goods. In his message to Congress on July 19, 1950 (H. Doc. No. 646, 81st Cong., 2nd sess.), President Truman made it clear that rearmament would "require substantial redirection of our economic resources." In order to achieve this redirection, specific authority was requested to: establish priorities and allocate materials, prevent inventory hoarding, and requisition materials needed for defense; make loans and loan guaranties to expand defense production, and make long-term contracts for purchase of scarce materials; and control consumer credit, credit used for commodity speculation, and privately financed real estate credit. Authorization for price and wage controls was conspicuously absent from President Truman's requests.

Initial reaction in Congress to the President's proposals was, predictably, cool. Bills including the proposed legislation were introduced in the House and Senate. H.R. 9176 and S. 3936, as they were denominated, were referred to the Committees on Banking and Currency in each respective house, where hearings were held. As a result of these hearings a marked change in sentiment took place in Congress. The July 26 testimony before the Senate Banking and Commerce Committee of Bernard M. Baruch, a dominant figure in World War I and II mobilization programs, must be credited as initiating this pronounced change in sentiment.

The much respected Mr. Baruch argued most persuasively that the menace of the current emergency could not be dealt with adequately without an "over-all ceiling across the entire economy—over-all prices, wages, rents, fees and so forth." The gravamen of Mr. Baruch's testimony quoted below appears immediately after some very terse opening remarks concerning the inefficacy of the League of Nations and the threat the Korean Crisis posed to the U.N. and the entire world:

> If we are to see it through, the legislation before this committee is vital. Many parts of this bill are excellent. There is one major fault which destroys much of its value. This bill does not go far enough.
>
> Experience has taught us that when the Government steps into the market, with such enormous demands requiring such quick priority, you must control all prices, including wages, rents, food, and other costs, eliminate profiteering and ration certain scarce essentials. This is not a pleasant outlook. Neither is that of the young man who has to go to battle. He risks all. Those who remain at home are called upon only to have less comforts.
>
> The situation is sufficiently grave to warrant an over-all ceiling across the entire economy, over-all prices, wages, rents, fees, and so on, with high enough taxes to prevent profiteering and to pay all defense costs and an all-embracing, effective system of priorities.

And several paragraphs below he argued even more persuasively for price control.

As now drawn, the bill before the committee defeats itself.

This bill proposes a system of priorities over production: yet, nowhere is provision made for controlling prices and other costs. Should this bill be enacted, without price control, the Government may get what it wants, but with needless delay and ever-increasing prices. The public will be left to compete for the remainder, with the fattest pocketbook, not the greatest need, deciding who gets what is available. The cost of every defense item will be needlessly increased; profiteering encouraged; cruel injusticese inflicted upon millions with fixed incomes or who have no pressure group to represent them.

This bill, gentlemen, is an invitation to inflation.

No system of priorities can work effectively or for long without price control. That was learned during World War I. It was forgotten and had to be learned anew, at what bitter cost, in World War II. Must we persist in repeating the mistakes of the past, even to inviting disaster?

Mr. Baruch's testimony coincided with a heavy run of mail from constituents protesting the pronounced upswing in prices following the June 25 invasion of South Korea. Quite understandably, then, congressional leaders quickly expressed support for the inclusion of standby rationing, price, and wage controls. On August 1, as the House began consideration of H.R. 9176, President Truman wrote to Representative Spence and Senator Maybank, chairmen of the two Banking and Currency Committees, saying that he would accept additional powers provided they were flexible. Rep. Spence then drafted a substitute bill incorporating rationing and price and wage control authority. But the Spence substitute bill contained no language exempting the print media from regulation.

In order to cure this deficiency an amendment was proposed on the House floor on August 3, 1950. The following dialogue from the Congressional Record (81st Cong., 2nd sess., CR-H, Vol. 96, Pt. 9, p. 11732) includes the text of the amendment, gives the purpose for it, and points out that it was patterned after the exemption for the print media found in the EPCA of 1942:

Mr. BUCHANAN. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Admendment offered by Mr. Buchanan to the Spence substitute: Add a new section 409 to read as follows:

> "Nothing in this title shall be construed to authorize the regulation of (1) rates charged by any common carrier or other public utility, or (2) rates charged by any person engaged in the business of selling or underwriting insurance, or (3) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio or television broadcasting station, a motion-pictuture or other theater enterprise, or outdoor-advertising facilities, or (4) rates charged for any professional services, or (5) materials furnished for publication by any press association or feature service, or (6) books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap."

Mr. SPENCE. Mr. Chairman, will the gentleman yield?

Mr. BUCHANAN. I yield to the gentleman from Kentucky.

Mr. SPENCE. That is practically the same provision that was in the old Price Control Act.

Mr. BUCHANAN. Public Law 421 of the Seventy-seventh Congress, with the two parts I have added, "or (5) materials furnished for publication by any press association or feature service, or (6) books, magazines, motion pictures, periodicals, and newspapers, other than as waste or scrap."

Mr. FULTON. Mr. Chairman, will the gentleman yield?

Mr. BUCHANAN. I yield to the gentleman from Pennsylvania, who helped collaborate and worked with me on this particular amendment in the discussion of yesterday.

I wish to compliment the gentleman for introducing this amendment and to join with my friend in sponsoring this provision.

Mr. FULTON. This amendment goes a little further than section 214 of the Kunkel bill, but is basically that provision, is it not?

Mr. BUCHANAN. That is true.

Mr. BROWN of Ohio. Mr. Chairman, will the gentleman yield?

Mr. BUCHANAN. I yield to the gentleman from Ohio.

Mr. BROWN of Ohio. The amendment, with the exception of the two additions which the gentleman mentioned, is exactly the same as the previous law during World War II and practically the same as the amendment which the gentleman from Ohio, myself, prepared and have at the desk at this time. I might say that this matter has been discussed with the leadership on both sides, and I understand there is no objection to it. It simply protects the sources of information of the American people so that under no stretch of circumstances can anyone interfere with the furnishing of information to the American people. (Underscoring supplied)

Further on in the discussion Rep. Brown clarifies what the intent and purpose of this amendment are:

Mr. BROWN of Ohio. The whole intent and purpose of this is simply to protect the right of the American people to obtain information without any control over it.

As might be anticipated in the case of such a controversial bill, the Buchanan amendment was not enacted into law without change in language or modification of content. After further hearings in both Houses, followed by a conference, the amendment finally emerged in the following form as Section 402(e) of Title IV, Price and Wage Stabilization, of the Defense Production Act of 1950:

(e) The authority conferred by this title shall not be exercised with respect to the following:

(i) Prices on rentals for real property;

(ii) Rates or fees charged for professional services;

(iii) Prices or rentals for (a) materials furnished for publication by any press association or feature service, or (b) books, magazines, motion pictures, periodicals, or newspapers, other than as waste or scrap; or rates charged by any person in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting or television station, a motion-picture or other theater enterprise, or outdoor advertising facilities;

(iv) Rates charged by any person in the business of selling or underwriting insurance;

(v) Rates charged by any common carrier or other public utility: Provided, That no common carrier or other public utility shall at any time after the President shall have issued any stabilization regulations and orders under subsection (b) make any increase in its charges for property or services sold by it for resale to the public, for which application is filed after the date of issuance of such stabilization regulations and orders, before the Federal, State or Municipal authority having jurisidction to consider such increase, unless it first gives 30 days' notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State or Municipal authority having jurisdiction to consider such increase;

(vi) Margin requirements on any commodity exchange. (Underscoring supplied)

ECONOMIC CONTROLS AT PRESENT: THE ECONOMIC STABILIZATION ACT OF 1970

The foregoing exposition clearly demonstrates that Congress wisely exempted the print media from regulation and control when crisis situations necessitated government intervention and control of the nation's economic activity. In the context of both an all-out war and an armed conflict which fell considerably short of world war. Congress wrote into the legislation authorizing control of the economy an explicit and unequivocal exemption of the print media. Strangely, however, in the context of a non-crisis situation and at a time when the United States was taking meaningful steps to extricate itself from the Southeast Asian morass, Congress delegated to the President seemingly unfettered authority to control the nation's economy. This it did by enacting the Economic Stabilization Act of 1970 (P.L. 91–379, 84 Stat. 799), Title II Section 202 of which sets forth in the broadest possible terms the authority given the President, as follows:

Presidential Authority

(a) The President is authorized to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 26, 1970. Such orders and regulations may provide for the making of such adjustments as may be necessary to prevent gross inequities.

(b) The authority conferred on the President by this section shall not be exercised with respect to a particular industry or segment of the economy unless the President determines, after taking into account the seasonal nature of employment, the rate of employment or underemployment, and other mitigating factors, that prices or wages in that industry or segment of the economy have increased at a rate which is grossly disproportionate to the rate at which prices or wages have increased in the economy generally.

From even a cursory reading of this section, it is obvious that the first sentence of subsection (a) is of the first magnitude of importance as it gives the President carte blanche authority "to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages and salaries at levels not less than those prevailing on May 25, 1970". The only limitation on the exercise of Presidential authority is that the levels of stabilization be not less than those prevailing on May 25, 1970. Otherwise, the literal language accords the President unrestricted authority. In fact, his authority is so unrestricted that the Act, unlike its predecessors, allows not even a single exemption for any economic activity of any character whatsoever.

Without addressing the obvious Constitutional questions which could reasonably be leveled at this Act, the question of whether or not the President and/or the Cost of Living Council is authorized to exempt the print media and others from regulation under its provisions must be considered.

This question must be answered affirmatively. Both the President and the Cost of Living Council are empowered by the Act to make such exemptions. Section 202(a) leaves no doubt about this, as it authorizes the President "to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries. . . ." There can be no denial that making an exemption is well within the ambit of this power.

Certainly, in light of the fact that such exemption always has been included in prior legislation—for good reason—the President could and should "deem" such exemption "appropriate". Therefore, he would be authorized to issue an order or regulation granting it.

The Cost of Living Council, to which the President delegated his authority in accordance with Title II section 203 of the Economic Stabilization Act of 1970, has the identical authority to grant an exemption. President Nixon has not left the Council's authority open to question. In his August 15, 1971, Executive Order 11615, Providing For Stabilization Of Prices, Rents, Wages, And Salaries, he established the Council (in Section 2(a) thereof), delegated his authority to it (in Section 3(a)) and gave specific authorization to certain activities of the Council (in Section 4(a) thereof). Section 4(a) is included in its entirety, below, simply to emphasize the fact that the Council is empowered to exempt the print media from control under the provisions of the 1970 Act:

> Sec. 4(a) The Council, in carrying out the provisions of this Order, may (i) prescribe definitions for any terms used herein, (ii) make exceptions or grant exemptions, (iii) issue regulations and orders, and (iv) take such other actions as it determines to be necessary and appropriate to carry out the purposes of this Order. (Underscoring supplied)

Senator Ervin. We are told that the First Amendment protects the publication of ideas. Aren't what kind of food people should eat, or what kind of clothes they should wear, or what they should drink, ideas, also?

Mr. Duffield. That is an idea in my judgment, too, Senator.

Senator Ervin. And I take it from your statement that you believe that government shall not undertake to separate some ideas and prohibit the free expression of those ideas in light of the First Amendment.

Mr. Duffield. I certainly do.

Senator Ervin. You concede that government can prohibit false advertising?

Mr. Duffield. That is right, I said that right at the beginning.

Senator Ervin. I regret to say that nobody is able to forestall false advertising on the part of government.

I say that because a few years ago the Post Office Department had some great placards put outside of all mail trucks proclaiming that 100,000 doctors had stopped smoking. They must have known something you do not know.

Since North Carolina grows a lot of tobacco and manufactures a lot of tobacco, I asked the Post Office Department why they did that, and they said it was done at the insistance of HEW. I pressed HEW for information as to why they did it, and they replied that it was done at the behest of that political doctor, the Surgeon General. So I demanded to know the basis of the information that

100,000 doctors had stopped smoking. I found that a public relations firm employed by HEW, the Surgeon General's office, had issued a questionnaire to about 3,000 doctors out of the multitude of doctors in the U.S. Most of the doctors had ignored the questionnaire, but perhaps a thousand or more replied to it, and a certain percentage of those who had replied said that they had stopped smoking. Many in the group did not give reasons as to why they had stopped smoking. So the U.S. Government undertook by false pretenses to turn the American people against smoking cigarettes.

Do you not think that the freedom of speech gives the one who is exercising it the power to say in his own way what he has to say instead of accepting dictation from government as to what he has to say?

Mr. DUFFIELD. Yes, sir. And certainly that dictation goes beyond the bounds of all reason if they require him at the same time he says it to deny it.

Senator ERVIN. And is there not always danger when the Government undertakes to dictate what people can say and what they cannot say, that the First Amendment is stifled and destroyed?

Mr. DUFFIELD. No doubt about it, in my judgment.

Senator ERVIN. For an illustration, I will turn again to tobacco. Congress passed a law that you could not advertise tobacco on TV, but you can advertise in the newspapers provided you adopt a certain formula for doing so. Well, in times past the FCC has professed to have a fairness doctrine. However, they allow the TV stations to issue spot announcements, at the expense of the taxpayers, and at the insistance of that political doctor, the Surgeon General, to condemn cigarette smoking. When the tobacco people demand the right under the fairness doctrine to reply to these spot announcements they were refused. In effect they were told that the political doctor, the Surgeon General, has complete possession of all of the truth on the subject of cigarette smoking, and the very eminent medical practitioners who emphatically disagree with him have none, and, therefore, this question has ceased to be controversial, and the fairness doctrine does not permit any reply on these assaults on the means of livelihood of hundreds of thousands of American people.

Mr. DUFFIELD. I believe, Senator, you made that point in your statement at the opening of these hearings, and made it very effectively.

Senator ERVIN. Yes.

I want to ask this question. There can be no doubt of the fact—I think all medical practitioners agree—that the consumption of dairy products in excessive amounts will produce kidney stones, and cholesterol. It would then follow that if the Federal Government has the right to prohibit the advertisement of cigarettes on the ground that they are injurious, it has a right likewise to prohibit the advertisement of dairy products, would it not?

Mr. DUFFIELD. I would think so.

Senator ERVIN. When you start to encroaching on the First Amendment rights in one respect, what assurances do you have that the Government is ever going to stop until the First Amendment is entirely removed as an effective instrument for debate in American life?

Mr. DUFFIELD. I agree with that, Senator. It seems to me that some people get confused about the application of the First Amendment to any utterance that may have a commercial motive. I believe I am correct that the right to picket was upheld in part based on the first amendment. And certainly that is speech directed at an economic motive, or motivated by an economic objective. It seems to me clear on that precedent that just because there is a commercial aspect to what a man expresses, be it fact or opinion, he is not robbed of the protection of the First Amendment.

Senator ERVIN. I will add to your closing statement which says:

"The rights of free speech and free press are not confined to any field of human interest".

Mr. DUFFIELD. Yes.

Senator ERVIN. I would paraphrase that and say: The rights of free speech and free press cover all human activities regardless of whether they are merely for the purpose of expanding the intellectual horizons of the people or for the purpose of enlightening them about what kind of candidates or policies they should support in the affairs of the Nation, or about any product which they should purchase or use. I think the rights of the First Amendment are not limited to any field of human endeavor.

Mr. DUFFIELD. I agree with you, Senator, exactly.

Senator ERVIN. Now, do you not agree with me that the right of freedom of speech or the freedom of the press gives one the right to exercise that right according to his own notions as long as he is not seeking to perpetrate fraud on any other person?

Mr. DUFFIELD. I certainly do.

Senator ERVIN. And is it not a negation in your judgment, of the right of freedom of speech, freedom of the press, for the Government in any way to say to an individual, or a newspaper, or magazine which carries advertisements, how they shall phrase that advertisement?

Mr. DUFFIELD. I do.

Senator ERVIN. In other words, when the Government undertakes to dictate in what manner or fashion you or I shall express ourselves, or that we shall not say certain things, or that we must say certain things, that is just as much a negation of freedom of speech as any act which denies us the right to speak at all.

Mr. DUFFIELD. Exactly so.

Senator ERVIN. The big question in your mind, I take it is that those who exercise the freedom of the press have a right to say, insofar as the advertisement is concerned, what products they will advertise and what products they will not advertise.

Mr. DUFFIELD. Indeed, they do have. And they have historically done so. I think that they must not be capricious in the exercise of that responsibility, but it is their responsibility under the first amendment, in my judgment.

Senator ERVIN. And that responsibility is something which the Government does not have the right to usurp or exercise?

Mr. DUFFIELD. Exactly, sir.

Senator **Ervin**. Governmental policies which impose restrictions on those who seek to exercise freedom of the press, destroy the value of the First Amendment in that respect just as much as the governmental policies which absolutely prohibit the exercise of that freedom.

Mr. **Duffield**. Yes, indeed. It seems to me that one recent development here—and I believe this is responsive to your question—has been not to prohibit but to say, you must say thus and so, which in my judgment, is just as fundamental a violation as a prohibition.

Senator **Ervin**. Now, in order that the people may have the benefit of the information which they can obtain by the exercise by magazines and newspapers of the right to freedom of the press, it is necessary from the very nature of things that those people who publish magazines and newspapers be allowed to receive such a financial recompense as will give them incentive to provide that information.

Mr. **Duffield**. It is essential—if the revenues were denied to a press, particularly revenues except such as it could raise from readers, the press would be restricted in its effectiveness almost to impotence.

Senator **Ervin**. I am glad you have sided with the *Grosjean* case, which was, I recall, a case where some or perhaps a majority of the legislature of Louisiana became dissatisfied with the way certain of the leading newspapers of Louisiana were exercised their rights of freedom of the press, and passed a particular tax law which imposed some excessive tax burdens on particular newspapers.

Mr. **Duffield**. Exactly. That is the case, as I understand it.

Senator **Ervin**. The Supreme Court of the United States struck down the law on the ground that by imposing taxation of that nature the State had violated the first amendment provisions guaranteeing those newspapers the freedom of the press.

Mr. **Duffield**. My limited knowledge, Senator, leads me to believe that both the courts and the Congress, and in Congress particularly the Senate, are quite well aware of this economic aspect of a free press.

Senator **Ervin**. And there is no doubt in your mind that the Court recognized in the *Grosjean* case the proof of John Marshall's assertion, the power to tax is the power to destroy, and recognized that you could destroy the freedom of the press guaranteed by the First Amendment by taxation.

Mr. **Duffield**. Exactly so.

Senator **Ervin**. Is there any doubt in your mind of the validity of the position that any Federal regulation which so limits advertising by newspapers and magazines, so as to destroy them as viable economic entities which are able to give information to the American people, is also a violation of the first amendment?

Mr. **Duffield**. In my opinion it is, yes, sir.

Senator **Ervin**. I am glad that you alluded to the effect of postage rates. I have been informed by a number of very highly respected publications that the increase in postage rates which has been made by the new Postal Corporation since it threatens some very fine nationwide publications with economic destruction.

Mr. **Duffield**. It does indeed, up and down the whole scale of size, from small to large.

Senator **Ervin**. That is one aspect this subcommittee intends to look into in later hearings.

Mr. **Duffield**. I am glad to hear that.

Mr. **Baskir**. Your discussion with Senator Ervin, I think, established your view that you do not think there is any conceptual difference between advertising for commercial products and the advertising of ideas. I would like to go into that a little bit more deeply to see if there is any practical distinction that can be made. The reason I raise this is because on page 3 you refer to the increasing practice of the Government to require that if one kind of advertisement is run, then another one rebutting it has to be run. This, of course, has been using the fairness doctrine quite a bit. I think probably that would certainly apply to the cigarette controversy, those persons advertising cigarettes are advertising their point of view about a problem. So therefore the person who thinks cigarette smoking is dangerous has to be given the opportunity to advertise their opposing point of view. In effect is not the reason for requiring the rebuttal advertising based on the fact that these are political controversies, that the usefulness of a particular product is in doubt, it is a matter of public controversy, and that both sides have to be expressed?

Mr. **Duffield**. Yes, Mr. Baskir, as I understand it. You have cited the fairness doctrine which is applicable to broadcast media. I have never worked in the broadcast field, and I am not a lawyer, and, therefore, I am not competent really to discuss it in any depth. I have an uninformed adversion to the fairness doctrine. I do not know to what extent the fact that the Government must license broadcast media in order to prevent chaos gives it a right to intervene in any other way. I cannot discuss that. But I will say that if any parallel attempt were extended to the print media, where I have worked, and where I do feel I know something about the legal rights, if it were that we must do thus and so subject to some penalty if we did not, I would feel that is clearly unconstitutional. I have no objection to Government agencies exhorting us to and urging us to present both sides of any question, either in editorial columns or in our advertising columns. They have a perfect right to say, you are not really discharging your public responsibility unless you do both of these things. True. But to require us to do it under any restraint or dictation would in my judgment, be a violation of the first amendment.

Mr. **Baskir**. The attempt to do so would seem to me to be based upon a theory or rationale that if there is a public controversy, that both sides ought to be presented.

Mr. **Duffield**. True.

Mr. **Baskir**. If that is the rationale, it seems to me that you cannot make a distinction between commercial goods and political issues, because the selling of commercial goods, one of those that you suggested, is a matter of public controversy.

Mr. **Duffield**. Absolutely.

Mr. **Baskir**. So, whether on theory or conceptual coverage or on very practical terms, if there are politics and political issues involved with respect to the selling of a commodity on old fashioned, very narrow, too narrow First Amendment grounds, the Government should not be getting into this area.

Mr. **Duffield**. I would agree with that, Mr. Baskir.

Mr. **Baskir**. Thank you.

Mr. **Ebner**. Mr. Duffield, in the highly unlikely situation that a distributor of heroin wanted to advertise in the magazine that his product was better than anybody else's heroin, would you feel that the Government could step in and prevent such advertising in that case?

Mr. **Duffield**. Yes, sir. I said at the beginning I was discussing the honest selling of a lawful product.

Mr. **Ebner**. In other words, your position is that once a product becomes lawful to possess, there is no way that the advertising of that product could be limited?

Mr. **Duffield**. Exactly.

Mr. **Ebner**. Thank you.

Senator **Ervin**. Is that not the line of demarcation? In other words, the First Amendment does not prohibit the Government making certain practices illegal as long as those practices do not consist solely of the dissemination of ideas, and so long as the Government permits something to be legally sold to the general public, the Government has no right to prohibit that kind of advertising?

Mr. **Duffield**. That is my understanding.

Senator **Ervin**. And when the Government adopts any other course and says, we are going to prohibit the advertising of this, that and the other, and whether there is great controversy about the article, and whether Congress permits it to be sold, the Government is assuming the right to say that it is the sole determiner of the truth, and undertakes to deny people the right to proclaim their ideas as to what is the truth if it disagrees with the Government's conclusion?

Mr. **Duffield**. Thank you.

Senator **Ervin**. Thank you very much. You have made a very helpful contribution to the study of this whole subject.

Mr. **Duffield**. Thank you, Senator, for staying here long enough for me to testify today.

(The prepared statement follows:)

STATEMENT BY EUGENE S. DUFFIELD, PRESIDENT, POPULAR SCIENCE PUBLISHING CO.

I am Eugene S. Duffield. I am President of Popular Science Publishing Company. We publish two magazines (*Popular Science* and *Outdoor Life*) copies of which are on the rostrum. I have been a director of the Magazine Publishers Association for 12 years and for the past year I have been chairman of the board. I have spent 33 years in magazine and newspaper publishing on both the editorial and the business sides.

Other witnesses have discussed First Amendment problems arising out of editorial activities. I would like to present for your consideration two interrelated First Amendment questions affecting the commercial, or business, activities of a free press.

The first question is: under the First Amendment can anyone, including any government, dictate what must be said or must not be said on the advertising pages of a free press?

The second question is: Does the First Amendment protect a free press from being starved into impotence by direct or indirect government interference with its sources of revenue?

Before I give examples of each problem and discuss them, let me dispose of the obvious. Of course, the First Amendment does not protect fraudulent selling in or by the press any more than it protects libel. What I shall be talking about is the truthful selling of lawful products and services.

The keynote of what I urge today can be expressed in two sentences. One sentence comes from an opinion by Justice Douglas. The second is from a Circuit Court decision that was affirmed by the Supreme Court.

Justice Douglas said: "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." Let me stress the words "and opinion."

The Circuit Court said: "If the advertisement is not false, defendants have a constitutional right to utilize it even though its content and blatancy may annoy both the (Federal Trade) Commission and the general public."

What do these two sentences mean?

To me they mean that, except for fraud, the content of advertising pages should be as thoroughly protected by the First Amendment as are editorial pages. No one, including government, should dictate what must be said or must not be said in the advertising pages of a free press. Under the First Amendment that decision must be left to the conscience and judgment of publishers, just as are editorial decisions.

Yet in three ways, the Federal Government is trying to interfere with freedom of the press to control advertising pages.

First, the government seems to be saying that advertising must be limited to quantifiable facts. The implication is that statements not verifiable by laboratory or statistical evidence can not be used in advertising. Opinion is to be proscribed. For example, the manufacturer of a spinning reel may not express the opinion that his reel offers the best value unless he can prove it by laboratory tests, field tests and price comparisons.

Second, the government shows signs of wanting to tell publishers: "If you run *this* advertisement, you must run *that* advertisement." For example, if you publish automobile advertising, you must publish clear air ads. Or, if you have published an ad saying that bread is good for kids, you must publish another ad denying the first one.

Third, the government shows signs of saying, "If you publish ads of a certain kind, you must include in each one certain words displayed in a certain way." For example, if you publish an ad for vitamins, you must leave one fifth of the ad white and print therein black lettering a quarter inch high saying, "The need for these vitamins in human nutrition has not been established."

In each of these three incipient attempts to dictate what shall or shall not appear in advertisements, the government is not confronting the press directly. It is attempting to control the press indirectly by dictating to advertisers. Government has not said to publishers directly, "You may not publish ads unless they say thus and so." Such an attempt would produce a clear First Amendment confrontation. The government instead is proceeding toward the same end by indirection. It is saying to manufacturers, "You may not offer advertisements for publication unless they say thus and so." This indirection does not avoid the First Amendment. It changes the angle from which the First Amendment must be applied, but it does not fake the First Amendment out of play, as I shall explain later.

Let me conclude the first part of my statement by expressing a hope. It is this: If the government persists in these attempts to dictate what must be said on advertising pages, I hope some advertisers will have enough courage to prepare and offer ads that defy the government's dictates. I know they will find publishers of equal courage who will join them in a direct First Amendment challenge to the government.

Thus far I have discussed the question: Under the First Amendment can anyone dictate what must be said or must not be said on the advertising pages of a free press?

I turn now to the second question: Does the First Admendment protect a free press from being starved into impotence by direct or indirect government interference with its sources of revenue? I should like to discuss direct interference and indirect interference separately.

As to government actions that would interefere directly and materially with the income of a free press, the First Amendment safeguards seem to be well established. In the courts, a leading case is *Grosjean* v. *American Press Com-*

pany, 297 U.S. 233. In the Congress, the press has been exempt twice from price control to avoid any temptation to the executive branch to tamper with the financial well being of the press. With your permission I will leave with your Committee a brief on the subject that the Magazine Publishers Association filed last week with the Cost of Living Council.

We may ask the Congress to enact that exemption again if and when it extends the Economic Stabilization Act of 1970.

Another Congressional policy of long standing that is important to a free press is embodied in second class postage rates. These rates were established and maintained by Congress for decades to encourage the wide circulation of a free press. When Congress gave up control of postage rates, it wrote into the Postal Reorganization Act of 1970 eight standards for postal rate making that, in our opinion, are adequate to justify special consideration for the social value of second class mail. However, the new Postal Service seems to be ignoring seven of the standards for rate making that Congress prescribed, concentrating only on the eigth, cost coverage. The result is a direct government threat to a healthy, free press. Therefore, we may have to come before Congress soon to ask for a stronger and clearer statement of postal rate making policy.

I will not prolong this digression into postal affairs. It is sufficient to say that in the courts and in the Congress there seems to be a clear understanding that the First Amendment forbids direct government meddling with the economic well being of a free press.

First Amendment protection against government action that would starve the press into impotence indirectly is less well established. By "indirectly" I mean shutting off revenues at their source. Earlier I touched on three incipient attempts by the government to dictate what must or must not appear in advertising pages. One of these attempts would go so far that, if it were to succeed, every ad for a certain product would be converted into an ad against that product. Under such government strictures, what advertiser would continue to pay for advertising? If the government establishes the legal right to destroy the effectiveness of advertising by regulation, the government could move from one category of advertising to another as the predilections of officials dictate.

The result could be to dry up most of the 10 or 11 billion dollars of annual advertising revenue that now makes possible the wide dissemination of publications at popular prices. The press would not cease to exist, but its editorial activities would be pinched back and its prices to readers would go so high that its circulation and its influence would dwindle to a fraction of their size. Its effectiveness as the Fourth Estate, balancing Big Government, would become miniscule. It would have been starved into impotence.

Does the First Amendment protect a free press from economic emasculation by the government acting consciously or unconsciously to that end? We may be on the eve of testing that question unless, as I said earlier and as I prefer, the freedom to advertise legal products honestly is established by a direct First Amendment confrontation between the government on one side and the press and advertisers on the other.

Before I close, permit me to speak briefly of the responsibility that freedom imposes on the press. I have said that the advertising pages of a free press must be as completely protected by the First Amendment as its editorial pages. Therefore, each publisher must feel the same responsibility for his advertising pages as he does for his editorial pages. In his day-to-day editorial operations he relies on the integrity of his editors. In advertising, he almost always can rely on the self interest of advertisers in preserving their own credibility.

However, advertising, like editorial activities, sometimes presents a publisher with hard decisions about what he will and will not print. He must make these decisions alone, for if he consults outsiders, he probably will be guilty of illegal conspiracy. For example, you all know that some publishers will not print advertising for alcoholic beverages. Others will print ads for beer and wine, but not for hard liquor. Some publishers will not accept tobacco advertising of any kind. Others accept it only with certain conditions. Health and hygience advertising that some publishers will accept, others will not. Within the specialties of my company's two magazines, there are types of advertising that we will not accept.

In their exercise of this responsibility for what they print, publishers are rightfully subject to exhortation and criticism by everyone, including government. A free press is not immune from criticism.

But the First Amendment says that the press shall be immune from dictation, especially from government dictation, and that freedom protects the press in its entirety. To quote from a Supreme Court decision, "The rights of free speech and free press are not confined to any field of human interest."

Senator **Ervin**. The subcommittee stands in adjournment until Tuesday at 10 o'clock in the same room.

(Whereupon, at 1:25 p.m., the subcommittee was adjourned, to reconvene at 10 a.m., Tuesday, October 19, 1971.)

S. 1311—FREEDOM OF THE PRESS

TUESDAY, OCTOBER 19, 1971

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the subcommittee) presiding.

Present: Senators Ervin (presiding) and Hruska.

Also present: Lawrence M. Baskir, chief counsel; Bill Pursley, counsel; and Stanley Ebner, minority counsel.

Senator ERVIN. The subcommittee will come to order.

The subcommittee today resumes its hearings on freedom of the press. We will hear testimony from representatives of both the broadcast and printed press and from a Member of Congress with considerable legislative experience in this area.

It is important that these hearings provide a forum for the presentation of the widest possible range of views. The different backgrounds and perspectives of today's four witnesses underscore the subcommittee's determination to hear a variety of viewpoints concerning this subject. When the subcommittee schedules the second series of hearings on freedom of the press in early 1972, we look forward to hearing from other individuals and groups who are knowledgeable and concerned about the state of freedom of the press in America.

Counsel will call the first witness.

Mr. BASKIR. Mr. Chairman, our first witness this morning is Congressman William L. Springer of Illinois, ranking minority member of the House Committee on Interstate and Foreign Commerce.

Senator ERVIN. Representative Springer, I wish to welcome you to this subcommittee, and to express to you our appreciation for your willingness to come and give us the benefit of your views on a subject on which you have made an extensive study and have been much concerned.

STATEMENT OF HON. WILLIAM L. SPRINGER, A REPRESENTATIVE IN CONGRESS FROM THE 22D CONGRESSIONAL DISTRICT OF THE STATE OF ILLINOIS

Mr. SPRINGER. Thank you, Mr. Chairman. It is very kind of you to grant me this time.

I think this is indeed a serious matter in this country at this time, because there is nothing that has an impact, I am sure, upon the people at large as much as television. Newspapers have none of the impact that is associated with TV, principally for the reason that nearly all polls show that the TV station at home is turned on in roughly 90 to 95 percent of the homes in this country at least once in every 24 hours. And I think all of us realize that a daily newspaper is not available to all the people in this country. I happen to come from rural Illinois, where a daily newspaper does not reach everybody everyday. And if you go on further west you will find it even more so.

Now, I think that we can put aside newspapers for the purpose of my discussion this morning very shortly by saying that there are no restrictions as far as the first amendment that I know of on newspapers. There are no decisions that I know of any court in the Anglo-Saxon world which puts a restriction on newspapers. This is not true just in this country, it is true everywhere where the English word is spoken. I think we can dispose of newspapers with that. There are no restrictions of any kind. The First Amendment is complete with regard to newspapers.

I want to take up TV and radio. There are serious restrictions on the right of radio and TV in the exercise of the First Amendment. Those were placed in the law with a definite purpose at the time of the creation of the Federal Communications Act of 1927, as amended in 1934.

Now, what are those? And let's specifically find out wherein the broadcast media differs from newspapers.

First of all, you request a license. You file an application for a license. The newspapers file no application with anybody, they start up whenever they get enough money to start a newspaper.

Second, when they request that license they make an affidavit that they will operate that license in the public interest.

Third, although there is no law, by a series of regulations and decisions of the FCC you have the fairness doctrine. Here is the legislative history of the fairness doctrine as developed by the Federal Communications Commission, and by the courts in this country, chiefly the U.S. Supreme Court. That is No. 3.

Four, section 315 applies, which means that if you allow any political candidate to appear on that station you must in turn allow the candidate running against him to appear. That is No. 4.

The newspaper certainly has nothing of that. I don't say that they don't do it, I just say that they are not required to by the first amendment.

The fifth reason, they operate on the public airwaves which are owned by the Federal Government. In other words, these are public airwaves they use, and the limitation is put there by virtue of the fact that the Federal Government owns the airwaves.

Now, you say, do they control opinions, does the FCC do anything about controlling opinions. Mr. Chairman, they took away a license down in Mississippi 4 years ago for a man expressing his opinion. They said that he was making racial slurs. I happen to agree myself with the FCC. But this was this man's opinion. They took the license away from him because he expressed his opinion. And I think the FCC was right in that. And I didn't hear anybody in the networks who were in here objecting at that time when a man's license had been taken away. But I will wager to you that if for some reason the FCC took away one of these licenses here in Washington you would hear the greatest outcry that has ever been heard that there was a limitation of the freedom of speech. And yet no one said a word when that man's license was revoked and I think rightfully so. But I give you this as one example with reference to radio where a license was removed because of a man's opinion.

If I could I would like to refer to the origins of this, Mr. Chairman, long before you and I came here. I understand that you were a judge of an appellate court. And I was sort of a curbstone judge in a lesser court in my earlier days, so I sympathize with you.

But I read here from the proceedings last year against Frank Stanton, and I quote from the report:

> Senator Wallace White, the Chairman of the Senate Interstate and Foreign Commission Committee, emphasized the distinguishing feature between broadcasting and print journalism when that committee in 1947 considered amending the Communications Act to give radio the same degree of freedom from government regulation of content as newspapers.

And I quote Senator White. This was on the hearings where that bill was considered:

> I do not accept in any degree that there is no difference between the power of government with respect to newspapers and the power of the government with respect to radio communication. If you radio people are placing your feet on that foundation you are just indulging in dreams, because Congress will not stand in the long run for any such interpretation.

Those are from the hearings of the 80th Congress, the first session.

Now, I would like just another quote over here in the *Red Lion Broadcasting* case, wherein the Supreme Court ruled that previous decision in these words:

> The Court upheld the regulation unequivocally, recognizing that the Commission was more than a traffic policeman concerned with the technical aspects of broadcasting, and that it neither exceeded its power under the statute nor transgressed the First Amendment in interesting itself in general program format and the kind of programs broadcast by licensees.

I quote again from the *Red Lion* case as also:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate it is ideal to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish.

And again:

> But the people as a whole retain their collective right to have the medium function consistently with the end and the purposes of the First Amendment. It is the right of the viewer and listener and not the right of the broadcaster which is paramount.

Now, in developing the fairness doctrine, again in the *Mayflower* decision in 1940, they laid down unequivocally that the FCC was more than a traffic cop, and it was its duty to see that fairness was had in any matter having to do with broadcast.

I would like to take up one thing which I think brings us to the meat of the program, and I would like to take a specific example. We had a report come to our Committee on Investigations of the full House Committee on Interstate and Foreign Commerce that there was deceit and fraud in "The Selling of the Pentagon." "The

Selling of the Pentagon" was not a news documentary in which opinions were given or in which the testimony that was taken was consolidated; it was a question and answer program. That was the format of that program.

We had two witnesses in before us, and we asked them questions with reference to what they had said. And we said, did you give this question and answer which appeared in "The Selling of the Pentagon?"

And they said, we did not give that answer to that question.

We took this and went all the way through it. What they in fact did on that program was to broadcast questions and answers, and they took answers to some questions and put them to different questions. A second technique they used was to take partial answers to questions and consolidate those into one answer and put them through another question. We said that that was deceit and fraud, because this was a question and answer series, and they did not give those answers.

That was why we got into this matter in the beginning. We believe that you could not commit deceit and fraud and this was the reason we had Mr. Stanton in. And the purpose of following up was not the deceit and fraud, that was there on the record, that showed from the film: what we were trying to find out was how the fraud was committed.

And I say to the chairman that we have all kinds of letters in our committee asking us how such fraud could be committed, the public writing to us wanting to know how the fraud could be committed. And that is what we did in subpenaing the outtakes in "The Selling of the Pentagon." We were trying to find out how the fraud took place; that is what we were attempting to find out.

May I say to my distinguished chairman that if he were sitting in an appeals court, the U.S. Court of Appeals, or an appeals court in the State of North Carolina, and I took answers to questions and put them to other questions, and combined the answers and put them to other questions, and took them up to you, and the lawyer called it to your attention, you would say to me, you have falsified the record. And I suspect probably that you would order me put in jail.

Now, there is nothing in this that would allow Frank Stanton or any other member of CBS to be put in jail. But the important part is that they did falsify the record; this is the all-important thing—they falsified a question and answer documentary.

Now, out of this, may I say, we saw this coming years ago. If you had the Communications Act of 1934 up for amendment today I can tell you that there would be some serious amendments made. We saw this coming when the Public Broadcasting Corporation was created 4 years ago. And we very carefully covered this matter in order to be sure that that did not take place in public broadcasting. And what did we do? We put in these records—and may I say as to those who were trying to create the Public Broadcasting Corporation, they not only consented to it, they approved it, because they didn't want to get in just exactly the situation that Frank Stanton and CBS did over "The Selling of the Pentagon," they wanted to be sure that controversial matters received attention both pro and con—and we put in there: "All controversial matters must be treated in perspective and in balance."

If the 1934 code were being written today, I can assure you, those words would be in that code.

There is one thing I think that probably ought to be covered here. Every poll in this country that I know of that has been taken in the last 2 years—and I would guess that there are any number—shows that the public believes that the news boardcasts are biased. If you can find a poll which does not show that, I would like to see it.

Now, I submit to you, Mr. Chairman, that that kind of a belief of people generally at large would not be true if both sides of the matter were treated equal. And this is the reason we see such an outcry on "The Selling of the Pentagon," because it was such a one-sided thing.

But I will say this, even if they had condensed this program, had not made it a question and answer format, I doubt if there is anything that our Subcommittee on Investigations could have done, because consolidation of a program is a matter of judgment for the newsmen. So therefore I doubt if we would have even gone into it. In fact, I think we would have said we probably didn't have jurisdiction of it. But where it was a question and answer, and in the question and answers we said that those questions and answers were falsifications, then we believed that we had a right to investigate it. And that is the reason we demanded the out-takes.

Now, may I say that some of this was taken in Peoria, Ill. And the fact of it is that they spent several hours up there, more than 1 day, in getting material for "The Selling of the Pentagon."

By merely an accident some 2 months ago I ran into a man on radio who was involved in this in that he was working for the station. And he gave me an idea of how this question and answer was done, because he sat there and watched it. And they asked question after question when the set was not even turned on. And then finally when they got the answers they wanted, they turned on the lights and turned on the sound.

Now, these are the kinds of things I think we ought to be interested in. These are the kinds of things I think that not only my committee ought to be interested in but your's ought to be interested in, because the effect that you are going to have on the media as we go through these next few years is going to be most important.

In talking with other newsmen that I believe are as nearly unbiased as I can find, they tell me that it is not necessarily a question of bias in most instances on newscasts. What causes this difficulty with the listeners and why they are getting these adverse polls against them is because of the selectivity of the news.

I think the chairman realizes that in the course of the day there is a tremendous amount of news accumulated from all over the world in 24 hours. The important part, and where the newsman has the great chance to have the bias, is because he discusses only the news which he believes to be the news.

There is one thing I have found. If you go to New York you will find that nearly all of them up there have very much of the same kind of an outlook on life. I don't say that this is necessarily political bias, I say that nearly all of them have that kind of an outlook in New York City. Now, what would be selected for New York City might not fit Charlotte, N.C.; Chicago, Ill.; San Francisco, or Houston. But as I watch the news night after night, this same type of news, the same selectivity of the items of the news seems to fit pretty much all of the broadcasts.

It is in this great area of selectivity of the news—and I think almost every newsman that I can find tells me that this is the secret of the bias, is the same selectivity of the news night after night. The items of the news that they choose to air seem to fit the kind of a format that fits them up here in their brains and in their hearts.

Now, how can you correct this situation?

Well, I had one newsman I remember distinctly, who probably is going to testify, or has testified already, who said: "I don't try to be objective, I have never made any effort to be objective. What I try to do is to be fair." Well, if you will just read the definition of objectivity, fairness is included in objectivity; if you are objective you will be fair. But there is more to it than that. The idea is that the news is presented from both sides of the spectrum. And may I say that that is one of the violent issues that I think we are involved with.

Now, 315 I don't think we have any difficulty with. Everybody understands it.

Mr. Chairman, wherever you have a station, and you have an issue presented, and you have an opportunity to choose one pro and con, you always get that kind, you always get a fair answer to that, because you get both sides of the issue presented. There is no difficulty in making that decision by the station as to whether you have one on one side and one on the other. The problem is, how does the newscaster himself absorb both sides of this issue and attempt to present it not only fairly but objectively. And I think that is what we have tried to do in the Public Broadcasting Corporation Act. And I think it is going to work.

I will be happy to answer any questions, but I believe this is the gist of what I have to say.

Senator ERVIN. If I construe your testimony correctly, you recognize and emphasize the fact that there are no limitations on the freedom of the press with respect to the printed word other than those limitations which are applicable to the spoken words of an individual. In other words, the only limitations on the press are the limitations which are imposed on the individual, such as he shall not slander or defame.

Mr. SPRINGER. That is true.

Senator ERVIN. You take the position that although the radio is a powerful media, the most powerful media in this country is TV?

Mr. SPRINGER. Mr. Chairman, I think anybody on our committee who has been at this as long as I have, 18 years, and has watched the development of this wonderful media, certainly comes to the conclusion today that this is by far the most powerful media in America, far surpassing anything in the newspapers, because, as I say, between 90 and 95 percent of all the TV's in this country are turned on once during a 24-hour period. This is the most immediacy that you have. I would say in most homes those that are at home listen to the 12 o'clock noon news. Those that maybe get there at 6 o'clock and are at home watch the 6 o'clock. But the great majority watch the 10 o'clock or 9 o'clock news, as it is in some communities.

Senator **Ervin**. I don't know what the statistics are on the subject, but as I ride along the road I pass a lot of houses which give the impression that the occupants don't have enough bread to eat, but they have an aerial sticking out of the roof. So I think there are perhaps more broadcast reception instruments in this country than any other country.

Mr. **Springer**. You are right, Mr. Chairman. May I take a personal example in my own district. In a home I entered in the last 6 months, where the recipients were getting $105 a month—that is all—they had a TV. And I asked them about this. And they said, well, you would be amazed at what we can do for $19 a month. But in explaining it to me, they said they felt this was even more important than eating, to have this available to them all these hours of the day, because they had nothing else to do. And I think this is just as true as human nature, when they can get this kind of entertainment this cheap, they are going to buy it.

Senator **Ervin**. You take the position that there is a fundamental distinction between news media which uses the printed word and news media which uses the broadcast frequencies?

Mr. **Springer**. I don't think there is any doubt about it, Mr. Chairman. For instance, the Fairness Doctrine as developed has been accepted, it has been reinforced in the Supreme Court. I don't say the newspapers are always fair. Some of them aren't. They don't have to be fair. Because a newspaper prints the words of one political candidate it doesn't have to another. These are fundamental things.

And second, the newspaper doesn't have to operate in the public interest. There is nothing that compels them to operate in the public interest. But when you file for a license you make an affidavit and swear that you will operate in the public interest.

I think these are serious distinctions. These are what I call, Mr. Chairman, modifications of the first amendment, modifications of the first amendment by law.

Senator **Ervin**. Isn't it true, however, that there are certain freedoms which belong to the broadcasters as well as to other individuals? You take the position that the freedom of speech clause of the First Amendment does not apply to broadcasters?

Mr. **Springer**. I say that it is modified by these three principles.

Senator **Ervin**. They certainly do speak. In other words, it has always seemed to me that the genius of the Constitution was that while the Founding Fathers could not foretell all future inventions, they framed the grants of power and the liberties in such a way that they covered every subsequent development or discovery to which those words would apply. Consequently, they couldn't foresee television or the radio, they did include some provisions in the Constitution about freedom of speech, and those provisions certainly, to some substantial degree, apply to those who speak words over the broadcast.

Mr. **Springer**. I have no fault with that. I do say this, that the question of what is in the public interest, and the reason that we took up "The Selling of the Pentagon" was because we said that when you had falsified a record which you said over the air was true—and that is in effect what they said—and that record was not true, we didn't believe they were operating in the public interest. But we didn't get into that. What we were trying to do was to defend the right of the people to know how that falsification was done. And they were trying to conceal the falsification by concealing the outtakes, so that we couldn't say how the falsification took place. Everybody knew that it was a falsification. It was deceit and fraud, that was evident from the record, they admitted on the witness stand that that is what took place. There wasn't any denial that they consolidated the answers to these questions and they put answers to other questions over in front of other questions, and they said, this is the record. They falsified the record. And we say there is a serious question in the public interest as to whether or not radio and TV can falsify a documentary where it is a question and answer documentary.

Now, that is the real issue, Mr. Chairman.

Senator **Ervin**. Now, nobody can gainsay the fact that where there is any person who has the finances he can go into publishing a newspaper or magazine, but there are limits on broadcast frequencies. It is therefore absolutely essential that some agency of the Government should have the power to assign these broadcasting frequencies among the applicants.

Mr. **Springer**. There is no doubt about that.

Senator **Ervin**. I also believe there is no doubt that any freedoms people have, whether it is freedom of speech of an individual, freedom of speech in debate of a Member of Congress, the use of the printed word, or the use of the telecast, freedoms are abused. But it seems to me that the question is how to stop the abuses of freedoms without curtailing the freedoms themselves.

Mr. **Springer**. Mr. Chairman, let me show you exactly what took place. They called everybody—there was never a lobbying job—I have been in Congress 22 years, and there was never a lobbying job on the House side like CBS did in this instance. They not only were calling every Congressman—I am talking about Frank Stanton himself, he called all my friends around, they told me that he did—but every station was doing it. But the important thing, Mr. Chairman, was, we got the regulation changed at CBS. And that is what got them off the hook when the vote came.

Now, let me just show you. It is good once in awhile to take a look at these media. What did they do? They changed it. It isn't possible for them to produce "The Selling of the Pentagon" or anything like it again and do what they did in that documentary. They changed their rules so that they can't transpose answers to questions and put them over to other questions, and consolidate answers and put them over, where this is a question and answer documentary. This is what I am talking about, the surveillance of the Congress and the public interest is good. We didn't find out how this fraud is committed because we didn't get the citation. But the important thing of it was, it was the surveillance of Congress that got the change made in the public interest. And that was in the public interest. And that is why

CBS made the change in their regulations. So what they did can't be done again.

Now, that is important, Mr. Chairman.

Senator ERVIN. I will certainly have to concur with the view that sometimes the news is not covered in the way it should be. I happen to be a southerner and I have opposed many so-called Civil Rights bills. I stood on the floor of the Senate with other people who entertained similar views and pointed out that some of these bills were very foolish because they took an act which was perfectly moral externally and made a man's guilt depend on something hidden inside of his mind. We pointed out that man didn't have the capacity to do a very good job of judging people's intents and a law that made a man's actions, perfectly legal in every respect, become illegal on the basis of intent was a very unwise law. We pointed out that many of these laws, by their nature difficult to enforce, held out false hopes that resulted in the frustration of the minority race. I also pointed out that, under the old interpretation of the Constitution, a law which made the right of a man to use his own property for a lawful purpose dependant upon the will of others deprived him of his property without due process of the law under the fifth amendment. We pointed out that a man who stakes his capital and invests his talents in a business should have a right to say who he hires and who he fires to make his business a success. I thought we had made some reasonable arguments. But I never did see many of them reported in the press, on television or radio. In other words, it sometimes appears that the news media adopts a common policy and a common program, and they ignore what is said on the other side. So there can be no doubt that these great powers are abused.

But the thing that bothers me is who is going to do the supervising? Personally, I would rather trust the news media than the Government. Consider the following illustration: In my own State we have thousands of people who grow tobacco, and thousands of them engaged in the manufacture of tobacco. The Surgeon General, the political doctor, began to make war on tobacco, notwithstanding the fact that many medical doctors discount his claims and say that what he says is not accurate. Well, in spite of the fairness doctrine, the FCC says that the political doctors, whose views have been adopted by the FCC, are in complete possession of all of the truth on that subject, and all those who have the complete truth on the subject can present spot announcements, but to those who disagree with them, the fairness doctrine doesn't compel that they be given time to present opposing information. In other words, you turned this over to the government, and the government said, we have the complete truth on this subject, and those who disagree with us have none, and therefore they shan't be heard under the fairness doctrine. That is rather a tyrannous power.

In addition, the fact that a broadcaster has the constant threat hanging over him that he may lose his license if he displeases a substantial part of the community, or the government. I think that impedes the freedom of speech. However, I am not sure I know what the remedy is. But you as a member of the Commerce Committee which has jurisdiction of this subject, and have given a great deal of study to the subject, and you have expressed yourself here in a most lucid and forceful manner. I understand from your testimony that in your judgment the bills which undertake to give the broadcast media the same unrestricted right to freedom of speech and freedom of the press that is enjoyed by citizens generally, the spoken word and the printed word of the newspaper, could not possibly pass Congress.

Mr. **Springer**. You have to say it this way, I think, judge. Anyone can say anything on radio or TV that he wants to. But if he does it he must be brought within these principles which I have outlined of operating in the public interest, the fairness doctrine, section 315 principally. Now, if he violates those three, then he is subject to some kind of a citation or some kind of correction or some kind of a penalty from the FCC for violating those three principles which have been enunciated and have been declared valid by the Supreme Court of the United States.

That is my answer. And I think that is just exactly where they are today. I would say that if you took a lawyer for any one of the networks he would tell you exactly, we can't stop people from saying whatever they want to say, the question is, do they violate any one of those three. There isn't any restrictions on them getting on there and saying it. But there are certain penalties that can be applied if and when they do violate those three things.

Senator **Ervin**. One of which is, they can be silenced as far as the use of the airways are concerned.

Mr. **Springer**. They could be. For instance, the radio station in Mississippi was put off the air.

Senator **Ervin**. I wonder whether, if the station had jumped on the white citizens council as they did on the minority race, it would have ever been taken off.

Mr. **Springer**. You have me there, judge. I can only stay within what I have here, these three principles, that—315 is in the law, and the fairness doctrine has been developed over the years by a combination of FCC regulations plus the decisions of the U.S. Supreme Court. Now, operating in the public interest, that is gradually being cleared up. But, judge, I think the most important thing that I found coming out of "The Selling of the Pentagon" is that it is the constant surveillance of the Congress that has helped. If you want to look at them and go back to what I call biased reports of 2 or 3 years ago and take them today, they have improved tremendously, even since "The Selling of the Pentagon" I can tell you. I watch these every night. They are tremendously improved insofar as getting balance into this thing and getting bias out of it. And it is the constant surveillance by the Congress which has brought this about. It has brought balance and objectivity and more fairness in my opinion in the newsbroadcast than we had 3, 4 or 5 years ago.

Senator **Ervin**. I just wonder, though, if Congress doesn't imperil the freedom of the press and the freedom of speech when Congress says, we are going to reserve to ourselves the right to conduct an investigation and see whether the broadcast media or the radio media or even the press—of course they have never done it on the press—have presented the truth as the truth should have been presented.

Mr. **Springer**. Let me say this. I think CBS would have been much better to let that citation go and then take it to the Supreme Court of the United States and get a decision. I would be happy to have that decision as to whether or not we have this power which we said we had to investigate "The Selling of the Pentagon" under the circumstances. Now, I think it is the Supreme Court of the United States that has to determine whether or not this is the thing that is going to be done. But we have been following these decisions as they have been issued by the U.S. Supreme Court. And those, may I say, affect us just as much as they did CBS. If we don't have this power we certainly don't want to exercise it. If we do have this power, which we do believe we have, then we ought to have a right to exercise it. And we ought to continue this surveillance which we have given to radio and the TV to be sure that we do not get falsifications and fraud and deceit which we have proved happened in "The Selling of the Pentagon." But I do believe that the influences of the Congress has had a constructive influence upon broadcasting. And I think it has been good that we have had that kind of influence.

And I think in turn, Judge, that it is a good idea for you to have these kinds of hearings to sort of determine in the area of the first amendment just exactly what their rights are.

Senator **Ervin**. I agree, and I think it is a good thing for you to present your views, especially since they don't harmonize with the views of some other persons. For example, they don't harmonize with the views of Walter Cronkite or the views of Frank Stanton, and their views aren't in harmony with those of David Brinkley. But certainly they are all entitled to their opinions.

I think it would be a very serious thing if the Government would undertake to control in any way the contents of a news broadcast. I hear much complaining that the large networks are selecting news, but I have noticed that when the President of the United States comes down to deliver the State of the Union message he selects what he is going to talk about and he leaves out a lot of things I think he ought to talk about.

Mr. **Springer**. Certainly we have no authority that I know of, judge, over any news broadcast. And we have never made any protest. What we did say in "The Selling of the Pentagon" was that here was a question and answer documentary, and they falsified the questions and the answers. Now, that is not in the public interest. Now, if they had taken this and consolidated in it a new documentary which was the opinion of the broadcasters themselves and for which they selected the items that they wanted, we would have had no jurisdiction over it whatever. Our subcommittee fully understood this. But it was an entirely different situation in "The Selling of the Pentagon" with the questions and answers as is. And that is the reason we got into it, and only for that reason. We said that what we wanted to find out, and felt the public wanted to know—and we had all these letters and inquiries—was, how did this falsification and deceit take place. We believe it is in the public interest to know how this fraud and deceit took place. That is our only interest in it, not that they did it.

And may I repeat to you again, we have no jurisdiction over news broadcasts that I know of. This is their pure right, to select the news. But I think it is this constant surveillance that we have, and talking about it—and may I say that the schools of communication in this country are developing activists, there is no doubt about it—I can go through it and name you a whole group of them—the schools of communications are coming out with activists in the field. And this presents us with a serious problem in the future. When you talk about activism—and this is the big discussion in journalism schools today, shall we be activists or shall we not? To be an activist means you take one side of a situation. In other words, you try to develop social issues. You see what I mean? Now, that has never been the theory of journalism at all up until this time. But this is one of the big issues in my opinion that is coming on in this country, is activism in journalism and communications schools. I don't take any position on it, I am just saying that it is coming. And practically every dean of a school of journalism will tell you that is true today, that that is what is happening.

Senator **Ervin**. I certainly agree. I see some newspapers that slant the news so as to fit their views as expressed on the editorial page and I also hear that some Senators occasionally lift things out of context. Therefore, I certainly recognize that there is a very strong argument that can be made for the necessity of having the fairness doctrine so as to require such powerful instrumentalities as broadcasters to present in a fair manner both sides of a controversy.

Mr. **Springer**. Judge, let me say this to you here. Back some months ago, the *Washington Post* in their editorial page discussed this very thing that you are talking about. And Wiggins, who used to be the publisher of the *Washington Post*, made a speech before the Washington Society of New Jersey. And it was a corker. I wish I could put it in this record. But the gist of it was somewhat droll, and with a sense of humor. He said: You know, I have been wondering about the Vietnam war. Suppose in the Revolution we could have had a newsman there with a microphone that he could have put under the GI's nose as he walked up to the Delaware River bank and said, what are you doing out on a snowy night like this with 12 inches of snow? Is this good tactics? And get an opinion from him like many of these people have. And then when they got on the other side of the river he could ask, why are you going up to Trenton? Don't you realize that if you go up there and bombard Trenton you will kill an awful lot of civilians, they will be running back and forth on the street—and then get the GI's opinion on this. And then, what is this all about, what is this thing you are talking about, taxation without representation? What does that mean?

Now, Mr. Wiggins in his rather eccentric way was trying to determine, if you had the Revolution today and you had a news media going out and getting an opinion from the GI's as to the strategy that was developed—I am talking about George Washington's Army—and then you broadcast this to the people in that vein, without any qualification, as you are taking these things and doing, what kind of reporting would that be—this was the point he was trying to make—without getting some kind of serious balance into it, such as the opinion of the commander, or something like that, as to exactly what the Army was doing?

But this raises immediate problems. Now, in those days nobody knew for months what happened. By 6 o'clock tonight everybody will know what has happened in Vietnam. And that is all right.

But I think he is coming back to the question of how you report the news and whether or not you get this news in balance and it makes some kind of sense. I think he was criticizing, but what he was trying to do is in a backhand sort of way to get at this question of what your judgment is in reporting the news.

Senator **Ervin**. I think the crucial question—which I think was asked about 2,000 years ago by Pontius Pilate—comes down to what is truth? And then the subsidiary question is, who is going to determine what is truth? I am very reluctant to let government make that determination, or the news media, or the broadcasters. Even though comments may be lifted out of context, even though they may be reported incorrectly in some cases, and even though they may be distorted in others, I believe it is better to leave it to the people to pass on that question, rather than the FCC, for example, or any other government agency.

Mr. **Springer**. If I could just comment on that, I don't know that the news is presented necessarily true—it may not be untrue. But as one broadcaster well known in this country said, the news is the unusual. Now, my point to this is, is this all of the news? Now, I would guess that that broadcaster was probably brought up by some newspaper, and that has been the purpose of newspapers, as you well know, back through the years, that you present the unusual. The ordinary thing, somebody acclaimed, some student that has done well, some fellow that has served the community well, that is not news. The news is the unusual, when somebody gets killed, something unusual. And that is the nature of the news. Now, when they come on with the international news I take it that the unusual is what they put on. And this is the way the newscasters explained it to me. It is the unusual. You are not going to get anyplace by talking about news that isn't unusual.

Senator **Ervin**. That expresses the old adage, when a dog bites a man, that is not news, but when a man bites a dog it is news.

Mr. **Springer**. Exactly. And that is what we are thrown into in this. And I don't think we can do anything about that, even though the newsman selects something that may not be of very much importance to some people, it is an eye-catcher, it is a lead item on news.

Senator **Ervin**. I want to thank you for a most interesting and illuminating discussion.

I take it you think it is essential to preserve the fairness doctrine in respect to the broadcast media. The doctrine, as you interpret it, would not give any governmental agency the right or the power to control the contents of what is presented as news, but it would require an objective presentation of both sides of the controversy and an opportunity for a man who feels he has been personally attacked to present his side of the story.

Mr. **Springer**. That is right. I think the fairness doctrine has worked well. In section 315 it has certainly worked well through the years. And it ought to be retained. And I think the whole thing of what is happening should in the public interest be presented.

Senator **Hruska**. Mr. Springer, in the last year more or less there has been a good deal of discussion before this subcommittee on the place of the press and how it is to operate. And some efforts have been made to judge it. And among the reactions, at least of some of the segments of the press, has been the observation that there is a conspiracy, a conspiracy against freedom of the press. Now, then, would you consider the constant surveillance by the Congress, which you advocate, as a form of conspiracy, or do you see any conspiracy against the media in the sense that has been charged from time to time?

Mr. SPRINGER. Are you talking about the written press, Senator?

Senator HRUSKA. Generally the press, most of it in the vocal press, the pictorial press.

Mr. SPRINGER. The written press I am convinced that we have no jurisdiction whatever over. The First Amendment applies completely to the written press. I don't think that there is any control or surveillance of any kind that we would have over the written press.

Senator HRUSKA. That would be separate and apart.

And the written press has also suggested that this criticism of them is a part of a conspiracy. Do you think there is such a conspiracy, either in the written press or the other press?

Mr. SPRINGER. Senator, I don't know of any conspiracy, I have never even heard of a conspiracy against the written press, I think it is ridiculous. I don't know of anyone who wants to do anything about the written press. That has been free during all of our history. There is a long history going back—almost every State court in this country has interpreted it, and it has been interpreted by the supreme court, and there is a line of decisions that there isn't any control over the written press. And my discussion here, as the judge well knows, completely has to do with the media of radio and TV.

Senator HRUSKA. I understand that. And we are all aware of it. And that is why I am asking this question, do you think there is a conspiracy? Is there any ground for saying this—notwithstanding the common knowledge as to the freedom of the press and taking for granted that the First Amendment is an absolute guarantee of the freedom of the written press. There have been suggestions that in some of the criticisms of the press there is a conspiracy to try to impinge upon that right and upon that constitutional privilege. Do you think there is any such conspiracy?

Mr. SPRINGER. Senator, Harold Anderson, president of the *Omaha World Herald*, couldn't have said it any better—I couldn't say it as well when he said: "I have serious reservations about the proposition that a heavily regulated licensed industry like broadcasting has automatically and inevitably the first amendment protection afforded to the Nation's newspapers. I fail to understand the almost hysterical reaction to these criticisms in some quarters." And he pointed out that Mr. Agnew hasn't dismantled a single TV network or cost a single TV commentator his job, and at the last report the *New York Times* was still publishing daily. It is absolutely ridiculous. There hasn't been any effort that I know of by anyone—I think I have talked to everybody on the Judiciary Committee of any consequence on the House side. There hasn't been any suggestion of any kind, even to them, and they haven't even come to any conclusion that this is the kind of thing—I just don't believe that as to the press, I am talking about the written press.

Senator **Hruska**. And yet you were resisted in the other body in an effort to obtain certain sources of information. And I imagine even there the assertion was made that those efforts were a part of a conspiracy, a part of an effort to try to whittle down the freedom of the press. Were such assertions made?

Mr. **Springer**. Senator, let me say this—and the judge probably knows this as well as I do—from your early law school days you know this, that as far as I know at this point—I haven't been a student of this in recent years, but I did know something about libel in my earlier days, because I was with a firm where we had this kind of case.

Senator **Hruska**. Since that time they have repealed most of your knowledge of libel.

Mr. **Springer**. Let me just say this to you, Senator. If you will recall from your law school days, there was only one privilege, I mean secret information, the sources of information, only one, and that was the lawyer. And why? Only because a lawyer had to retain the confidence of his client in order to defend him. Nobody else has ever had that right. And the only reason the lawyer ever had it—they wouldn't even have given it to him except that he couldn't defend his clients if he had to go into the grand jury and divulge the information, it would make it impossible for him to have any defense. This is a question of the public interest when you are talking about sources of news, sources of information. There has to be a reason in the public interest why that person would fail to give it up. Now, if somebody has killed somebody, the grand jury has a right to subpena anyone. It hasn't to do with just newsmen, but anyone else. There is only one privilege that I know anything about in all my law school days, and subsequent to that, is the lawyer himself and he has it only for one reason. And the only reason they gave it to him is because it is in the public interest, you couldn't have justice otherwise. There is no reason for anybody else—if somebody has been killed, murdered, or raped, and if you have some kind of a violent act, and somebody knows about it, they should be required to testify about, unless it is in the public interest that they not do it. If I am mistaking my law, I think the judge can tell you that that is the law on the question at the present time.

Senator **Hruska**. You have told us what many witnesses have told us; namely, that there is a freedom of the press under that right of a free press, including the right to be wrong. We cannot restrain anybody from saying anything he wants to say. Now, do I understand further that this freedom, in the light of your testimony particularly about "The Selling of the Pentagon," and that this freedom of the press is also extended to include a right to engage in fraud and distortion and falsity in the content of the disclosures that are made pursuant to this right?

Mr. **Springer**. I said, and I think I am right, there is not any restriction we have on the right of any person to say anything on radio or TV that he wants to. That is his judgment, as to whether he wants to do it. What I did say is that he was subject to the penalties of these three things if he did it. Now, that is subject to two things: First, a hearing by the FCC as to whether or not he has violated any one of these three things. I am talking about operating in the public interest, the fairness doctrine, or section 315. Now, if he takes that risk when he broadcasts that he violates that. And that is a risk he takes. But there isn't anything in the law that I know of that keeps him from getting on there and saying anything.

Senator **Hruska**. And what are the other two things, the FCC and what else?

Mr. **Springer**. He is subject to the FCC jurisdiction. If he is not satisfied that this is fair, he may take an appeal to the court. And Senator, can there be anything fairer than that? If he is attacked as violating one of those three things that I have mentioned, if he has been, and the FCC finds against him, he can take an appeal to the courts. There isn't anything in this thing that keeps anybody from having all the rights that he is entitled to. He isn't cut off down at the FCC just with a hearing.

Senator **Hruska**. And I presume that as an elected official you would believe that you are at least as qualified as any medium of the press, including the networks, to judge which issues are in the public interest and which are not; would that be a safe assumption?

Mr. **Springer**. Take "The Selling of the Pentagon." They didn't give us outtakes. On "Projects Nassau" and the "Invasion of Haiti" they gave us every single outtake we wanted, which we asked for, last year. They gave it to us on "Project Nassau" and the "Invasion of Haiti," and they didn't give us on "The Selling of the Pentagon." Why? Because there is a serious question in "Project Nassau" and the "Invasion of Haiti" that they violated a section of the statute with reference to conspiracy, and they also violated the Logan Act, there is a serious question. And the lawyers advised them, and they coughed up everything.

You want to know how much it was? If you put in single boxes 14 inches high, 20 inches square, it would go from this railing all the way around to there. They gave us all of it in the "Invasion of Haiti." They didn't stand on this principle in that, did they? They said there was a principle involved there. The principle involved there was that they might go to jail, and that is the reason they didn't stand on their principle in "Invasion of Haiti" and "Project Nassau," which was the preparation of people down in Florida, to which CBS contributed somewhere around $85,000 to $115,000.

Now, I give you this: when you stand on principle once, you ought to stand on principle all the time.

Senator **Hruska**. Thank you for coming here. It is very evident that you have given this a lot of study and a lot of review.

Senator **Ervin**. During my time in Congress I received two especially intriguing letters from constituents. One of them was back in 1946 when President Truman vetoed the OPA bill and made an appeal to the country to contact their Senators and Representatives and ask for a strong OPA bill. The letter I received from one of my constituents proposed a solution that would have been satisfactory to everybody if it could have been made administratively possible. He said: "I am in the electrical business. I want you to get an OPA law that will take the controls off of everything I have to sell, but keep them on the things I have to buy."

The other day I received a letter from a constituent on what Congress should do with respect to freedom of the press. He said: "Nobody in his right mind would ask Congress to suppress the freedom of the press, but Congress certainly ought to do something about all these lies and distortions."

I want to thank you again for your very illuminating and very enlightening discussion.

Mr. **Springer.** Thank you very kindly.

Senator **Ervin.** Counsel will call the next witness.

Mr. **Baskir.** Mr. Chairman, our next witness this morning is Mr. David Brinkley from NBC News.

Senator **Ervin.** We are delighted to welcome you to the subcommittee, and wish to express to you our appreciation for your willingness to come and express your views with respect to a matter on which you are most knowledgeable and have had vast experience.

STATEMENT OF DAVID BRINKLEY, NEWSMAN, NATIONAL BROADCASTING CO., INC.

Mr. **Brinkley.** Thank you, Senator. And I would like to thank the subcommittee first for inviting me to come. And I want to say that I think what you are doing here is a most useful work certainly to all of us in journalism, and I trust to the Congress and to the American people.

You have had a great many other witnesses here who have discussed in some detail the legislation that is pending on this subject, including S. 1311 by Senator Pearson and Representative Whalen. And on this score, and to avoid repetitious testimony, I would say only that I agree entirely and totally with what you the chairman said at the opening of these hearings.

And instead of covering ground that has already been covered expertly and even eloquently, I would like instead, with your permission, to offer a few thoughts on the nature and cause of the difficult relationships these days between the press and the public officials and the public. And with your indulgence I will try to do that, in the hope that it might help in some small way to understand why these difficulties exist.

Television news arrived on the scene and achieved some kind of maturity only in about the last 15 years. And because of its speed, immediacy, pervasiveness and very wide circulation, it has by now had a substantial effect on how the American people, the public officials, and private citizens view the performance of journalism.

And the first point I think is that television news every night reaches people who are not reached by any other news media, and never have been. It reaches vast numbers of people who may buy a daily newspaper, but who often only read the sports pages or the comics, who may skim the front page lightly, and who almost never read the editorial pages, and people who therefore do not fully understand what the function of journalism is.

I have learned this over a number of years, all my working life, in fact, by a careful reading, very often between the lines, of vast quantities of mail from the millions of people at the other end of the tube. And what I have found are profound misconceptions about journalism in general and television news broadcasts in particular. Great numbers of people, public officials and private citizens, resent the fact that a great deal of what we put on the air is unattractive, disturbing, depressing, and even ugly. And a great many somehow have the idea that we put this on the air because we like it—campus riots, urban riots, violent demonstrations, and so on—that we put it on because we approve it, endorse it, or advocate it.

Any time there is any kind of ugly or depressing public event, say a spasm of urban arson, looting and so on, I get letters by the hundreds or by the thousands saying in effect, why do you glorify and dignify this kind of unspeakable conduct?

The answer of course is so obvious it is almost embarrassing to have to give it. It is of course that we put it on because we think the audience would like to know about it or ought to know about it, certainly not because we like it or approve it or advocate it.

Nevertheless, the question keeps coming up day after day, year after year. And I suspect the questions come mainly from listeners who never until recent years have ever been exposed to anything like serious journalism. And so they therefore don't really understand what it is, don't understand what its purpose is.

And this has led to a fairly widespread public anger directed mainly at television news, and now reflected in the public statements of political figures who have detected this anger and hostility, and have made a public issue of it.

Political figures make sensational attacks against the news media, and in the act of doing that they reinforce and further encourage the public hostility. And it is a repetition of cause and effect. And this is a process we have seen now for the last two or three or 4 years.

In the mail people who are angry at us—and they are fairly numerous—people who are angry at us still make precisely the same charges and precisely the same complaints they were making before. But now invariably they add one additional line at the bottom. And the line is: "Agnew was right."

That is one point, that we have reached people not previously exposed to serious journalism and who don't really understand what its purpose is.

The second is that on television journalism takes on a personal dimension. On a newspaper of course a reporter is not seen, his work is there in the form of type on paper, whereas on television he is there in living color complete with haircut and necktie.

And people who want to can always detect or think they can detect a raised eyebrow or something equally silly. But that happens only when they don't like what he is saying. If they do like what he is saying, then he can laugh and cry and light a cigar and stand on his head and nobody minds. There are never any complaints about bias and slanting when the news is good. They appear only when the news is bad. And to the regret of all of us nowadays, it quite often is.

And a third point is that a television news broadcaster comes out of the same tube, the same box, as a succession of entertainers, comedians, actors, jugglers, and so on. And after all of that, much of it junk, when another face appears that is not wearing a toothpaste smile, comes on and says, there has been another riot, and more war casualties, and taxes are going up, and so, pouring out a stream of depressing news, well, it looks even worse by comparison with what came before it and by comparison with what came after it.

Now, I don't say all this to complain about how misunderstood we are and how put upon we are, and how hard life is for people in journalism. I say it only in the hope that it will help to explain some of the current controversy and help all of us to look at it in a realistic way.

As for intimidation by our critics, there is none that I know of. Anyone who can't stand criticism should not go into journalism, as I say, and I think you would agree that anyone who can't stand criticism should not go into politics. The two professions——

Senator **Ervin**. I think Harry Truman expressed that same truth when he said, if you can't stand heat, stay out of the kitchen.

Mr. **Brinkley**. Precisely. Our two professions are closely related in many ways. Those in both fields are exposed to public scrutiny, attacks, criticism, and second guessing. And some stand for reelection every 2 years, and some every four and some every six. We have to stand every night—and they can vote us out any time simply by turning a knob, they don't even have to go out of the house to do it. And if enough people did so, very soon everyone now on the air would be off the air, or, so to speak, out of office.

So intimidation by critics is not a serious problem.

I think the other problems being discussed here are serious—the increasing flood of subpenas, the demands to produce notes, films, tapes, and so on, second guessing a month or a year or more after the fact. I think those indeed are dangerous to freedom of the press—the press meaning all of us—and in my view they ought to be stopped. And I believe S. 1311 would be a good way to start.

There are of course other questions and problems, such as the so-called Fairness Doctrine, the Skelly-Wright decision about advertised products, but those have not yet, at least, been applied particularly to the part of television I am involved in and know very much about, which is the news programs. And there have been other witnesses here who know more about that than I do.

But finally on the general subject of how well television news does its job and how much it merits the criticism it now gets, I think the network news programs, which are the only ones I am familiar with, are pretty good. Their limitations are quite severe, imposed as they are by the nature of the medium itself. Obviously they are not comprehensive. A great deal of selectivity is required. Much of what we do is excessively brief. But a half-hour is a half-hour, and there is no way to stretch it. While a newspaper can add pages, we can't.

I do believe them to be honest, and I know there is no conspiracy or plot to undermine or to be unfair to the right or the left. And I think the proof of that is that our bitterest critics are the far right and the far left. The far right generally thinks we are radicals, while the far left thinks we are conservative members of the establishment.

We have, needless to say, been guilty of some sins and made our share of mistakes, and I certainly would not attempt to defend them. This particularly was true in the earlier years of television news when we had an entirely new kind of American history being made and reported by new people using an entirely new medium. And we still have a number of faults. But the rampant political bias charged by our critics simply does not exist. What happens mainly is that people project their own political bias on us. A biased opinion simply is an opinion you do not agree with. And if we are accused of bias by both sides, the far right and the far left, we must be doing something right.

Thank you.

Senator ERVIN. I think that you put your finger squarely on what causes controversy in the field of speaking—and I'm using that word speaking in the broadest terms—on page 4 of your statement where you said in effect that if people don't like what a broadcaster is saying, they can detect, or think they can detect, a raised eyebrow, but if they do like what he is saying, then the broadcaster can laugh and cry and light a cigar and stand on his head and nobody minds.

Mr. BRINKLEY. It is true, Senator.

Senator ERVIN. And I think that what you say on page 6 explains why there is some criticism of broadcasting because it has to limit news and select news, and you say that "their limitations are quite severe, imposed as they are by the nature of the medium itself."

Mr. BRINKLEY. I had better add one point there, Senator. You mentioned while Mr. Springer was on the stand that some of your own thoughts and your own words during one of the civil rights debates were not reported or not widely reported. Covering the Senate and the House is a terrible problem for us. You know, of course, we can't make any film inside the Senate Chamber. And what we quite often do—and as I recall, I don't know what particular bill you were referring to, but what we have often done with great difficulty is have an artist go in the Senate Chamber and draw a picture of you, or whoever it may have been, and then we use that on the air, which is not very satisfactory. But it is the best we can do. They won't even allow him to draw in there, he has to go and look at it and go outside and draw. And this is a very slow process. It is quite difficult. And we are on at 6:30 rain or shine, regardless of what the Senate does. So difficulties like that affect us, and they do not affect the printed press. They can sit in there and take notes and carry the entire proceeding if they want to.

Senator ERVIN. My criticism is that there was a tendency on the part of the news media to overlook those persons who were opposing these bills. I really thought that what we were saying in opposition to them was more sensible than what was being said in support of them. But most of the media printed what was said in support of them, except for those beknighted television stations or newspapers that reported what we said.

So in spite of the fact that I didn't like the way they functioned, I don't know any way, as I said, that you can have freedom and it won't be abused on occasions. Fortunately over the longrun the abuses have been minor in consequences.

I am a great believer in freedom of speech. I am not speaking with respect to any media, but as to all the media. I think that the Founding Fathers wrote the First Amendment to cover all media of communications for two reasons: The first was philosophical in nature, they recognized that there must be freedom of speech and freedom of the press if the people of this Nation were going to be free from the worst kind of tyranny there is, that is, tyranny over the mind of man, secondly, they wrote the First Amendment because they recognized that the kind of a governmental institution they created could not function properly without freedom of speech and freedom of the press. I think it is accurate to say that the first amendment gives the freedoms to all peoples within our borders, regardless of whether they be wise men or foolish men, profound men or shallow men, learned men or ignorant men, or devout men or ungodly men, it even gives it to people who hate America as well as to those who love it. Those who created the First Amendment staked the very existence of this nation on the proposition that our country in the long run has nothing to fear from freedom of speech or freedom of the press as long as it leaves truth free to combat error. I believe that one of the greatest tragedies that could ever befall this country would be for Government to undertake to arrogate to itself the power of Pontius Pilate to question, what is truth.

Senator Hruska.

Senator **Hruska**. Mr. Brinkley, you heard the testimony of Congressman Springer and his statement that it is wholesome to have congressional inquiry and surveillance more or less on a constant basis, just as a sort of levening process, and for all the other reasons that he suggested. Would you have any thoughts on that which you would like to share with us?

Mr. **Brinkley**. Well, I certainly wouldn't have any objection to Congress taking a continuing interest in what we do, along with anyone else taking a continuing interest in what we do.

I did have one thought while Mr. Springer was talking. First, let me say that I am not intimately familiar with the Pentagon documentary he was talking about. We didn't make it. And not only that, I never even saw it, to be honest with you. But I did wonder—and perhaps it is not fair to bring up the question after he has left—I did wonder why if, as he described, this fraud was proved, established and admitted beyond doubt, why was any further action called for? Why was it then necessary to subpena the film and tape and notes and whatever it was if the fraud as he described was no longer in question? I don't really see anything further that needed to be known about it.

Senator **Ervin**. If I may interject myself, my information, which I do guarantee to be correct, is that the FCC had a complaint on this subject about "The Selling of the Pentagon," and that the FCC decided that fraud was not apparent in the broadcast.

Mr. **Brinkley**. But after it was over, and after it was, as he described it, established and admitted, or confessed, or whatever word he used, it did seem to me that that must have settled it; I didn't see any point in pursuing it further. I don't know what could have been gained by pursuing it further. Obviously any broadcaster who wants to have his license renewed—and as Mr. Springer was saying, if he has not performed in, I think, the public convenience and necessity at the end of his license period, that then he could lose it, as I think the station in Mississippi did.

To answer your question, Senator Hruska, I could certainly have no objection to it.

Senator **HRUSKA**. The FCC has responsibilities as a supervisor in the area of radio and TV. What is your opinion as to how they discharge those responsibilities and these duties generally speaking?

Mr. **BRINKLEY**. I can't give you a very informed answer, because candidly I really never have had anything to do with the FCC. I am not a network lawyer, I am not a lobbyist, and have never had anything to do with the corporate or business aspects of television, and I really know nothing about them. And to be honest, care nothing about them. And as to relationships with the FCC, I have never had any, direct or indirect. And I really don't know much about it. They have never bothered me and I have never bothered them. And I am very happy to leave it that way.

As for the other departments of NBC, the lawyers and the executives and so on, I am sure they have strong feelings on the subject. But I am really not qualified to speak about it. I don't know anything about it. I regard myself as what I am, I am a journalist, and I do my job the best I can. The FCC has never bothered me. They have had a lot of mail over the years complaining about things I have done. And I trust they will get more. But they have never bothered me in any way.

Senator **HRUSKA**. I suppose on that score the status quo is a very happy condition, and you would like to see it perpetuated.

Mr. **BRINKLEY**. It suits me fine, yes.

Senator **HRUSKA**. I imagine, however, that if someone suggested that the FCC powers and responsibilities be extended to networks, and that they should look into that aspect of it, perhaps your interest would become sharpened and more than academic, wouldn't it?

Mr. **BRINKLEY**. I dare say it would, Senator.

Senator **HRUSKA**. I think a good many people would share that same experience.

Mr. **BRINKLEY**. The fairness doctrine is so beautifully named that it is very hard to speak against it. But the fact of the matter is, as we all know, fairness is quite often in the eye of the beholder. If it were possible to precisely, objectively, and scientifically determine the public interest, then I would assume that every vote on every issue in the Senate would then be unanimous. Needless to say, it is not. It is impossible to say with any precision in all cases what fairness is. One example that has often been used is, if I, for example, said something unflattering about Jimmy Hoffa, as in fact I often have, am I then obligated to run a television camera from here to the Federal prison and allow him to answer? Well, I don't know. What would the fairness doctrine say about that? As I say, fairness is so universally admired by all of us that it is very hard to raise any question about it. But when it comes down to the practical matter of applying it in everyday work, it is not always so obvious, and not always so easy.

Senator HRUSKA. Well, perhaps there would be no occasion to run over to Jimmy Hoffa's cell and put a camera in his face and have him answer. But what about a situation where a witness is in the chair that you now occupy, and very vigorous charges are made and questions are asked and conclusions and judgments are pronounced by the man who is interrogating him or subjecting him to that kind of inquisition? Then the camera stops, although the witness is there and proceeds to answer those charges, and no part of the answer is presented to the public. Is the fairness doctrine involved in that situation? Would it require too much imagination to suggest that some people think that this is not only unfair but highly unbalanced?

Mr. BRINKLEY. I would agree with you on that score. I think, however, that the idea of fairness did not originate with the fairness doctrine. It simply originated with the——

Senator HRUSKA. I understand. But we do talk about balance in journalism. Would you like to put it on that basis and suggest whether or not—of course you can't get more than 30 minutes in a half-hour, but at the same time there is a percentage—if you are going to devote 5 of that 30 minutes to the particular hearing, or whatever it is, don't you think that it would be unfair for all of it to be taken on one side of an issue and none or very little on the other?

Mr. BRINKLEY. I couldn't agree more, Senator. The situation you describe would be a quite unfair presentation of what happened here, or in whatever committee it might be. But if we did that, we certainly would be guilty of bad journalism if nothing more. And I think beyond that we would be guilty of unfairness. I would not say that has not happened. Obviously I don't see everything put on the air by everyone. I do know that we try not to do it. As I said here, we make no pretense of being comprehensive, because we simply can't; we just can't. It is impossible. But we do try to be fair with what we do put on. And I confess we don't always succeed. And in the presumably hypothetical situation you have described, if it happened as you said, it would indeed be unfair, and it should not be done.

Senator HRUSKA. Well, it does happen quite often, and it has happened right in this committee room within the last 90 days.

Mr. BRINKLEY. Has it?

Senator HRUSKA. Oh, yes.

Mr. BRINKLEY. I trust it has not been done by——

Senator HRUSKA. I have consistently watched the TV, and it is not an unusual occurrence; it is quite frequent.

Mr. BRINKLEY. I think what happens is, if you have in a committee a prolonged series of questions, and then a prolonged answer, we simply don't have room for both at times. And so what then might happen would be to have me or Cronkite, or whoever it might be, say, Senator Hruska asked the witness this and this and this, paraphrasing the questions, and then giving the witness' answers, or on the contrary, using the question and paraphrasing the answers. It is sometimes necessary to do that simply for reasons of time, not often, but that does happen.

Senator **Hruska**. The incident that I refer to did not involve this Senator, but it did involve a high official in the administration and one of my colleagues. No reference was made at all to the high official in the administration, and no coverage was given, nor even an intimation that the charges and the questions were answered or commented upon. And it was quite unfair, because the occasion didn't call for that kind of treatment. There are other examples as well. I presume, however, the right to do that is one of those things that Senator Ervin frequently refers to that is included in the right of freedom of the press, and if they want to proceed in that way, I suppose they can.

There is no way that we can say, and certainly it would be hard to envision any process by which we would say that this must not be done, and there is going to be a law to enforce it; that is totally impractical, and all of us know it.

Thank you very much for your appearance here.

Mr. **Brinkley**. Thank you, sir.

Senator **Ervin**. In the final analysis, don't you believe that the cause of good government is preserved by the fact that the news media reports on the actions of government and public officials, and on occasion criticizes them?

Mr. **Brinkley**. Senator, I think a fact not often thought about which is terribly important on this score is that if we don't do it there is no one else.

Senator **Ervin**. And is it not also true that criticism by public officials and criticism by the people of the news media does have a tendency to be helpful to the news media?

Mr. **Brinkley**. Oh, yes. As I say, if you can't stand criticism you shouldn't go into journalism or politics.

Senator **Ervin**. That is the reason the Founding Fathers believed in the freedom of speech and the freedom of the press.

Mr. **Brinkley**. Yes.

Senator **Ervin**. Although it might be uncomfortable to individuals at times, it serves the highest public interest in the long run.

Mr. **Brinkley**. I couldn't agree more.

Senator **Hruska**. May I ask unanimous consent that an article from the *Stanford Observer* of October 31, 1971, written by Prof. Robert A. Horn, professor of political science, be incorporated in the record in a suitable place. It bears on some of the matters just discussed, inasmuch as it is entitled "How Free Should the Press Be."

Senator **Ervin**. That will be included in the record.

(The article referred to follows:)

[From the Stanford Observer, October 1971]

HOW FREE SHOULD THE FREE PRESS BE?

(By Prof. Robert A. Horn, Prof. of Political Science)

Although the publication of the Pentagon Papers and the United States Supreme Court's ultimate judgment in the cases brought by the government to restrain further publication have made more people more aware of some of the questions about a "free and responsible press," these decisions are but the latest of a number of cases since 1957 in which the Supreme Court has opened up new freedoms for the press. "The press" of today is the "media of mass communication" for it embraces not only the printing press but those gifts of electronic technology, the movies, radio, and television.

Beginning with the Roth case in 1957, the Court has freed the press from legal restraints previously assumed to exist in three major respects. The Roth case and its numerous progeny have made a new constitutional law of obscenity, the results of which all can see and hear.

The Court's unanimous decision in *New York Times* v. *Sullivan* in 1964 held that a public official can recover damages for libel only if a publication concerning his official conduct, no matter how false and defamatory, was made with knowledge of its falsity or with a "reckless disregard" for the truth. In practical effect this decision has stripped public officials of almost any legal recourse, and its progeny have similarly affected "public figures" like college football coaches and retired major generals, at least if they are sufficiently notorious. A democratic form of government, the Court reasoned, requires nothing less, although any hard evidence that this new constitutional law of libel has contributed to honest discussion of public affairs is difficult to come by.

Finally, in the recent *New York Times* and *Washington Post* cases a badly divided Court held—but what did it hold?

The three paragraph *per curiam* (unsigned) opinion is such a model of opacity that it is not surprising no member of the majority wished to be credited with its authorship. In a case of such notoriety and gravity this puny opinion justified the Chief Justice's denunciation of the "unseemly" and "frenetic haste" and "precipitous action" of his Court. No member of the Court was unaware of this weakness; not only each of the three dissenters but all six of the Justice in the majority proceeded to "do his own thing" in an individual opinion! About all one can confidently say is that the majority concluded the government should not have its injunction.

Otherwise it is easier to understand what the Court did *not* hold than what it did. Most importantly the Court did *not* hold these three things.

First, it did not hold that further publication would not endanger significant national interest and even the national security. Indeed, given the admissions of Justices Stewart and White, who were in the majority, it seems fair to say that a *majority* of the Court conceded that publication of some material instanced by the government could and even would endanger the interests and security of the nation.

Second, the Court did not hold that the First Amendment bars all "prior restraints" in cases involving national security. Its principal (though unexplained) citation of authority was Chief Justice Hughes's 1931 opinion in *Near* v. *Minnesota*. There that great Chief Justice, with the experience of distinguished prior service as Secretary of State behind him, had expressly recognized that particularly in cases involving national security "the prohibition even as to previous restraint is not absolutely unlimited."

Third, the Court did not hold that *Congress* is without constitutional power to provide by statute for the kind of action the Department of Justice had sought to bring. In fact, half of the majority of six, Justices Stewart, White, and Marshall, leaned heavily on their belief that Congress had by implication refused to authorize a proceeding such as the one before them.

The upshot of what must be ranked as one of the strangest cases in the annals of the Court is that at least until Congress acts or a future Court majority has second thoughts, anyone who can obtain much of the information (whether trivial or of the gravest import) classified by the government and stolen from it may do what he likes with it subject only to the rather cloudy possibility of a criminal prosecution after the damage is done. Can any prudent citizen regard this as a satisfactory state of the law?

How did we arrive at this state of the law? It is worth emphasizing that these recent decisions have made a new First Amendment, although as courts typically do when they make innovations, our Court has sometimes suggested it is merely finding the law which has always been inherent in the Amendment. Obviously, however, we cannot derive the holdings of these cases simply from the brief language: "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ."

Absolutists and literalists like Mr. Justice Black lovingly emphasize the word "*no*" in that phrase. But if we would be literally literal, we should also take note of the words "*Congress*" and "*the* freedom."

When the framers of the First Amendment wanted to say "the government of the United States" they knew how to do so, as the Tenth Amendment, part of the same Bill of Rights, shows. It is Congress, not the President, not the federal judiciary, to which the Amendment literally addresses itself. Moreover, Madison's original draft of the Amendment used language that would have limited the executive and the courts as well as the legislature. There is no reason to suppose that the change of language was mere accident. Members of the First Congress, which proposed the Amendment, had the need for executive authority in emergencies which they had observed in the Revolution as part of their own experience.

As for the judicial power over the press, their use of the definite article. "*the* freedom of speech and the press" is suggestive. Again, it would have been easy to say simply "*freedom* of speech and of the press," and leave definition of freedom to the creative imagination of future interpreters. But they did not do that; they said "*the* freedom."

The function of the definite article is to *define*, to limit, to specify. What definite, limited specific freedom could they have had in mind? The most obvious answer to lawyers, as most of them were, was freedom of speech and press at the common law, then so recently summed up by Blackstone.

Obscenity was not within that freedom, as our Court still agrees it is not, whenever a majority of the Justices can agree that anything is obscene. Nor was libel, as our Court still agrees it is mostly not, since Mr. Justice Black was never able to persuade a majority of his colleagues that the First Amendment ought to bar *all* libel actions. Most notably criminal prosecutions for "seditious libel" against government and officials were permissible at the common law.

Thus common law courts could without any statutory authorization deal with the press in all such cases. And until the Supreme Court finally ruled otherwise in 1813 many lawyers claimed that the federal courts possessed a common law criminal jurisdiction and some federal judges had exercised it as inherent in "the judicial power of the United States."

Thus the constitutional law of press freedom in the United States is not an ineluctable consequence either of the intent of those who adopted the First Amendment or of its language. Nor is it "ancient law." The first case of any consequence in the Supreme Court interpreting the freedom of speech and press" was the famous case of *Schenck* v. *United States*, in which Justice Holmes set forth the "clear and present danger" test. The Schenck case was decided in 1919.

The constitutional law of speech and press is thus almost entirely a development of the past fifty and predominantly the last twenty years.

Why this massive body of new constitutional law, not simply of press freedom but of civil liberties generally, has developed so explosively in the twentieth century is an intriguing topic for speculation. Surely it can be shown to be an illustration of the general link between social change and legal change found in all societies at all times.

This new law has come in an era marked by several major currents of social change in America. Among the most important in relation to this civil liberties law have been scientific and technological development, urbanization, secularization, growing national cultural uniformity, the changing positions of ethnic groups, affluence, and the rising level of formal education. To trace out in detail the relationships between these ongoing social changes and literally hundreds of Supreme Court civil liberties cases in the last half century is beyond our present scope. All that can be said here is that these decisions are the Court's response—and sometimes stimulus—to social change.

It has been the "felt necessities of the time", in Justice Holmes's famous phrase, and not past history of the blackletter constitutional document which account for them.

But we must not from this recognition step into the trap of some vague notion of sociological determinism. In many, indeed most, of these decisions not all members of the Court have felt the same necessities. Indeed they have frequently divided five to four in their appraisal. These legal questions have been controversial, and since the social conditions which made them so persist, they remain controversial—and the answers therefore subject to change.

But as the answers stand today, the overall import of these decisions is to lessen—not to say weaken—legal restraints, specifically and not least those on the press.

Recognition of this cutting down of legal restraints on the press should lead us to contemplate two paradoxes.

The first of these is that legal restraints on the press have only limited effectiveness and have never been our chief reliance. The more important paradox is that some very great restraints are indispensable to effective communication, through either the spoken or the printed word. The first of these paradoxes is more obvious though less important.

Legal restraints on the press historically have taken only two forms, and given the frequent and not entirely groundless anxiety of governments over the press, if the wit of lawyers could have devised any others, we should probably have discovered them by now. Legal controls are either "prior restraint" or "prior censorship" on the one hand, or on the other, "subsequent punishment," that is, criminal prosecution.

The difficulty is apparent. If obscene publications can endanger those exposed to them, or if defamatory publications damage reputations, or if publication of secrets of state threatens the security of a nation's people, subsequent punishment can only lock the barn door too late. Only prior censorship can certainly prevent the damage publication may do. Yet even by Blackstone's time Anglo-American freedom of the press meant that government ordinarily should have no power of prior censorship.

Of course governments which have used censorship even in earlier times could never entirely prevent evasions. But when John Milton in the *Areopagitica* (unsuccessfully) prayed Parliament to end prior censorship of the press, a literate Englishman could probably have read each day everything published in English on that day. Prior censorship then was at least physically easy. But imagine anyone now trying in a day to read, listen to and watch everything printed, broadcast, filmed, and televised in English on that day.

A thorough system of governmental censorship today would require us to choose between only two alternatives, or possibly a mixture of the two: either to choke the torrent of mass communication to the trickle a few censors could monitor in advance, or to create another swollen bureaucracy.

Science and technology have given the press a protection from governmental censorship Milton could not accomplish or even envision.

Today Communist and other authoritarian regimes must rely largely on the deterrent effects of severe subsequent punishment rather than prior censorship to control their presses. Where the protections of criminal defendants traditional in our law are unavailable, such deterrence can be quite powerful.

To embrace such a system would force us to surrender most of what we regard as essential to a free society. Since we have never been willing to do so, legal restraints on our press even earlier but especially now can have only limited although significant effect.

The notion of an "absolute" freedom of speech and press is a delusion however, even if there were no legal restraints whatever.

Paradoxically, the very possibility of effective communication depends upon some observance of restraints. Effectiveness of spoken communication requires at least that not everyone talk at once, as the shouting down of Ambassador Lodge at Stanford well demonstrates. Radio and television broadcasts would be hopelessly jumbled if each station did not confine itself to its channel and proper power output.

But, you may say, the printed word is different. Not so. Suppose there were no "rules" of grammar, syntax, punctuation, and spelling that we *could* follow, even that there were no agreed ways of making the letters of the alphabet. We would then have an absolutely free and absolutely unreadable press. The price of such freedom would in effect be universal illiteracy. *Finnegan's Wake* and the writings of Vladimir Nabokov offer us a tantalizing vision of what such a world of printing would be like. So, occasionally, does a student's examination paper.

In communication as in other aspects of social life, of which communication is not simply a large but the one indispensable part, the terms freedom and restraint are each in isolation or "absoluteness" meaningless.

Freedom and restraint are polar terms. We really can conceive no explicable meaning whatever for either term without reference to the other. You may say that is self-evident, but it needs repeating in an age and a culture in which to many it is no longer self-evident.

Objection may be made—anyone who knows today's students knows it *will* be made—that the need for restraints in communication concerns only procedures, the ways in which we communicate, and that no restraint on the substance of what is said or written is needed or tolerable. Such an argument is equivalent to asserting that the written or spoken word can produce no evil consequences, or as Justice Holmes put it, no "substantive evils that" society "has a right to prevent."

That argument cannot bear analysis. In starkest terms if two or more people carry out an assassination, arson, or a bombing they will have perfected their plans through the written or spoken word. All the other examples that come to mind are simply more complex illustrations of the same fact. There can, in short, be no *organized* crime without the word. To revise Max Lerner's phrase, *communicated* "ideas have consequences."

Unless one stubbornly and sullenly rejects this truth, one must concede that society needs some restraints on what is published. Restraints can take a number of forms, but basically they are either self-imposed, internalized as the psychologists say, or they are imposed upon the individual by some agency of the society. The law is one but not the only form of imposed social restraint.

On what forms of restraint should we or can we rely for appropriate control of what the press publishes? This is the question in its gravest form which the decision in the Pentagon Papers case has thrust to the foreground. For the substantive evil such publication can bring about is to the life and fortune and security of every person in the country.

Surely we must put aside reliance solely on the self-discipline of the individual reporter, editor, publisher or newscaster. We must do so not because self-restraint is unimportant; it is, one suspects, a *sine qua non* of real effectiveness of any imposed social restraints. We cannot trust simply to the individual's sense of restraint because the contemporary press is rarely an individual enterprise, if it could be so described even in the time of John Wilkes. Benjamin Franklin or Thomas Paine. The publication of news and opinion today in print or electronically is an organized social task engaging the coordinated effort of many hands and brains.

Moreover in our culture and economy it is not only a social task, it is a competitive enterprise. Unfortunately we have too familiar a record of sensationalism in the press not to see a kind of Gresham's law at work by which the irresponsible journalist can profit from the self-restraint of his competitors. It is scarcely exaggeration to say great publishing empires have been built upon that law.

When competitors rush to peddle secrets of state in the "free market of ideas" to gossip-hungry consumers, only such a spoof as William Buckley's fictitious set of Pentagon Papers in the *National Review* can adequately satirize the situation.

When we turn from self-restraint to forms of imposed social restraint, the kind closest to self-discipline is that flowing from adherence to the tenets of a religious organization. The relevant religious injunction which comes first to mind is: "Tell it not in Gath, publish it not in the streets of Askelon." Interestingly enough, the secret King David warned against revealing was news of a military defeat which he feared would damage national morale. Perhaps their religion's tenets would be a sufficient guide for those responsible for religious publications, but overwhelmingly our contemporary press has a secular orientation. We must look elsewhere.

Aside from legal restraints by far the most significant possibility of adequate control of the press lies in a set of rules and standards formulated and adopted by the great social and economic organizations which are the press and imposed by them upon all persons who in turn make up the organizations. This may be thought of as self-discipline but it is quite different from the restraint an autonomous individual chooses to observe for himself. This is the kind of self-government which Alfred North Whitehead considered the hallmark of a profession.

Physicians have their Hippocratic Oath and organized ways of elaborating its meaning and enforcing it. Similarly lawyers have their Canons of Ethics. The ultimate sanction in either profession for violation of its standards is revocation of the license to practice the profession. Organized society through government has devolved upon these two of our oldest professions definite legal status and legal powers and responsibilities. Of course the press has no such comparable position, nor should it. To require a license to practice journalism would be a virulent form of prior consorship.

Closer to the situation of the press is the scientific or scholarly community. James Bryant Conant has described the professionalization of the scientists.

Though there is not such formal legal devolution of authority and responsibility for self-government upon scientists (or academicians generally), there is professionally imposed restraint on scientific *publication.* The scientist who is even negligently inaccurate in publishing his research operations and findings, let alone one who would purposely report them falsely, will almost certainly suffer severe sanctions: loss of recognition, prestige, and future opportunities, even his job and income, by the judgment of his peers.

It must be acknowledged that the press has not yet imposed upon its members even these standards. Anyone even moderately familiar with the journalistic world knows that there has for many years been a continuing consideration and discussion of the problem of establishing a code of professional ethics and means of enforcing it by many conscientious members of the press. Since these men are writers, the reports of conferences, books, and articles on the subject issue in a constant stream. The fact remains that their goal has not been reached and is perhaps not even attainable.

To say so is not to suggest that the gentlemen of the press are less honorable in their intentions, less competent, or more self-seeking or intransigent than lawyers, physicians or scientists. The trouble is that their task of setting professional standards is harder.

It is not enough, like the scientists, simply to have sanctions for not telling the truth. The very qualities of industry and ability to dig out information and of truthfulness in reporting it which rightfully evoke professional and public admiration may be the cause of substantive evils, even threats to the security of an entire nation.

There is no easy way out of this dilemma. If there were, the efforts to establish a professional code of ethics for the press would probably not have languished so long.

Difficulties in professionalizing the press also stem from the roots from which it has grown. Our newspaper press comes out of a tradition of fierce political partisanship. It has not entirely outgrown this condition, but cynics might say that it has arrived at a rough politcal balance in which generally conservative publishers are checkmated by a predominantly left-of-center liberal working journalistic corps. More likely it has been the secular decline of the strong partisanship engendered by the Civil War and Reconstruction among the newspaper-reading electorate which has led the newspaper press to conclude that greater political neutrality is more profitable for it.

In contrast, radio and now television journalists must function in a fundamentally apolitical medium. For radio and television are, like the movies, basically a medium for entertainment rather than information.

No one can watch a day's commercial television without recognizing that the medium is "show-biz," however different an image the top network executives try to convey in their public pronouncements. Surely there is nothing shameful about trying to entertain people, but both the critics of television and its corporate spokesmen seem to be in implicit agreement that there is.

But the show-biz orientation of the television industry cannot make the task of its enclave of newsmen easy. They cannot, they obviously do not entirely escape the drive of their medium to dramatize. With all respect to the Vice President, the tragic flaw of electronic journalism lies more in its penchant for drama than for propaganda. If news photographers became the newspaper editors, newspapers would be under the same though not so severe a temptation.

"The public's right to know" has become a popular slogan for many journalists in recent years. In a democracy it is hard to quarrel with this slogan as a general proposition. But "general propositions do not decide concrete cases." Any satisfactory journalistic canon of ethics will have to come to grips with this slogan.

Why, for example, does the public have a right to know all the details, factual, alleged, and rumored, about some lurid crime before a defendant charged with it is brought to trial? Significantly, the Supreme Court's recent decisions on the problem of "pre-trial publicity," especially in the notorious case of Dr. Sam Sheppard in 1966, have limited rather than extended press freedom, quite contrary to the general direction of other press cases.

When the public's right to know collides with a defendant's right to a fair trial by unprejudiced jurors, the public must give way. So also it must, as the Billy Sol Estes case in 1965 held, when televising a trial will disrupt, as it surely will, orderly procedure in court.

Trials are not held as entertainments, no matter how dramatic they may be. Immediately familiar with the problems, the Court has not hesitated to protect the integrity of the *judicial* process.

But is the integrity of the Executive branch and the possibility of orderly procedure in the administrative process less important? True, what publication may damage the fate of a nation is a more imponderable question than what may prejudice a criminal defendant. But is it less important?

Probably those who use the slogan really mean "the *American* public's right to know." But Twentieth Century technological development of the press makes the American public's right to know equivalent to the *world's* right to know, just as fully and just as speedily.

Failure to recognize the great change which this technological revolution has wrought in the conditions under which the nation's diplomacy and defense must be conducted can lead one to some rather quixotic conclusion.

Suppose that the *New York Times* and the *Washington Post*, a week before President Nixon's August 14 announcement of the new economic program, had been able to obtain a stolen classified document which detailed these policies.

Would the public's right to know have justified immediate publication of the document? No threat to national security in any military sense would seem to be involved. Yet the disclosure would have subverted orderly establishment of the program, especially the international monetary measures.

Our suspects that the *Post* and the *Times* would not have published. But can one be as confident all other publishers, including the "underground press," would have abstained if they had the document?

More importantly, should the decision to publish with impunity or abstain rest in the absolute discretion of anyone who manages to come into possession of such classified material?

The press in its efforts to build a code of professional standards has not been able to announce any consensus in principle on the question, although its record in actual practice has been on the whole quite responsible. But "on the whole" may not always be good enough, and the possibility of publishers dedicated to using press freedom to "destroy the system" may not be quite as remote as one hopes.

So we return to the question of needed legal restraints raised by the Pentagon Papers decision. To postulate them here would be presumptuous. The most careful study of all facets of the problem and only then the most painstaking draftsmanship of new law and thorough debate over its adoption are the minimal requirements for a wise public policy in this field. Moreover, any such effort should include some restraints on undeniable bureaucratic excesses in classifying and failing to declassify information.

But does prudence demand anything less than a serious effort to deal with the problem "with all deliberate speed?"

Senator ERVIN. The subcommittee will be in recess until 2:30 this afternoon.

(Whereupon, at 11:30 a.m., the subcommittee was recessed until 3:55 p.m. of the same day.)

AFTERNOON SESSION

Senator ERVIN. I want to apologize to everybody concerned. Although we scheduled these hearings a long time ago, the Senate sets its agenda about 1 day in advance and like time and tide, it waits on no man. I had to remain on the floor for the vote on a measure I had proposed.

The subcommittee will come to order.

Will counsel call the next witness.

Mr. BASKIR. Mr. Chairman, our first witness is Mr. C. A. McKnight, editor, the *Charlotte Observer*, and president of the American Society of Newspaper Editors.

Senator ERVIN. Mr. McKnight is well known to me. When he was just starting out as a newspaper reporter he used to, among other tasks, cover the superior court in Mecklenburg County.

We are delighted to have you here. We appreciate your willingness to appear and I regret the delay you have had. There are few people who have had more experience over the years than you have had in the newspaper field, and you are still comparatively young.

STATEMENT OF C. A. McKNIGHT, EDITOR, THE CHARLOTTE OBSERVER; AND PRESIDENT, AMERICAN SOCIETY OF NEWSPAPER EDITORS; ACCOMPANIED BY RICHARD M. SCHMIDT, JR., COUNSEL

Mr. McKnight. Thank you, Senator Ervin.

Mr. Chairman, I appear here today with the general counsel of the American Society of Newspaper Editors, Mr. Richard Schmidt.

Senator Ervin. We are delighted to have Mr. Schmidt present.

Mr. Schmidt. Thank you.

Mr. McKnight.There is a reason for that. Although I learned a good deal of law when I was covering the superior court when you were a judge in North Carolina, I think you will realize as I go through this document today that Mr. Schmidt had a hand in at least the original draft. He is a pretty good lawyer, and I have him here just in case you start asking any questions that get beyond my legal depth.

I would like to add one other thing, that not until Friday of last week did I have the opportunity to read the full text of your statement opening these hearings, in the Congressional Record of October 5.

I would like to say that if you ever decide to retire from the Senate and return to North Carolina, I would invite you to become a regular contributor to my editorial page, because I think you make a good deal more sense than some of my editorial writers.

Mr. Chairman, the American Society of Newspaper Editors was founded 50 years ago. The first two paragraphs of our constitution set forth its purposes in these words:

> Although the art of journalism has flourished in America for more than 200 years, the editors of the greater American newspapers have not hitherto banded themselves together in association for the consideration of their common problems and the promotion of their professional ideas. Theirs is a great and honorable profession, yet in the past there have been no facilities for those interchanges of thought and experience that are so helpful in promoting the general interest of any profession or craft, no means of defending their profession from unjust assault, no avenue by which professional co-operation can be reached.
>
> It is with the purpose of remedying to some degree these conditions that this society is established. Its purpose shall be to promote acquaintance among its members, to develop a stronger professional esprit de corps, to maintain the dignity and rights of the profession, to consider and perhaps establish ethical standards of professional conduct, to interchange ideas for the advancement of professional ideals and for the more effective application of professional labors and to work collectively for the solution of common problems.

Today the society has 749 members representing 495 daily newspapers. Ours is an amorphous association of highly independent and individualistic editors, with opinions of their own, usually strong ones. on any given issue. And though I appear here today with the knowledge and approval of the board of director, I do not profess to speak for the entire membership. The statement that follows is my own.

Mr. Chairman, I welcome the opportunity to testify before this subcommittee which is examining the application of First Amendment principles to the press and analyzing the relationship between the press and Government. You state in your invitation to testify: We will be seeking to create a better appreciation of the First Amendment's purpose and its crucial importance to a free society.

That the first amendment protection of free speech and a free press is the very foundation of free government by free men is not a cliche, though it has been said so often that it may sound like one. Our Supreme Court has said: A free press stands as one of the great interpreters between the Government and the people. To allow it to be fettered is to fetter ourselves.[1]

The Court has also said: It is the purpose of the first amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. * * *[2]

The primacy of press freedom was set forth in the 1945 U.S. Supreme Court decision of *Associated Press* v. *U.S.* (326 U.S. 1, 20):

> (The First) Amendment rests on the assumption that the widest possible discrimination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.

"The First Amendment," said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." (*United States* v. *Associated Press*, (52 F. Supp. 362, 372 D. C. S. D. N. Y. 1943).)

Today this becomes more important than ever, for in our increasingly complex and interrelated society, in which the average American citizen cannot possibly, on his own, find out about the events which will directly affect his life, the role of the free press is even more essential to the maintenance of American democracy than in the past. Unless the First Amendment guarantee of press freedom is protected to the fullest extent, the role which it has played will inevitably be diminished. Let me emphasize that if this happens, the public, and not merely the press, will be the loser.

I am deeply concerned about certain recent trends.

First, the desire of the executive branch of our Government to impose prior restraint of publication. This came about earlier this year when the Department of Justice sought and obtained temporary restraining orders against the *New York Times* and the *Washington Post*.

I said publicly at the time:

> I am appalled at this exercise of "prior restraint" censorship by the government. At the same time, I agree with the decision of the *New York Times* to obey the temporary federal court restraining order.
>
> I have great faith in our federal courts and I am confident that this unprecedented effort at governmental censorship will ultimately clarify still further the responsibility of a free press in a free society.

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[1] *Grosjean* v. *American Press Co.* (297 U.S. 233, 250 (1936)).

[2] *Red Lion* v. *Federal Communications Commission* (395 U.S. 367, 390 (1969)).

I may have been overly optimistic. While the Supreme Court's per curiam opinion referred to the heavy burden of showing justification for prior restraint of free speech and a free press, nonetheless some of the opinions by the individual Justices gave us small comfort.

Other than the absolute statement by the late Justice Hugo Black, the several concurring and dissenting opinions left open the possibility of future action by the Government to impose prior restraint. This deeply concerns me.

To complete the record, after having cleared the text with each member of the ASNE board of directors, I submitted an affidavit in the *New York Times* case which said in part:

> I submit this affidavit on behalf of the Board of Directors of the American Society of Newspaper Editors in opposition to the action by the Government of the United States to prohibit the *New York Times* from continuing to publish articles with respect to the Vietnam War, such as those contained in the issues of June 13, 14, and 15, 1971, which are the subject of this litigation.
>
> In my view and the view of the Board of ASNE, the freedom to publish without prior restraint is a cornerstone of the American people's right to know and any order to the contrary destroys a basic constitutional right of the people under a democratic government.

Later, on June 25, 1971, the vice president of our society, J. Edward Murray, associate editor of the *Detroit Free Press*, appeared before the Subcommittee on Foreign Operations and Government Information of the U.S. House of Representatives. I have a copy of his statement in the event this committee would like to have it in its files.

You have had before you Senator Pearson testifying on S. 1311, the so-called Newsmen's Privilege bill. I think this is a misnomer. I do not claim a privilege for newsmen, nor do I feel that the protection guaranteed by the First Amendment can properly be called a privilege. The right under the First Amendment is not just to protect newspapers. It is the right of any citizen, be he editor or pamphleteer, to print and distribute information and ideas, and it is the right of all citizens to receive information and ideas—or to reject them if they wish.

The membership of ASNE at its annual convention held in April of 1971, and by subsequent action of its board of directors, endorsed the principle of a Federal shield law.

We are well aware that there are three cases currently pending before the U.S. Supreme Court concerning this matter, and ASNE has filed a brief as amicus curiae in the case of the *United States of America* v. *Earl Caldwell.* I will not comment directly on the facts in that case, but our position is that there is a constitutional right of protection for a newsman's sources. In the event that the Supreme Court should not concur with this view, we will have a deep and urgent interest in the passage of Federal legislation to supplement existing State statutes.

That the wholesale issuance of subpenas and the protracted legal proceedings which often follow have had a chilling effect (even in those instances where the subpenas were later withdrawn or quashed) has been amply demonstrated to ASNE by the experience of its various members.

For example, over the past 3 years, more than 30 subpenas have been served on newspapers published by Field Enterprises, Inc. of Chicago, two-thirds of which were issued on behalf of the Government. One *Chicago Sun-Times* reporter (Duane Hall) was subpenaed to testify in 11 separate proceedings in the space of 18 months. Incidentally, if the committee would like a copy of our brief and the accompanying affidavits from ASNE members all over the country, our counsel, Mr. Schmidt, will provide it.

Senator ERVIN. Is that the brief in the *Caldwell* case?

Mr. MCKNIGHT. Right.

Senator ERVIN. I am sure the committee would like to have a copy of the brief and also of the statement of J. Edward Murray, mentioned on page 3 of your statement. (Material referred to will appear in appendix.)

Mr. MCKNIGHT. The experience of our members indicate that the rights of journalists and the concomitant right of the public to a free press can be bartered piecemeal in frenzied negotiations between prosecutors, newspapers, and newspapermen in an atmosphere of broadly drawn subpenas, contempt citation threats, and hastily convened legal proceedings seeking protective orders.

The tyranny of time, the press of other matters, and the depth of the commitment to a free press of the particular participants involved, have all combined to create a chaotically inconsistent nationwide pattern of response.

In some cases, the government attorneys have voluntarily withdrawn such subpenas if resistance is encountered from either the newspaper or the journalist. In other cases, newspapermen have arrived at an accommodation with the government, voluntarily yielding certain information in return for the government's dropping other demands. On still other occasions, journalists who did not have the resources or the time to combat subpenas, have acceded to such demands, often much against their will, and to the detriment to their future ability to gather and report news.

All of these events have taken place in a legal framework which lacks specific direction, either from an authoritative opinion of the Supreme Court of the United States or from proper legislation at the Federal level indicating the limits of the government's power.

Again let me emphasize that the ultimate loser in such contests is the public, whose right to a free flow of information is involved.

Unless newsmen are free to obtain background information it is difficult, if not impossible, for them to report events accurately.

Unless the reporter can get such information, and unless he is free to meet and talk confidentially with members of dissident groups who espouse unpopular ideas, the public may never have the opportunity of hearing these ideas set forth fairly and objectively, and this will be unable to evaluate their merit or lack of merit.

We are gratified that the Attorney General has adopted guidelines which impose some checks on federal district attorneys. However, the difficulty with the guidelines is that they have no binding validity on State courts or, indeed, upon any investigative body, Federal or State, other than those supervised by the Department of Justice.

Moreover, the Attorney General's guidelines contain an escape clause reserving to the Attorney General the right to violate the guidelines in a specific instance, if emergencies and other unusual situations develop. This caveat reintroduces the very uncertainty and ambiguity which has plagued newspapermen during the recent past.

I am well aware that our stand may bring into conflict two basic rights, the first being that of the people's right to know and the second being the oft quoted admonition that the law is entitled to every man's evidence. In general, of course, both propositions are correct, but as with most generalities, they cannot be taken literally.

The U.S. Supreme Court, in the case of *Blair* v. *United States*, 250 U.S. 273, 281, in 1919 stated:

> **It is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned. The duty * * * is subject to mitigation in exceptional circumstances; there is a constitutional exception from being compelled in any criminal case to be a witness against one's self * * *; some confidential matters are shielded from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.**

This case is often cited as having cemented into law the proposition that the law is entitled to every man's evidence, and that reporters have no special dispensation to avoid the requirement of testifying in judicial proceedings. However, this same case made it clear that there were significant exceptions to this rule which have been crafted out of recognition that the transcendental requirements of justice make it necessary to protect certain relationships from compulsory process.

You are familiar with some of the recognized exceptions, those of the so-called evidentary privileges, such as the client-attorney, or the patient-physician relationships. Also the courts have recognized the necessity of an informer privilege, whereby the government need not ordinarily reveal the source of an informant's testimony, even in a criminal prosecution.[1]

The law has recognized that the administration of justice, and the protection of the rights of individuals, are better served by protecting confidentiality in these cases, rather than granting the short term and fleeting advantage which the disclosure of such confidences may have.

But the so-called evidentary privileges do not by any means exhaust the area of exception to compulsory process. The courts have long excluded otherwise relevant and material evidence obtained through illegal search and seizure. And, of course, the most extensive exclusionary rule ever to be devised is the Fifth Amendment to the Constitution of the United States, which deprives not only courts, but every governmental agency of testimony from the most potentially fruitful source of information. The drafters of the Constitution deemed the right to remain silent more important than the ability of the government to administer justice through self-incrimination.

I believe that protection of journalists from compulsory disclosure of information is of enduring importance to the preservation of our democratic system. And I do not believe that any of the privileges or the exclusionary rules to which I have referred stand on a broader base of legality or logic than the fulfillment of the journalist's constitutional role.

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[1] **See *Rovairo* v. *United States*, 353 U.S. 53 (1957).**

That First Amendment freedoms are delicate and precious rights which need breathing space to survive, strong medicine for protection, is now well established in constitutional law. The court in *New York* v. *Sullivan* said, "The general proposition that freedom of expression upon public questions is secured by the first amendment has long been settled by our decisions.

Another recognition of the need to protect the source of journalists' information is the fact that a number of States—I believe the number now stands at 19—have enacted statutory bars to compulsory process against newsmen. Some of these State shield laws are absolute and some conditional. The New York Law Revision Commission's 1949 report made it clear that the existence of this so-called privilege has not impeded law enforcement and may have aided it. The fact that the number of States enacting shield laws has steadily increased over the years indicates a growing recognition that protection of journalistic confidences has a long-range beneficial effect on the administration of justice which far transcends any fleeting short-term gain which may appear possible in a particular prosecution.

We may well ask why the increase in the numbers of subpenas of newsmen. To me it is no accident or coincidence. This recent spate of investigatory subpenas came during a period of social turmoil when many groups in our society felt the need to protest and to challenge what, in other times, have been almost universally accepted ideas and values. It is precisely at such times of crisis that governments feel their security most threatened, and are most likely to over-react through open-end investigations, broad range subpenas, electronic and other types of surveillance. It is also at such times that deviate or aggressive political action is apt to be characterized by prosecutors as a threat to national security. Dilution of the public's right to know through erosion of newspapermen's protection limits the public's ability to comprehend affairs, precisely at the time when such ability is most needed.

It is precisely in these times when the public must have the fullest access to the views of dissident groups so that their claims and their tactics can be understood and evaluated. It does no service to the cause of democracy to silence these groups or drive them underground.

As I have stated, it is the ASNE position and my sincere hope that the highest court of this land will ultimately recognize a constitutional right of protection of newsmen's sources, but in the event that the Supreme Court should not concur with this viewpoint, I reiterate that ASNE, at its annual convention held in April of 1971 and by subsequent action of the board of directors, overwhelmingly endorsed the principle of a Federal shield law.

Like other witnesses who have appeared before you, we have some serious questions relating to S. 1311, and its related bills introduced in the House by Congressman Whalen, Koch, and others. Briefly, we feel that sections 2 and 3 should include photographers. Along with the photographer and his photographic output, we feel that the materials of the reportorial trade—notes, tapes, correspondence, and other similar matters—should be included. Also we feel all notes and materials should be exempt—not just those obtained on a confidential basis.

We recognize that when it comes to drafting legislation of this kind, it may possibly create new problems. For example, one member of our society has raised a question about the implication of the phrase contained in the last section of the bill—to prevent a threat to human life.

He writes:

> This phrase is extremely vague and capable of a wide range of interpretations. Murder or kidnap plots and even disclosures involving the manufacture of unsafe vehicles or other products, air pollution, water pollution, political demonstrations posing threats of violence, abortion, and a host of other imaginable threats to human life, could, again, make the privilege illusory.

I welcome these hearings. They will serve to re-educate the people of the United States about the basic reasons for the sacred rights protected by the first and other amendments of the Bill of Rights. Several public opinion polls in the last few years show that many of our people are willing to accept prior restraint on publication and complete censorship and control of the news media.

And I must regretfully say that this attitude is made respectable by those in high governmental positions who utilize the very media they criticize to engender suspicion and hostility toward the mass media.

I thank you, Senator Ervin, for the opportunity to meet with you today.

Senator **Ervin**. Can it not be said that in our Nation today we live in an era that may be characterized as an era of doubt and fear? In other words, many of us feel our country is threatened from abroad by potential enemies, and we know that violent crime stalks our land and threatens our daily lives, therefore we all tend to fear for our national security as well as for our personal security.

And it seems to me that it is in such times as these that we are in the greatest danger of losing the fundamental freedoms. As you suggest in the closing portion of your statement, people are more inclined to accept a curtailment of some of our basic freedoms, or the Bill of Rights, in order to enforce the criminal law.

The danger in people expressing ideas that are inconsistent with the established order of things, inclines others to accept limitations on their freedoms at such times. Therefore, aren't public officials tempted to try to curtail those freedoms for what they consider to be very broad purposes, namely, the security of the country, and the security of the individual?

Mr. **McKnight**. In October of 1969 I read a very perceptive article in *Fortune* magazine by Max Ways. I don't think I will ever forget it. I can't quote him word for word, but he said, you know in 1492 there was no great stir in Europe, no fast horses raced from city to city spreading the news that Columbus had sailed west for 70 days and found a land occupied by naked people. And he said it was years really before the rest of the people in Europe vaguely became aware of the fact that Columbus had discovered a new country. And he said, you contrast this with—he was writing in 1969 when one fifth of mankind simultaneously shared the experience of watching the astronauts walking on the moon, and heard commentators writing and explaining in very lucid terms about the meaning and significance of this.

And just a few months ago a sociologist, speaking to the Inland Press Association, made this same kind of comment. He wasn't quoting Max Ways, but in a sense he was saying the same thing. Even the language is getting more difficult today.

It was easy for people in 1492 to understand 70 days, and sailing, and land and naked. But when you get into some of the complex terms used in trying to report the news today, even the editors have trouble keeping up with the language, much less the readers. The sociologist went on to say, that he had just made a jet flight from Chicago to Los Angeles, and he was waiting on his baggage. And he said to the attendant, "the Rams really creamed them yesterday."

And the attendant said, "Yes, sir. Did you see that interior line play?"

And just on Wednesday night, last week, not just one fifth, but probably one half of mankind, saw two rookies, Rison and Mays, for Pittsburgh whose names did not take as long as Agnew's to become household words around the world.

The instantaneous sharing of experiences by people thousands of miles apart is to me the most significant thing about a period involving a totality and a velocity of change beyond anything in the recorded history of mankind.

And it is this, Senator Ervin, rather than the manifestations of it, I think it is the speed and the totality of change that has so unnerved and unsettled our people today that they are beginning to challenge every value, every institution. This is an age of accountability. The press is being held accountable. The Congress is being held accountable. The executive branch, our churches, our universities, our systems of communications and transportation. And this is the reason, as you say, that this thing comes to the surface more at a time like this.

And this is why I think we have to fight harder, because the pace of change is not going to slow down. It is going to accelerate. And I think we are going to have to fight even harder in the next 10 years to preserve the basic freedoms we are talking about here today.

Senator ERVIN. It is in a time like this that the people need these freedoms, the most, and need to exercise them fully, as free from restraint as the general welfare will permit.

You point out very well in your statement that the freedom of speech and the freedom of the press are not given for the benefit of the media, they are really given for the benefit of the people, so that the people may be informed. In other words, those great freedoms were put in the Constitution in order that the people might know the truth, is that not so?

Mr. MCKNIGHT. And also that the individual citizen who wants to print up one pamphlet and go out and hold it up on the street corner and express his ideas may do so. He may hand print it with the crayons belonging to his child. And this is just one step away from the printing press. But in my opinion this right belongs to him just as much as to a newspaper editor. We just haven't had the machinery and the distribution system.

Senator **Ervin**. The First Amendment doesn't attempt to limit the right to any particular group of people. As I said this morning in a colloquy with a witness, the First Amendment extends this right to all men regardless of whether they are wise or foolish, regardless of whether they are learned or ignorant, regardless of whether they are profound or shallow, and regardless of whether they are right or wrong, and even regardless of whether they love our country or its institutions or hate them.

Mr. **McKnight**. I couldn't agree with you more.

Senator **Ervin**. It seems to me that the founding fathers wrote the First Amendment, and especially the right of freedom of the press and freedom of speech for two reasons. In the first place, I have always loved the expression of Thomas Jefferson when he said, "I have sworn upon the alter of God eternal hostility to all forms of tyranny over the mind of man." So it seems to me that they put this first amendment in the Constitution to make it as certain as humanly possible that people will be able to escape tyranny over their minds and to be enlightened. In the second place, I think they recognized that our institutions of Government, which the Constitution created, cannot possibly work in the absence of free speech and freedom of the press.

Mr. **McKnight**. We wouldn't have a free Nation.

Instruments of Government would work.

I spent 19 days in the Soviet Union in 1969. And we talked with a lot of Russian newspaper editors. And I will never forget the time in Leningrad when one of the high officials of the Communist Party was explaining to us how they select newspaper editors to run—I have forgotten, I think something like 8,000 newspapers published all over the Soviet Union, many of them with a common wire that prints all the news from Moscow.

And I dared to ask the question—maybe I had a drink of vodka at the time—I said, "what do your guys do if one of your editors gets out of line and doesn't reflect the communist party line?"

He gave me a very bland smile and he said, "we don't select editors who get out of line"—which was his complete answer, the differences in the two systems.

Senator **Ervin**. Human freedom is gained by people who do get out of line, I think we can agree on that. Freedom of the press and freedom of speech distinguish a totalitarian government from a free society, and they are certainly the freedom which distinguish us from other societies the most.

Now, I am interested in your very fine statement with respect to the fact that despite the desirability of obtaining truth under all circumstances, that there are limitations upon the government, and upon the courts in particular, in their search for truth. You cite one limitation with which I think we are familiar—the Fifth Amendment. We have heard the Fifth Amendment pleaded before Congressional investigating committees very frequently.

However you say that the Fifth Amendment's protection prevents access to the most potentially informed source of truth, the individual's knowledge about his own conduct. Now, there was a time, of course, back in the days of the Star Chamber that they used a man's own self— incriminating statements to convict him. But our people were so opposed to that procedure that they put a protection against it in the Fifth Amendment, and absolutely prohibited every agency of Government from requiring a man to divulge incriminating information.

You also point out the confidential relationships that exist between attorney and client, and physician and patient, and I would add husband and wife in many circumstances, which are founded on confidence. I would assume that the standard would be the promotion of public knowledge rather than protecting the confidence of the informant.

Mr. McKnight. I am not sure my counsel will agree on this completely, but let me just say two things about that. First of all, I think I would say that in the normal pursuit of the average reporter's duties, when he is going out to write a feature story about some Girl Scout troop which has done something brave, or maybe a success story of a small businessman, or maybe a wreck on the corner, or a fire, or this, that and the other, I think on this question of divulging information which he might have gotten in the process, presumably in these cases he would print everything that he thought was pertinent, and there would be no unpublished notes or this, that, and the other.

But when the newspaperman who is conducting a serious investigation, whether it is investigating a Member of Congress or a city council or purchasing agent of the city hall who may be taking bribes on the side, he of necessity has to at some stage of this information, get some confidential information from people whose jobs will not only be impaired but might be abolished if the source of this information were ever divulged, or if he is looking into gangsterism and crooks in the community.

And he has got to depend on informers just like the government, because the culprits are not going to open up and tell him; he has got to get his information otherwise. And I think this investigative process of the free press, and trying to account to the public for government, for crime, and whatever may be wrong with our society—it may be the Black Panther group—is an extremely important part of our function. And without it I think the first amendment would be relatively meaningless if we are just going to feed them pap all the time.

And it is in these situations where the power of the government subpena frightens me, that a reporter can be compelled to go behind the closed door of a grand jury and divulge to the jurors the information he got from them. Because the minute he does, the minute that this gets out, this guy is washed out as a useful reporter in this field. And I think this is a tremendously important function of journalism in our country today, and has been for a long time.

Senator Ervin. Of course you do not argue or contend, and the Association of Newspaper Editors does not contend, that if a newspaperman was an eyewitness to a crime or had personal knowledge of a crime, that he should be granted any greater exemption than any other witness receives.

Mr. **McKnight**. I think other than the restrictions of prejudicial publicity, he not only would tell a grand jury about it, but I think he would put it in the paper if he is a good reporter.

Senator **Ervin**. Yes. What you object to is the situation in which a newspaper reporter, in the interests of getting the truth, has to go to other sources of information rather than himself. You feel that if he is called upon to act as an arm of the government that his confidential sources of information in many cases will dry up. The necessity to inform the public about many aspects of our society require that he be allowed to protect his sources of information and not be forced to divulge them.

Mr. **McKnight**. I think he has to if he and his newspaper and the profession in general are going to continue its important role to trying to ferret out wrongdoing, whether it is in public office, crime, or with the effect, I presume this is one of our functions. It is not the only one by any means.

Senator **Ervin**. Judge Williamson, a former chief justice of the Supreme Court of Maine, and a very knowledgeable man in the field of law, testified last week and advocated something somewhat similar. He didn't express it exactly like the bill the subcommittee is considering. He also pointed out that there were four or five different ways to approach this problem. I am glad to note that you are not as fully convinced that it ought to be done by legislation, but—if I interpret your statement correctly——

Mr. **McKnight**. Once again, this is not in my script. And I am speaking personally and not with the advice of counsel. But in my own opinion the passage of such statutes to protect what I believe to be a constitutional right implies that at some later date the statute could be repealed. Now, I contend this is a constitutional right. And I hope, and I believe, that the Supreme Court will so declare, but only in the event it doesn't would I then become interested in some kind of Federal statute which would go beyond the existing State statutes and give a sort of blanket protection involving Federal agencies over which State statute may not have jurisdiction.

Senator **Ervin**. I have an open but somewhat confused mind on the question of the phraseology of this particular statute, because, since the First Amendment is rather broad in scope, I am inclined to——

Mr. **McKnight**. I like that umbrella better, as soon as the Supreme Court opens it up.

Senator **Ervin**. In other words, I have more confidence in the linguistic ability of the Founding Fathers than I do in my own and that of my associates in Congress.

Mr. **McKnight**. I agree.

Senator **Ervin**. But I take your position that there is a constitutional right in this field which is based upon the desirability of the people knowing the truth, and you would prefer it to be worked out by the Supreme Court on a constitutional basis rather than by legislation.

Mr. **McKnight**. Yes, sir.

Senator **Ervin**. I am sure you are familiar with the decision in the *Caldwell* case, which to my mind is one of the truly great judicial opinions. We all recognize that sometimes two public needs, both of which have a basis in the Constitution, seem to conflict. In this case, the conflicting needs are the need of society to know the truth for the purpose of enforcing the law, and the need of society to know the truth in order that society may exercise its rights with respect to legislation, and so on. It would seem to me that the opinion of the court of appeals in the *Caldwell* case does an excellent job of recognizing both of these interests in saying that in this particular case the right of the public to know took precedence over the other. Personally, if the Supreme Court goes along with a decision of that character, I would prefer to rely on it rather than an act of Congress. But we don't know, of course, what the Supreme Court is going to say.

Mr. McKnight. I have spent a good part of my life, including a period in the firing line, in the South, and I have gone along with the Supreme Court at times when it wasn't really popular. And I will continue to do so, sir, until I find some reason to do otherwise.

Senator Ervin. You speak of the fact that today we have so many challenges to the validity of established law. Some people do not like the status quo. So they agitate for change by demonstrating, which creates quite a clamor at times, and I am sure tends to annoy all of us occasionally.

But I think it is very fortunate that the First Amendment usually compels us to put up with their noise. If their dissent, provoked by their dissatisfaction over certain policies of Government, is valid, we can always hope that society will recognize it and change the conditions which give rise to the dissent.

Furthermore, the right to dissent, even in a way which proves annoying to the public, or when it is not based on sound ground, has a therapeutic value to society. It does, as the psychiatrists say, enable the protestors to get rid of some of their tensions, for the time being. So I believe that these observations demonstrate why we have these great freedoms.

I always like what Judge Oliver Wendell Holmes said:

"The validity of a thought should be measured by its ability to get itself accepted in the market place of ideas."

In my opinion, he put his finger right squarely on the purpose of the First Amendment, that it was designed to allow people to express ideas as distinguished from action, and that if the idea is valid it will be accepted in the market place for ideas, and if not, it will be rejected there. Therefore I think it comes to the proposition that our country really has nothing to fear from freedom of speech if it just leaves truth free to combat error, and that those who should determine the truth in the long run are the people, not the Government, and not the news media. We should have the freest possible flow of information so that all of the people might be able to judge what is true for themselves.

Mr. McKnight. I agree with you, sir. And I congratulate you once again on these hearings. They are long overdue. And they are very interesting.

Senator Ervin. Thank you. These hearings reinforce two propositions which I think are undoubtedly true: eternal vigilance is the price of all liberty; and liberty is always imperiled, but it is mostly imperiled in times of crisis. We put something in the North Carolina Constitution back in 1776, which says the frequent recurrence to fundamental principles is absolutely essential to the preservation of liberty. And I think it is very well to reassert these fundamental principles because we tend to lose sight of them and lose sight of the reasons for them.

I want to thank you for the excellence of your statement both in the content and in the manner in which it was presented.

Mr. McKNIGHT. Thank you, sir.

Senator ERVIN. Do you have anything you would like to add, Mr. Schmidt.

Mr. SCHMIDT. No thank you, Senator.

Senator ERVIN. Thank you. I am sorry we had this long delay.

Mr. BASKIR. Our final witness today is Mr. Kenneth McCormick, who is appearing on behalf of the American Association of American Publishers.

Senator ERVIN. Mr. McCormick, I am delighted to welcome you to the subcommittee. And I appreciate very much your willingness to appear and present your views and those of the organization you represent on this very important matter.

STATEMENT OF KENNETH McCORMICK, CHAIRMAN, FREEDOM TO READ COMMITTEE, ASSOCIATION OF AMERICAN PUBLISHERS, ACCOMPANIED BY ROBERT W. FRASE, VICE PRESIDENT AND ECONOMIST

Mr. McCORMICK. Thank you, Mr. Chairman.

My name is Kenneth McCormick, and I am chairman of the Freedom to Read Committee of the Association of American Publishers. I have with me Robert W. Frase, vice president and economist of the association, who is also in charge of our Washington office. The 260 members of the AAP publish more than two-thirds of the annual U.S. book production in this country. The United States is the leading book publishing nation, both in domestic sales and in exports. Our per capita consumption of books is also the highest of any major publishing nation.

We appreciate the opportunity to appear in these hearings representing an important and distinctive part of the press and related media protected by the first amendment.

The title of my remarks today are "Price Control as an Abridgement of the Freedom of the Press."

I have within the last few days completely reordered the priority of my remarks to your subcommittee. I have not omitted any of the three major subjects to be covered, but I have moved to the top of the list the subject which is reflected in the title of this statement "Price control as an abridgement of freedom of the press."

It has become increasingly clear that if price controls of the magnitude being discussed are applied to book publishing many older book titles first published 1, 2, 3, or even 10 or 20 years ago which need to go back to press because publishers' stocks have become exhausted will not be reprinted.

The cost of reprinting new stocks of these older books may increase from 20 to 100 percent, especially in the case of small reprintings of a few hundred copies of specialized and scholarly books.

In addition to the matter of reprints, two additional problems should be mentioned. One deals with the need for flexibility in order to provide elementary and secondary textbooks to American school systems, on which fixed prices frequently must be guaranteed by publishers over a period of 4 to 8 years. Another concerns the fact that there is free trade in books in 90 percent of the world market and the reduction of American titles available for sale abroad would adversely affect the present 2 to 1 favorable balance of trade in books between the United States and the rest of the world.

It seems clear to us, and we hope to others who are prepared to examine the facts of the case, that book prices should not be controlled following the end of the first 90-day price freeze on November 13. Such a policy is justified not only in terms of the freedom of the press and the First Amendment, but also in purely economic terms. Because of the highly competitive situation in book publishing with scores of competing firms, classical economics still works. The average per copy price of the principal categories of books, such as elementary and secondary textbooks, college textbooks, and general books, has increased far less in the last 3 years than the consumer price index. Looked at from another dimension, the book component in the consumer price index—that is in the total consumer market basket that the CPI attempts to measure—is a small fraction of 1 percent. Clearly, book prices are not a significant influence in causing inflation, but rather increases in book prices are the result of inflation originating in other areas and for other reasons. Thus the exemption of books from price ceilings would have no adverse general economic effects, and would prevent price control from taking books off the market, both domestically and internationally, which otherwise would be available to serve educational, cultural, political and professional purposes under the normal working of the competitive economic system.

We would hope, therefore, that the administration and the Price Commission will at an early date provide an exemption for the press in Phase II. If not, we shall appear before Congressional committees to present our case for another statutory exemption in hearings on the renewal and modification of the Economic Stabilization Act of 1970.

THE PRESS EXEMPTIONS DURING WORLD WAR II AND KOREA

In World War II the Congress exempted the press and related media from price ceilings by exclusion from the definition of commodities subject to price control in the following language in Public Law 421, 77th Congress:

"The term 'commodity' means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than waste or scrap) * * *"

This precedent was followed in the Korean War when similar language was adopted. Thus there were no ceiling prices for books, magazines and newspapers during World War II and the Korean

War, and there is no evidence that such an exemption for the press interfered in any practical way with the successful stabilization of prices on those two previous occasions.

In the current situation the Economic Stabilization Act of 1970 contains no exemptions for the press. In reviewing the legislative history of the Economic Stabilization Act it seems that there was no active role taken in the House hearings on this question by private groups. Specifically, there was no participation by the press associations—newspapers, magazines, books or the electronic media. The Senate had no hearings on powers to control prices and wages. Therefore, we think it can fairly be said that the committees and the Congress did not have an opportunity to focus on the question as to whether an exemption for the press should again be mandated in the current authorization legislation for price and wage control instead of being left to executive discretion.

The Association of American Publishers on September 27, 1971 made a written proposal to the Administration, and specifically to the members of the Cost of Living Council that in Phase II, after November 13, specific exemption from price control for the press be provided. We have had several acknowledgments of our proposal, but no specific press exemption has thus far developed in Phase II, although the proposed Price Commission could so provide. Meanwhile, it has become clear from Secretary Connally's news conference on October 8 that the absolute freeze on prices will continue until the Price Commission, not yet appointed, has an opportunity to get into operation.

THE SEVERAL COMPONENTS OF THE PRESS

I resume now with my original plan for this statement, which deals with three major subjects. The first is the inter-relationship of the various segments of the press, using that term broadly, and the importance of each one of them in serving public needs. The second is to amplify on the particular strength of the book. The third is to discuss various general measures in addition to price control taken by the Government which are not specifically directed at the press, but can have a very large influence on whether the press remains vigorous and can perform its true role in our society.

Each segment of the press or the communications media has its special strengths. The electronic media are extremely rapid and can have a great immediate visual and dramatic impact. On the other hand they are not as effective as print in permitting very careful, detailed and precise analysis; and they cannot easily be recalled and further studied. In addition they are not available to the viewer on his timetable, and the viewer is required to take what may be available from a limited menu at a particular hour on any one day.

The newspaper press is also quite rapid, and has much more space available. Some large city newspapers can and do cover almost the entire gamut of human interests. The same is true on a somewhat slower time scale with national news magazines. Various specialized magazines, usually on an even slower time schedule, can go into greater detail and explore complicated subjects in more depth.

All of these relatively "fast" media are dependent economically on advertising and this may affect what they place before their audiences to a greater or lesser degree. In addition the electronic media are subject to the control of the Federal Communications Commission, imposed because of the limitations on the number of channels available.

The book is the slowest of the great media of expression, although we have seen that in special circumstances this may not necessarily be the case. Some of the great public documents of our time such as the Warren Commission Report and the Pentagon papers have been made available in millions of copies in paperback editions within a matter of days. Generally, however, the book is slow. But it is also thorough and the amount of space available for detailed treatment of a complicated subject is almost unlimited compared with any of the other media.

The book is also the most free of economic restrictions. This is true for two principal reasons: the book is not dependent financially on advertising and the unit of production which is economically viable is very small. As compared with newspapers and radio stations with their heavy capital investment and their need to appeal to mass audiences for advertising reasons the typical book publisher has no capital investment in printing facilities. He buys his printing and binding from any number of specialist book manufacturers. He is not concerned with advertising. He need not serve a mass audience although he welcomes best sellers when they occur.

An individual general book title can be produced and distributed at a small fraction of the cost of operating one of the other media. The ideas and information developed by an author can be placed before ten thousand readers in book form in an economically viable way and on a national basis for $25,000 of initial outlay. Among the several score competing publishers one can almost always be found to finance a worthwhile title. In publishing an individual "controversial" book the book publisher does not endanger a multimillion dollar enterprise tailored to a group of regular readers or listeners. He is only looking for a few thousand readers for the intellectually honest ideas in the book. He may also be publishing an honest presentation of the other side of the same question, either for the same or differing group of readers. In the relatively low cost of the individual title, and the freedom from advertising the book resembles very much the pamphlet familiar to those Americans who drew up our Constitution and the First Amendment.

All of the above generalizations apply more to general books than to textbooks and multi-volume reference works, for which the capital investment in development and editorial costs may be very heavy.

GOVERNMENT AND THE PRESS

I resume now my third subject touched upon earlier in connection with price control: the myriad ways in which the government, and especially the Federal Government, impinges on the press. The First Amendment is, of course, a fundamental protection in preventing direct Government censorship. However, even in this area experience has shown that "eternal vigilence is the price of freedom." A few recent examples on the Federal level will serve to illustrate this point; some of these have been discussed by witnesses who have preceded me. We have the action of the Federal Government in attempting to impose prior censorship on the *New York Times* and the *Washington Post* in the case of the Pentagon papers. We have the case of a committee of the House of Representatives attempting to cite CBS and Frank Stanton for contempt of Congress for refusing to turn over to a congressional committee material not used in broadcasting "The Selling of the Pentagon." In both of these cases I am happy to say the Association of American Publishers came to the defense of the other media involved.

We have almost every year one or more bills which get to the stage of approval by one or both Houses of the Congress which attempt to limit the freedom of the press under the guise of protecting either the sexual or political morality of the American public, under the Federal power to control interstate and foreign commerce or the Federal monopoly of the Post Office. In addition there are scores of problems great and small at the State and local level.

I proceed now to a few examples of less direct but very important kinds of government activity which impinge on the press. One of these is the power of the Federal Government to establish on a national basis copyright laws pursuant to section 8 of article I of the Constitution which gives the Congress power:

> To promote the Progress of Science and useful arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

PRESS FREEDOM AND COPYRIGHT

Copyright is probably just as important to certain segments of the press, and this includes book publishing, as the first amendment.

The copyright laws give to the author and to the publisher title to a salable commodity, providing them an economic status based on their ability to sell to the American and world public materials which that public is willing to pay for. Without this title in intellectual property the author and the publisher would need to find some other source of economic support. Prior to the evolution of the copyright law and the development of the publishing industry, based on copyright in the 19th century, authors and other artists were dependent on the patronage of kings, princes, cardinals, and other politically or economically powerful men. In the absence of copyright they would now be dependent on such individuals plus their modern counterparts: governments, corporations, and other types of powerful economic organizations.

Because of technological changes, copyright laws must be kept current either by court decisions which apply old principles to new technology or by actual changes in the statutes. We are now in midstream of a several-year effort to modernize the U.S. copyright law. The continued vigor of a considerable part of the press, especially books, will depend on the extent to which this revision effort is successful in continuing to give authors and publishers effective title to their works and a viable base of economic and therefore political independence.

THE ROLE OF THE POSTAL SERVICE

Another example of special current interest is the matter of postage rates and conditions of mailing. The post office in all countries is either a legal or practical monopoly for distributing many products of the press, especially certain types of newspapers, most magazines, and a very heavy proportion of book production of all types. We are facing critical decisions in this area in the United States within the next few months. The Congress, by the Postal Reorganization Act of 1970, turned the matter of setting postal rates, postal classifications and conditions of mailing over to the Board of Governors of the U.S. Postal Service, subject to review by a five-man Postal Rate Commission appointed by the President but not requiring confirmation by the Senate. That Postal Rate Commission has closed the record after 7 months of hearings on proposals by the Postal Service to raise postage rates on the average far more than they have ever been raised by congressional action. For example the Postal Service has proposed, over a span of 5 years, to increase the postage rates for second-class newspapers and magazines by 143 percent on the average and has proposed for the same 5-year period to increase the postage rates on books and educational and cultural materials by 83 percent, It remains to be seen whether these massive proposed rate increases will be moderated in line with the Administration's goal of restricting the rate of inflation by 2–3 percent by the end of 1972.

In closing, I repeat our thanks to the subcommittee for scheduling these important hearings and for inviting us to participate.

Senator ERVIN. Mr. McCormick, I wish to say that you have made a very substantial contribution to the completeness of this study and these hearings. You have given us information and views which I don't believe have been presented by any other witness.

You point out, I think, in a very graphic way the fundamental differences in the operations of the various media of communications.

You point out the virtues and weaknesses of the electronic media, newspapers, and also books.

You state that each of these methods of communicating ideas and information has great value, and each of them has certain limitations.

You point out very effectively that the limitation on the publishing of books arises out of the fact that it doesn't deal with advertisements, that its only method of obtaining the necessary funds to finance publication is from the prices which are obtained for the books.

You also make a very graphic case for the fact that a constant revision and modernization of the copyright laws is necessary to enable the book publishing company to continue to flourish and fulfill its role in our society.

Of course, I think that of all the opinions the Supreme Court has ever handed down which recognize the importance of books in the dissemination of ideas, and you might say the effort to influence the minds of men, which ultimately influence society, the most important is the Rumly case.

You are familiar, I am certain, with the *Grosjean* case from Louisiana, where the Court recognized that it is inconsistent with the first amendment for government to take steps, although not expressly undertaken to limit the freedom of the press as in the area of taxation.

which in effect inhibit the exercise of the freedom of the press. As you point out, in order for the book publishing medium to discharge its special role in our society, it is necessary for it to have a viable economic existence.

As I interpret your position, you say the price control of books could very seriously damage the ability of book publishers to perform their special role in the dissemination of ideas.

Mr. **McCormick.** Mr. Chairman, we feel in the book business that we are really the last stronghold of a free press, because we don't have advertisers and we don't have subscribers.

But here is a limitation that is very serious, and many worthwhile books would disappear.

Senator **Ervin.** And the State school book commissions, which control the award of contracts for the purchasing of school books, have a firmly established habit of compelling the book publishers to contract for years in advance the price that they will offer those books to the school children for.

With the increase which we have seen that has characterized everything in recent years, that practice presents a very serious threat to the continuation of the book publishing company as a viable economic force insofar as school textbooks are concerned, and I imagine that there are a great many companies that specialize and concentrate all their activities in that field, aren't there?

Mr. **McCormick.** Many of them do.

Senator **Ervin.** So that poses a very serious economic threat to them.

Mr. **McCormick.** Many of us work in both fields, the so-called trade books that you get in the book shops and school books. There are enormous school book companies—which this would hurt materially.

Senator **Ervin.** You discussed one matter, but not in any great detail, therefore, I would just like to state for your information that we propose to have some witness testify in the future as to the impact of postage rates on publishers of magazines and publishers of books. In order to get people to exercise the right of freedom of press through any kind of media of communication, which includes the publishing of books, it is absolutely essential that those who engage in these enterprises should receive sufficient recompense to enable them to discharge their functions under the first amendment.

After all, while communications media may be a way of making a living for the people, the overall purpose of the amendment in the field is to make all kinds of information available to the people. They exercise a function of the highest importance in our Nation.

Mr. **McCormick.** I am glad to hear you say that.

Thank you for letting us come to testify.

Senator **Ervin.** I think of the statement, "Ye shall know the truth and the truth shall make you free." To my mind the First Amendment is designed to make it possible for the people at least to have an opportunity to know the truth. This is based upon the theory that I mentioned a while ago that Justice Holmes stated so well, that our country rests on the foundation that in the long run sound conclusions will be reached by the people because the validity of an idea or thought depends upon whether it is able to sell itself in the market place of ideas.

Mr. McCormick. Very well quoted.

Senator Ervin. I appreciate very much your contribution to our hearings.

We will investigate further into the postal rate aspect.

Mr. Frase. I will be glad to come back when you have further hearings on this subject.

Senator Ervin. In other words, your thesis is that it is possible for the government to price freedom of speech out of existence.

Mr. McCormick. Exactly.

Senator Ervin. And that can pose just as real a threat in the long run as an actual overt attempt by government to limit the exercising of the freedom.

Mr. Frase. It achieves the same result.

Senator Ervin. Counsel.

Mr. Baskir. Have you in the publishing field had any contact with the subpena problem that has been mentioned with respect to the press and broadcasting?

Mr. McCormick. I understand the question. Not seriously.

Mr. Baskir. I mention this because we did have a witness earlier in the hearings who suggested that there is one area of book publishing, sometimes called public policy studies, which has in recent times run up against this kind of problem. I wonder if you have any thoughts on whether or not a shield law, or what has been called the newsman's privilege, ought to be extended beyond those of the working daily press to cover persons in the longer term press, that is to say, book publishing. I don't know if you have given it any thought.

Mr. McCormick. Our lists are filled with many controversial books, some of which are almost explosive. And I do feel that that privilege should be extended in some cases. But the fact that we are not such a rapid media makes it sometimes even more serious. And I can think of one or two authors who have very definitely been harassed and had serious problems.

Mr. Baskir. I wonder if it would be asking too much for the association to address itself to the problem of a shield law and the extension of its coverage to book publishing, whether you approve it or not, and at least discuss the problem.

Mr. McCormick. We would be glad to.

Mr. Baskir. It would be very helpful if you would address to this question.

Mr. Frase. We would be glad to.

Senator Ervin. I might state at this point that that is something akin to the issue involved in the Rumly case. In that case the congressional committee ordered a book publishing company, the Gandy Co., as I recall it, to provide the committee with names of all the persons in the United States who bought in bulk the books it published. A lot of times people think it is only the left wing press or the underground press that is harassed by government, but in this case this was a very conservative publishing company, a little too conservative for the views of the majority of the congressional committee. The company was cited for contempt of Congress, as I recall, for failing to produce to the committee the list of those who had bought their publications in bulk quantities.

The Supreme Court reversed the conviction holding that the committee had violated the First Amendment rights of the company, and that it had the same right to sell their books and have their books compete for the minds of men as anyone else did.

And I thought that was one of the most wholesome decisions ever handed down by a court.

Mr. **McCormick**. I certainly agree with you.

Senator **Ervin**. I cite it because of counsel's questions about the subpenas issued. This situation is very much akin to the subpena issue, and it also represents an assault on the First Amendment rights of a conservative organization. We are all familiar with assaults on the First Amendment rights of very radical organizations, such as the underground press, so it behooves all of us, regardless of whether we are conservatives, reactionaries, liberals, or radicals, to unite together to fight for the preservation of the first amendment, because it protects us all.

Mr. **McCormick**. I agree.

Senator **Ervin**. Thank you very much.

The subcommittee is adjourned until 10 a.m. tomorrow.

(Whereupon, the subcommittee was adjourned.)

S. 1311—FREEDOM OF THE PRESS

WEDNESDAY, OCTOBER 20, 1971

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the subcommittee) presiding.

Present: Senators Ervin (presiding), Hruska, and Thurmond.

Also present: Lawrence M. Baskir, chief counsel; Bill Pursley, counsel; and Stanley Ebner, minority counsel.

Senator **ERVIN**. The subcommittee will come to order.

The subcommittee concludes its first series of hearings on the state of freedom of the press today. As I have previously announced, we intend to schedule a second series of this important subject in early 1972.

This second series of hearings is necessary because there are several critical issues which need further exploration and because there are knowledgeable individuals in this field who have important information and ideas as yet not presented to the subcommittee. Between now and this second series of hearings, the subcommittee will be studying the excellent testimony already presented with a view toward refining the issues for the second set of hearings.

Today's three witnesses are all involved in one way or another with the broadcast media. In the course of our hearings we have heard many questions raised as to the validity and scope of government regulation of broadcasting. Some witnesses have asserted that present statutes and administrative regulations and procedures have seriously undermined the impact of the first amendment on broadcasting. Others have called for even greater government control to insure fairness in news coverage or to secure a right to access.

Today we shall hear from the chairman and another member of the Federal Communications Commission address themselves to these and other questions concerning the government's regulation of broadcasting. In addition, we shall hear from the North Carolina Broadcasters Association representing hundreds of individuals in one of our States.

Counsel will call the first witness.

Mr. **BASKIR**. Mr. Chairman, our first witness this morning is Mr. Dean Burch, Chairman of the Federal Communications Commission.

Senator **ERVIN**. I want to welcome you to the subcommittee and express to you our great appreciation of your willingness to come and give us the benefit of your observations and experience in the very important field of electronic communications.

STATEMENT OF DEAN BURCH, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION; ACCOMPANIED BY RICHARD E. WILEY, GENERAL COUNSEL

Mr. BURCH. Thank you very much, Senator. I am delighted to be here. And I commend your committee for the scope of these hearings and the desirability for them at this particular time.

I am accompanied this morning by the general counsel of the Commission, Mr. Dick Wiley.

Senator ERVIN. We are delighted to have you with us.

Mr. WILEY. Thank you, Mr. Chairman.

Mr. BURCH. The Commission appreciates the opportunity to present its views on the important subject of FCC policies relating to broadcast journalism. I think the best way for me to proceed is to describe first the general statutory scheme for regulating broadcasting. Then I will review the way in which the Commission has applied this statutory scheme with respect to broadcast journalism. I shall necessarily paint with a broad brush, but I shall be glad to supply additional details in answer to questions today or by letter if you wish.

Broadcast stations are licensed by the government. In contrast, newspapers are not. Government licensing of newspapers has been and continues to be abhorred in this Nation because the power to license carries with it the threat of government control of news, a circumstance well-known to totalitarian nations. While it is undoubtedly old hat to all of you, I think it is essential to repeat here the reason for this distinction between newspapers and broadcasting stations—why the Government must license broadcast stations.

The Supreme Court stated the reason 28 years ago:

> Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation.

Conflicting demands for many uses of radio, both broadcast and nonbroadcast, require that the frequencies which comprise the radio spectrum must be allocated to various uses or services. Once segments of the spectrum have been allocated for a service—here broadcast service—the frequencies within that segment must be assigned to specific users in a way that prevents destructive interference. Otherwise, interference could effectively preclude the public from hearing any broadcast. Once television broadcast channel 4 has been licensed to one person in Washington, for example, no one else can be licensed to use that channel. The Commission accomplishes this result in the broadcast field by following the licensing scheme embodied in the Communications Act of 1934, as amended.

Congress clearly stated the purpose of the act—"[T]o maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority. * * *" The standard Congress established to govern such licensing is the public convenience, interest, and necessity.

It is by now beyond dispute that the act's comprehensive scheme for regulating the use of radio in the larger interest of the public is not inconsistent with the First Amendment. This is not because the First Amendment is inapplicable to radio—the protections of the First Amendment certainly do apply to broadcasting. The Supreme Court has so stated on several occasions; Section 326 of the Communications Act so states. Rather Government regulation is permissible because different standards are appropriate for different media of expression in light of their differing natures.

Thus, since radio is inherently not available to all, regulation of the use of radio in the public interest does not violate the First Amendment. That is the holding of *NBC* v. *United States* in 1943, and it was repeated only 2 years ago in the landmark decision, *Red Lion Broadcasting Co.* v. *FCC*.

I believe this decision to be so important to the subject of this hearing that I have attached a copy of the unanimous opinion to this statement.

Mr. Chairman, you may hear the argument that there are far more broadcast stations than newspapers of daily circulation—that it is much more difficult to start a newspaper than it is a broadcast operation: this is true. But no one will stop you from putting out a newspaper. Only one person can operate on channel 4 here in Washington, and all others will be prevented from doing so.

In short, despite the argument as to numbers of stations, the vital consideration is that the radio spectrum remains a precious, scarce resource. In view of the demands pressed upon us by those applying for spectrum space, I can assure you that this is so. And when we revoke or deny a station license, we find eight, 10, sometimes as many as 16 applicants for the frequency. The Supreme Court recognized the limits on spectrum space and rejected this no scarcity argument in *Red Lion*, which I have cited previously.

I might say, Mr. Chairman, that particular argument in *Red Lion* meets very squarely the position that was presented to you by Walter Cronkite in his testimony before this subcommittee.

Chief Justice Burger, in his last opinion as an appeals court judge, said:

> A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts the franchise it is burdened by an enforceable public obligation. A newspaper can be operated at the whim or caprice of its owner, a broadcast station cannot.

What, then, is the public obligation imposed upon broadcast journalism?

The first obligation of the broadcaster is to engage in broadcast journalism—to devote a reasonable amount of time to informing the public on controversial issues of public importance. A democracy cannot function without an informed electorate. Because of the contribution broadcasting can make to an informed electorate, we have allocated a relatively large amount of spectrum space to this service. To justify that allocation of scarce radio frequencies, broadcasters must act (in the words of the *Red Lion* case) "as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. * * * "

The Commission has also stressed the need for the licensee to discharge this obligation by presenting partisan voices, rather than always itself presenting views in a bland, inoffensive manner. For, such a licensee policy, we noted, "would run counter to the 'profound national commitment that debate on public issues be uninhibited, robust, and wide-open debate'." The case I am quoting from is *New York Times* v. *Sullivan.*

In line with that objective, the Commission believes that the broadcaster cannot properly present only one side of the debate—the side with which he agrees. The Commission therefore early developed the fairness doctrine as a necessary corollary of the public interest standard of the Communications Act. The doctrine emerged in a series of early cases and then was enunciated in considerable detail as the result of a proceeding initiated by the Commission to clarify its position with respect to the obligation of licensees in the field of broadcasting news commentary, and opinion. That proceeding culminated in the issuance of the 1949 Report on Editorializing by Broadcast Licensees. Simply stated, the fairness doctrine requires that where a broadcaster has covered one side of a controversial issue of public importance, he must afford reasonable opportunity for the discussion of contrasting viewpoints. He cannot sit back and wait for someone to knock on his door and offer to present the other side. He must affirmatively encourage and implement the presentation of other sides—by making offers over-the-air or to specific groups or persons representing other viewpoints. In presenting other viewpoints the broadcaster has considerable leeway to make good faith, reasonable judgments as to the viewpoints to be presented, the appropriate spokesmen, the format of the program, and many other similar programing decisions. Thus, fairness—that is, affording reasonable opportunity—does not mean the mathematical precision of equal opportunities, a concept which is applicable only to broadcasts by legally qualified political candidates, which is set forth in section 315 of the act.

The Commission's role in enforcing the fairness doctrine is limited. The Commission determines, upon appropriate complaint, whether the broadcaster's judgment can be said to be unreasonable. The Commission does not, I stress, determine whether it is a wise journalistic judgment or one with which this agency would agree.

That is a thumbnail sketch of the Commission's fairness doctrine. It was expressly codified in the 1959 amendments to the Communications Act. Section 315(a) now imposes upon broadcast licensees the obligation " * * * to afford reasonable opportunity for the discussion of conflicting viewpoints on issues of public importance."

In the 1960's the Commission adopted two specific rules within the fairness doctrine field—the rules applicable to personal attacks and to political editorials. I have attached these rules as appendix B. Under these rules, the Commission requires the broadcaster to give timely notification to a person or group attacked and to the candidate opposed or not supported and to make an offer of comparable time for a response.

These rules and the general fairness doctrine were challenged in litigation culminating in the Supreme Court's 1969 decision in *Red Lion*. Mr. Chairman, their invalidity was urged principally on first amendment grounds. The Court affirmed the Commission. I believe the *Red Lion* opinion is therefore of special interest to the subcommittee. I shall quote here only one portion of it:

> . . . There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.
>
> This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in 326, which forbids FCC interference with the "right of free speech by means of radio communications." Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount [cases omitted]. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be the Government itself or a private licensee [citations omitted]. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government" [citations omitted]. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

Except for the two rules on personal attacks and political editorials, the Commission has implemented the fairness doctrine by ad hoc rulings on complaints. These rulings have resulted at times in important policy declarations. The *Cullman* ruling, for example, established that the broadcaster must present the other side free, if the American public would otherwise be left uninformed. Rather than discuss these many other important ad hoc rulings, I should like to submit for the record our "Fairness Primer", which contains a compilation of the more important rulings up to 1964.

There are advantages to acting only in concrete factual cases—the equivalent of the "case or controversy" requirement for the judiciary. Thus, this ad hoc way of proceeding should not be disparaged. But there are also disadvantages. In an ad hoc proceeding, we have before us only the few parties involved in the case, and we do not receive the comments of all persons interested in the underlying principle. Further, the problem may be treated only within its narrow adjudicatory context rather than on an overall basis. The agency may thus not foresee the twists and turns of the road it is going down.

An administrative agency may therefore opt for an overall view of a subject in a general rulemaking or inquiry. In the fairness area, we have just recently opted for such an inquiry—the first since 1949.

Our reasons for initiating an inquiry into our fairness doctrine are stated in some detail in the notice—a copy of which I also offer for the record. I will not go over all of them but rather will focus on the general concern of the inquiry. As I have already explained, the purpose of the doctrine is to promote robust debate, not stifle it. As stated by the court of appeals in a recent case, "the fairness doctrine must be administered by the Commission to enhance, not inhibit, the rights secured by the First Amendment."

The critical issue of our inquiry is whether our administration of the doctrine, since its inception over two decades ago, has enhanced these rights, or whether we need to make minor or major revisions. Just as one example of the problems the Commission must resolve. I should like to call the subcommittee's attention to the recent ESSO ruling and particularly the concurring and dissenting statements. Again, I have copies for the subcommittee's study.

I am not now prepared to indicate where our inquiry will lead. The comments on this phase of the inquiry are not yet in. But I stress that we view this matter most seriously. We plan to allocate special staff resources, employ special procedures, and devote a number of Commission meetings to the subject.

There is no retreating from the fairness doctrine. The doctrine is the law and indeed may well be constitutionally required in light of the *Red Lion* holding. Rather, the Commission must consider and determine those policies and procedures under the fairness doctrine which effectively advance the first amendment goal of robust, wide-open debate.

Other important Commission policies directly concern broadcast journalism. First, there is the matter of deliberate distortion or staging of the news. I am not referring to mistakes, which, while regrettable, are bound to occur at times. I mean actions that are deliberate. Evidence that a licensee directed his newsman to slant the news would raise a grave issue as to the licensee's character qualifications. Such an issue would have to be thoroughly explored by the Commission; and it would be contrary to the public interest for the Commission to renew the station's license until and unless the issues were resolved favorably to the licensee.

I point out, Mr. Chairman, that that question does not go to the truth or falsity of what the newsman said on the air. The question is whether the licensee ordered him to deliberately distort the news. which goes to the licensee's character qualifications.

A charge of distortion or staging of the news raises a most important question: When should the Commission conduct an investigation or hold a hearing? For example, we may get a complaint of news distortion based on the claim that the facts of some matter are different from those presented over the air. We have absolutely refused to act there. Very simply stated, deliberate distortion cannot be established by determining what is true and then comparing it with what was broadcast. The Commission is not the national arbiter of truth. Similarly, when a person quoted on a news program complains that he very clearly said something else, the Commission cannot investigate and weigh the credibility of the newsman and the interviewed party. We refer the matter to the licensee for its own investigation and appropriate handling.

Having now given you these two examples in which the Commission will not act, I should like to stress two points. First, I am not saying that the press is above criticism and critical analysis on how it fulfills its journalistic functions. On the contrary, the Commission has stressed that the press, like all other institutions—including of course Government—can benefit from critical analysis.

Second, I am in no way diminishing the gravity of the issue. Staging or slanting the news is flagrantly contrary to the public interest—indeed, it is difficult to imagine a more effective way to destroy the public's ability to understand, and participate in public affairs, and thus to destroy the very essence of democracy. The integrity of the press is a linchpin of the republic. Every act of deliberate distortion—in some senseless race for ratings—not only diminishes the profession of journalism or broadcasting, but also impoverishes the Nation.

In every case where we may appropriately do so—where there is, for example, extrinsic evidence that a newsman has been directed to slant the news—and where, Mr. Chairman, the answer to a question is changed from no to yes—we shall act to protect the public interest in a responsible press. But in this democracy, no government agency can, or should try, to authenticate the news. Therefore, in a series of recent cases we have consistently and repeatedly stated that we will shun the censor's role and will not try to establish news distortion in situations where government intervention would constitute a worse danger than the possible rigging itself.

Mr. Chairman, I have brought with me copies of these recent rulings. I do not want to overburden your record, and I shall therefore leave them with your counsel, so that you may consider whether you want to have them placed in the record at this point.

There is one other area which directly concerns broadcast programs dealing with controversial issues. We have at times received complaints that such programming has, for example, presented patently anti-Semitic material and requests that the Commission should take action against the licensee on the ground that the carriage of such material is inconsistent with the public interest standard. The lead case is *Anti-Defamation League of B'nai B'rith* v. *Radio Station KTYM*. In refusing to take action, the Commission stated that "its function is not to judge the merit, wisdom or accuracy of any broadcast discussion or commentary" but rather to insure that reasonable opportunity is afforded for the presentation of contrasting viewpoints on controversial issues of public importance. The Commission further stated:

> It is the judgment of the Commission, as it has been the judgment of those who drafted our Constitution and of the overwhelming majority of our legislators and judges over the years, that the public interest is best served by permitting the expression of any views that do not involve "a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance or unrest." [citation omitted] This most assuredly does not mean that those who uphold this principle approve of the opinions that are expressed under its protection. On the contrary, this principle insures that the most diverse and opposing opinions will be expressed, many of which may be even highly offensive to those officials who thus protect the rights of others to free speech. If there is to be free speech, it must be free for speech that we abhor and hate as well as for speech that we find tolerable or congenial.

And in this same case, the Commission refused to impose a verification process which would be inconsistent with the fundemental goal of robust, wide-open debate. The Commission's position was supported by several precedents in the courts. The court of appeals affirmed the

Commission decision and the Supreme Court did not grant certiorari.

I should like merely to mention some Commission actions which are pertinent although tangential to broadcast journalism. I will not develop these subjects here but, as I mentioned before, I will be glad to supply additional information or answer questions concerning them.

First, for many years we have had rules to prevent undue concentration of ownership of broadcast facilities either locally or on a national basis. These rules obviously pertain to the first amendment issue under consideration because their basic purpose is to diversify the sources of information broadcast to the American people.

Second, we have rules that assure the right of network affiliates to substitute local programing; prohibit restraints on taking programing from nonnetwork sources; and indeed require that at least one quarter of the time period, 7-11 p.m., so-called prime time, be of a nonnetwork nature. These rules also seek to diversify the sources of material broadast to the American people.

In addition we have applied the fairness doctrine to the advertising of one product—cigarettes. In 1967 the Commission issued a ruling that required licensees carrying cigarette commercials to inform their listeners to some significant extent of the hazards of cigarette smoking. In doing so, the Commission stressed the unique nature of cigarettes as a health hazard authenticated by the Congress and other governmental entities. The court of appeals, however, in a recent decision, *Friends of the Earth* v. *FCC* extended this ruling to ordinary commercials on behalf of high-powered cars and leaded gasoline. The court's decision raises the issues of whether virtually all commercials are included and whether such a result would undermine the commercial broadcasting system and the contribution which it makes to an informed electorate on matters of great public concern. We are now studying these questions particularly in the overall fairness inquiry. Again, I cannot tell you at this time what course we will follow—I can say only that we recognize the need for both expeditious and careful action that will best serve the public interest.

Other court developments are also pertinent in relation to the object of the fairness doctrine that the people be informed. I refer to the court's recent decision in *Democratic National Committee* v. *FCC*. The case concerns editorial advertising and the court of appeals decision postulates a First Amendment right of access by some individuals or groups to some time on broadcast stations. The opinion opens a host of issues, and we are considering requesting review by the Supreme Court.

I will stop here in my list. I hope that I have indicated that some of our policies in the broadcast field are in a state of flux. Our goal, however, is firm. We seek to promote robust debate to the end "that the American public must not be left uninformed." We must reach this goal with procedures that do not interfere improperly with the freedom of broadcast journalism. That may be a difficult task, but we must meet it, if we are to discharge our responsibilities under the Communications Act.

(The complete prepared statement of Mr. Burch follows:)

STATEMENT OF CHAIRMAN BURCH, FEDERAL COMMUNICATIONS COMMISSION, BEFORE THE SENATE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

October 20, 1971

The Commission appreciates the opportunity to present its views on the important subject of FCC policies relating to broadcast journalism. I think the best way for me to proceed is to describe first the general statutory scheme for regulating broadcasting. Then I will review the way in which the Commission has applied this statutory scheme with respect to broadcast journalism. I shall necessarily paint with a broad brush, but I shall be glad to supply additional details in answer to questions today or by letter if you wish.

THE GENERAL REGULATORY SCHEME

Broadcast stations are licensed by the government. In contrast, newspapers are not. Government licensing of newspapers has been and continues to be abhorred in this nation because the power to license carried with it the threat of government control of news, a circumstance well-known to totalitarian nations. While it is undoubtedly "old hat" to all of you, I think it is essential to repeat here the reason for this distinction between newspapers and broadcasting stations—why the government must license broadcast stations.

The Supreme Court stated the reason 28 years ago: "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation.[1] Conflicting demands for many uses of radio, both broadcast and nonbroadcast, require that the frequencies which comprise the radio spectrum must be allocated to various uses or services. Once segments of the spectrum have been allocated for a service—here broadcast service—the frequencies within that segment must be assigned to specific users in a way that prevents destructive interference. Otherwise, interference could effectively preclude the public from hearing any broadcast. Once television broadcast channel 4 has been licensed to one person in Washington, for example, no one else can be licensed to use that channel. The Commission accomplishes this result in the broadcast field by following the licensing scheme embodied in the Communications Act of 1934, as amended.[2]

Congress clearly stated the purpose of the Act—"[T]o maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority. * * *"[3] The standard Congress established to govern such licensing is the "public convenience, interest, and necessity."[4]

It is by now beyond dispute that the Act's comprehensive scheme for regulating the use of radio in the larger interest of the public is not inconsistent with the First Amendment. This is not because the First Amendment is inapplicable to radio—the protections of the First Amendments certainly do apply to broadcasting. The Supreme Court has so stated on several occasions;[5] Section 326 of the Communications Act so states.[6] Rather government regulation is permissible because different standards are appropriate for different media of expression in light of their differing natures.[7]

Thus, since radio is inherently not available to all, regulation of the use of radio in the public interest does not violate the First Amendment. That is the holding of *NBC* v. *United States* in 1943,[8] and it was repeated only two years ago in the landmark decision, *Red Lion Bctg Co.* v. *FCC*.[9]

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[1] NBC v. United States, 319 U.S. 190, 226 (1943).

[2] 47 U.S.C. §§ 151–609 (1970).

[3] *Id.* § 301.

[4] *Id.* §§ 307(a),(d),—309(a),—310(b).

[5] *E.g.*, Rosenbloom v. Metromedia, 29 L. Ed. 2d 296 (1971); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 386 (1969); United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948); Winters v. New York, 333 U.S. 507, 510 (1948).

[6] 47 U.S.C. § 326 (1970).

[7] Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 386 (1969); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952).

[8] The Court there stated (319 U.S. at 227):

> * * * The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

[9] 395 U.S. 367, 389 (1969).

I believe this decision to be so important to the subject of this hearing that I have attached a copy of the unanimous opinion to this Statement.

Mr. Chairman, you may hear the argument that there are far more broadcast stations than newspapers of daily circulation—that it is much more difficult to start a newspaper than it is a broadcast operation: This is true. But no one will stop you from putting out a newspaper. Only one person can operate on Channel 4 here in Washington, and all others will be prevented from doing so.

In short, despite the argument as to numbers of stations, the vital consideration is that the radio spectrum remains a precious, scarce resource. In view of the demands pressed upon us by those applying for spectrum space, I can assure you that this is so. And when we revoke or deny a station license, we find eight, ten, sometimes as many as 16 applicants for the frequency. The Supreme Court recognized the limits on spectrum space and rejected this "no scarcity" argument in *Red Lion.*[10]

Chief Justice Burger, in his last opinion as an Appeals Court judge,[11] said:

> A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts the franchise it is burdened by an enforceable public obligation. A newspaper can be operated at the whim or caprice of its owner, a broadcast station cannot.

What, then, is the "public obligation" imposed upon broadcast journalism?

The public interest standard and broadcast journalism—the fairness doctrine

The first obligation of the broadcaster is to engage in broadcast journalism —to devote a reasonable amount of time to informing the public on controversial issues of public importance. A democracy cannot function without an informed electorate. Because of the contribution broadcasting can make to an informed electorate,[12] we have allocated a relatively large amount of spectrum space to this service. To justify that allocation of scarce radio frequencies, broadcasters must act (in the words of the *Red Lion* case) "as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. * * *"[13]

The Commission has also stressed the need for the licensee to discharge this obligation by presenting partisan voices, rather than "always itself presenting views in a bland, inoffensive manner."[14] For, such a licensee policy, we noted, "would run counter to the 'profound national commitment that debate on public issues be uninhibited, robust, and wide-open debate'."[15]

In line with that objective, the Commission believes that the broadcaster cannot properly present only one side of the debate—the side with which he agrees. The Commission therefore early developed the fairness doctrine as a necessary corollary of the public interest standard of the Communications Act. The doctrine emerged in a series of early cases and then was enunciated in considerable detail as the result of a proceeding initiated by the Commission to clarify its position with respect to the obligation of licensees in the field of broadcasting news commentary, and opinion. That proceeding culminated in the issuance of the 1949 Report on Editorializing by Broadcast Licensees.[16] Simply stated, the fairness doctrine requires that where a broadcaster has covered one side of a controversial issue of public importance, he must afford reasonable opportunity for the discussion of contrasting viewpoints. He cannot sit back and wait for someone to knock on his door and offer to present the other side. He must affirmatively encourage and implement the presentation of other sides —by making offers over-the-air or to specific groups or persons representing other viewpoints. In presenting other viewpoints the broadcaster has considerable leeway to make good faith, reasonable judgments as to the viewpoints to be presented, the appropriate spokesmen, the format of the program, and many other similar programming decisions. Thus, fairness, that is, affording

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[10] *Id.* at 396–400.
(D.C. Cir. 1966).

[11] Office of Communications of United Church of Christ v. F.C.C., 359 F. 2d 994, 1003 (D.C. Cir. 1966).

[12] *E.g.*, Report on Editorializing by Broadcast Licensees, 13 FCC 1246 (1949); Storer Broadcasting Co., 11 FCC 2d 678 (1968).

[13] 395 U.S. at 394.

[14] *See* Democratic National Committee, 25 FCC 2d 216, 223–24 (1970).

[15] *Id.* at 222–23, quoting from New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[16] 47 U.S.C. § 315(a).

"reasonable" opportunity does not mean the mathematical precision of "equal" opportunities—a concept which is applicable only to broadcasts by legally qualified candidates.

The Commission's role in enforcing the fairness doctrine is limited. The Commission determines, upon appropriate complaint, whether the broadcaster's judgment can be said to be unreasonable. The Commission does not, I stress, determine whether it is a wise journalistic judgment or one with which this agency would agree.

That is a thumbnail sketch of the Commission's fairness doctrine. It was expressly codified in the 1959 amendments to the Communications Act. Section 315(a) now imposes upon broadcast licensees the obligation "* * * to afford reasonable opportunity for the discussion of conflicting viewpoints on issues of public importance."[17]

In the 60's the Commission adopted two specific rules within the fairness doctrine field—the rules applicable to personal attacks and to political editorials. I have attached these rules as Appendix B. Under these rules, the Commission requires the broadcaster to give timely notification to a person or group attacked and to the candidate opposed or not supported and to make an offer of comparable time for a response.

These rules and the general fairness doctrine were challenged in litigation culminating in the Supreme Court's 1969 decision in *Red Lion.* Mr. Chairman, their invalidity was urged principally on First Amendment grounds. The Court affirmed the Commission. I believe the *Red Lion* opinion is therefore of special interest to the Subcommittee. I shall quote here only one portion of it:[18]

> * * * There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.
>
> This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with "the right of free speech by means of radio communications." Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount [cases omitted]. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be the Government itself or a private licensee [citations omitted]. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." [Citations omitted]. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

Except for the two rules on personal attacks and political editorial, the Commission has implemented the fairness doctrine by *ad hoc* rulings on complaints. These rulings have resulted at times in important policy declarations. The *Cullman* ruling,[19] for example, established that the broadcaster must present the other side free, if the American public would otherwise be left uninformed. Rather than discuss these many other important *ad hoc* rulings, I should like to submit for the record our Fairness Primer, which contains a compilation of the more important rulings up to 1964.[20]

There are advantages to acting only in concrete factual cases—the equivalent of the "case or controversy" requirement for the judiciary. Thus, this *ad hoc* way of proceeding should not be disparaged. But there are also disadvantages. In an *ad hoc* proceeding, we have before us only the few parties involved in the case, and we do not receive the comments of all persons interested in the underlying principle. Further, the problem may be treated only within its narrow adjudicatory context rather than on an over-all basis. The agency may thus not foresee the twists and turns of the road it is going down.

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[17] *Cf.*, Report on Editorializing by Broadcast Licensees, *supra* note 12.

[18] 395 U.S. at 389–90.

[19] Cullman Broadcasting Co., 40 FCC 576 (1963).

[20] Applicability of the Fairness Doctrine to Broadcast Licensees, 29 Fed. Reg. 10415 (1964).

An administrative agency may therefore opt for an over-all view of a subject in a general rule making or inquiry. In the fairness area, we have just recently opted for such an inquiry [21]—the first since 1949.

Our reasons for initiating an inquiry into our fairness doctrine are stated in some detail in the Notice—a copy of which I also offer for the record. I will not go over all of them but rather will focus on the general concern of the inquiry. As I have already explained, the purpose of the doctrine is to promote robust debate, not stifle it. As stated by the Court of Appeals in a recent case,[22] "the fairness doctrine must be administered by the Commission to enhance, not inhibit, the rights secured by the First Amendment."

The critical issue of our inquiry is whether our administration of the doctrine, since its inception over two decades ago, has enhanced these rights, or whether we need to make minor or major revisions. Just as one example of the problems the Commission must resolve, I should like to call the Subcommittee's attention to the recent ESSO ruling [23] and particularly the concurring and dissenting statements. Again, I have copies for the Subcommittee's study.

I am not now prepared to indicate where our inquiry will lead. The comments on this phase of the inquiry are not yet in. But I stress that we view this matter most seriously. We plan to allocate special staff resources, employ special procedures, and devote a number of Commission meetings to the subject.

These is no retreating from the fairness doctrine. The doctrine is the law and indeed may well be constitutionally required in light of the *Red Lion* holding. Rather, the Commission must consider and determine those policies and procedures under the fairness doctrine which effectively advance the First Amendment goal of robust, wide-open debate.

Other Commission policies in the field of broadcast journalism

Other important Commission policies directly concern broadcast journalism. First, there is the matter of deliberate distortion or staging of the news. I am not referring to mistakes, which, while regrettable, are bound to occur at times. I mean actions that are deliberate. Evidence that a licensee directed his newsman to slant the news would raise a grave issue as to the licensee's character qualifications.[24] Such an issue would have to be thoroughly explored by the Commission; and it would be contrary to the public interest for the Commission to renew the station's license until and unless the issue were resolved favorably to the licensee.

A charge of distortion or staging of the news raises a most important question: When should the Commission conduct an investigation or hold a hearing? For example, we may get a complaint of news distortion based on the claim that the facts of some matter are different from those presented over the air. We have absolutely refused to act there. Very simply stated, deliberate distortion cannot be established by determining what is "true" and then comparing it with what was broadcast. The Commission is not the national arbiter of "truth." Similarly, when a person quoted on a news program complains that he very clearly said something else, the Commission cannot investigate and weigh the credibility of the newsman and the interviewed party. We refer the matter to the licensee for its own investigation and appropriate handling.

Having now given you these two examples in which the Commission will not act, I should like to stress two points. First, I am not saying that the press is above criticism and critical analysis on how it fulfills its journalistic functions. On the contrary, the Commission has stressed that the press, like all other institutions—including of course Government—can benefit from critical analysis.

Second, I am in no way diminishing the gravity of the issue. Staging or slanting the news is flagrantly contrary to the public interest—indeed, it is difficult to imagine a more effective way to destroy the public's ability to understand and participate in public affairs and thus to destroy the very essence of democracy. The integrity of the press is a linch-pin of the republic. Every act of deliberate distortion—in some senseless race for ratings—not only diminishes the profession of journalism or broadcasting, but also impoverishes the nation.

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[21] Notice of Inquiry on the Handling of Public Issues under the Fairness Doctrine, 30 FCC 2d 26 (1971).

[22] Larus Bros. v. F.C.C., No. 15382 (4th Cir., August 20, 1971).

[23] Wilderness Society, 29 FCC 2d 807 (1971).

[24] *See, e.g.*, KMPC, Station of the Stars, Inc., 14 Fed. Reg. 4831 (1949).

In every case where we may appropriately do so—where there is, for example, extrinsic evidence that a newsman has been directed to slant the news—we shall act to protect the public interest in a responsible press. But in this democracy, no Government agency can, or should try, to authenticate the news. Therefore, in a series of recent cases[25] we have consistently and repeatedly stated that we will shun the censor's role and will not try to establish news distortion in situations where Government intervention would constitute a worse danger than the possible rigging itself.

(Mr. Chairman, I have brought with me copies of these recent rulings. I do not want to over-burden your record, and I shall therefore leave them with your counsel, so that you may consider whether you want to have them placed in the record).

There is one other area which directly concerns broadcast programs dealing with controversial issues. We have at times received complaints that such programming has, for example, presented patently anti-Semitic material and requests that the Commission should take action against the licensee on the ground that the carriage of such material is inconsistent with the public interest standard. The lead case is *Anti-Defamation League of B'nai B'rith* v. *Radio Station KTYM.*[26] In refusing to take action, the Commission stated that "its function is not to judge the merit, wisdom or accuracy of any broadcast discussion or commentary"[27] but rather to insure that reasonable opportunity is afforded for the presentation of contrasting viewpoints on controversial issues of public importance. The Commission further stated:[28]

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And in this same case, the Commission refused to impose a verification process which would be inconsistent with the fundamental goal of robust, wide-open debate. The Commission's position was supported by several precedents in the courts.[29] The Court of Appeals affirmed the Commission decision and the Supreme Court did not grant certiorari.

Related policies

I should like merely to mention some Commission actions which are pertinent although tangential to broadcast journalism. I will not develop these subjects here but, as I mentioned before, I will be glad to supply additional information or answer questions concerning them.

First, for many years we have had rules to prevent undue concentration of ownership of broadcast facilities either locally or on a national basis.[30] These rules obviously pertain to the First Amendment issue under consideration because their basic purpose is to diversify the sources of information broadcast to the American people.

Second, we have rules[31] that assure the right of network affiliates to substitute local programming; prohibit restraints on taking programming from non-network sources; and indeed require that at least one quarter of the time period, 7–11 p.m., be of a non-network nature. These rules also seek to diversify the sources of material broadcast to the American people.

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[25] *E.g.*, Democratic National Convention, 16 FCC 2d 650 (1969); Hunger in America, 20 FCC 2d 143 (1969); Selling of the Pentagon, 30 FCC 2d 150 (1971).

[26] 4 FCC 2d 190 (1966), *aff'd. on reconsideration*, 6 FCC 2d 385 (1967), *aff'd*, 403 F.2d 169 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969).

[27] *Id.* at 191.

[28] *Id.* at 191–92.

[29] *E.g.*, Smith v. California, 361 U.S. 147 (1959); Bantam Books v. Sullivan, 372 U.S. 58 (1963); Washington Post v. Keogh, 365 F. 2d 965 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

[30] *See, e.g.*, 47 C.F.R. § 73.636 (1971).

[31] *Id.* § 73.658.

In addition we have applied the fairness doctrine to the advertising of one product—cigarettes. In 1967 the Commission issued a ruling that required licensees carrying cigarette commercials to inform their listeners to some significant extent of the hazards of cigarette smoking.[32] In doing so, the Commission stressed the unique nature of cigarettes as a health hazard authenticated by the Congress and other Governmental entities. The Court of Appeals, however, in a recent decision, *Friends of the Earth* v. *F.C.C.*,[33] extended this ruling to ordinary commercials on behalf of high-powered cars and leaded gasoline. The Court's decision raises the issues of whether virtually all commercials are included and whether such a result would undermine the commercial broadcasting system and the contribution which it makes to an informed electorate on matters of great public concern. We are now studying these questions particularly in the overall inquiry.[34] Again, I cannot tell you at this time what course we will follow—I can say only that we recognize the need for both expeditious and careful action that will best serve the public interest.

Other Court developments are also pertinent in relation to the object of the fairness doctrine that the people be informed. I refer to the Court's recent decision in *Democratic National Committee* v. *FCC.*[35] The case concerns editorial advertising and the Court of Appeals decision postulates a First Amendment right of access by *some* individuals or groups to *some* time on broadcast stations. The opinion opens a host of issues, and we are considering requesting review by the Supreme Court.

I will stop here in my list. I hope that I have indicated that some of our policies in the broadcast field are in a state of flux. Our goal, however, is firm. We seek to promote robust debate to the end "that the *American public must not be left uninformed*."[36] We must reach this goal with procedures that do not interfere improperly with the freedom of broadcast journalism. That may be a difficult task, but we must meet it, if we are to discharge our responsibilities under the Communications Act.

Mr. BURCH. Thank you, Mr. Chairman.

Senator ERVIN. You say in your statement that government licensing of newspapers has been and continues to be abhorred in this Nation because the power to license carries with it the threat of government control of news. How can the government license broadcasters without raising exactly the same threat of government control of his news.

Mr. BURCH. I think, Mr. Chairman, the only answer I can give you to that is the one the Supreme Court has given, and that is, the first amendment applies differently to different media of expression. The government, in 1927 and again in 1934, decided that it would license broadcast facilities. And I think that is the basic distinction.

Senator ERVIN. You say, "Staging or slanting the news is flagrantly contrary to the public interest." How is it possible to give the government the authority to prevent the staging or slanting of the news without giving the government the power to censor it?

Mr. BURCH. Senator Ervin, I don't think anybody would disagree with the abstract proposition that slanting news is not in the highest standards of journalism and is not a good thing to do. What I said in my statement is that although we abhor slanting of the news, we do not attempt to verify the truth or falsity of the news, and do not constitute ourselves as national arbiters of the truth. I think the word is arbiters more than anything else.

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[32] Applicability of the Fairness Doctrine to Cigarette Advertising, 9 FCC 2d 921 (1967).

[33] No. 24, 556 (D.C. Cir., August 16, 1971).

[34] Notice of Inquiry on the Handling of Public Issues under the Fairness Doctrine, *supra* note 21.

[35] No. 24, 537 (D.C. Cir., August 3, 1971).

[36] Green v. F.C.C., No. 24,470 (D.C. Cir., June 18, 1971) (emphasis added).

Senator **Ervin**. I have a little difficulty in comprehending the concept that you can determine whether the news is being slanted without determining the truth or falsity of what is being said.

Mr. **Burch**. I think in our statement, Senator, we made it quite clear that we do not attempt to determine whether news has been slanted unless we have extrinsic evidence that does not require us to determine the truth or falsity of the statement. If, for example, an employee of a broadcast station comes to the Commission and says, my boss, the licensee of station XYZ, ordered me to do a job on Senator Smith, in other words, to always present him in a good or bad light, whatever the case may be, we would then look into that allegation, not so much as to whether or not the statements about Senator Smith were true or false, but the fact is that a licensee of the Commission ordered a newsman to slant the news.

A second example: If in answer to a question, are you a Communist, I said no, and through an editing technique the answer to that question came out yes, and it was quite obvious by examination of extrinsic material that that was the case, we would probably take action.

Senator **Ervin**. You think that is essentially telling a falsehood?

Mr. **Burch**. Yes.

Senator **Ervin**. And in order to ascertain the truth, you have to determine if the charge is true.

I still have difficulty in understanding what——

Senator **Hruska**. Would the chairman yield on that?

Senator **Ervin**. If you can enlighten me I would appreciate it.

Senator **Hruska**. You speak in your statement of the deliberate distortion or staging of the news, and at another point of news distortion. You talk about balancing and also the danger of government intervention. Now, then, in line with the observation made by the Chairman on that point, what position did the FCC take regarding the "Pentagon" program, where certainly there seems to be, from the testimony we received the other day, a very, very bad case of almost outright falsity and distortion?

Mr. **Burch**. Senator Hruska, let me answer that in this way. First of all, I would like if I may to give you a copy of our decision on "The Selling of the Pentagon" for your information.

We received complaints on "The Selling of the Pentagon" from Chairman Hebert and Chairman Staggers of the House of Representatives. The complaints basically were two:

One, that a Colonel McNeil was photographed in such a way that it appeared he was making a statement when in fact he was reading a quotation from Souvanna Phouma.

The second objection was that a Mr. Hingan, who is in the Defense Department, was introduced. He was asked certain questions and he gave certain answers. But when the show was put on the air, the questions were the same, but the answers were a compilation of various answers that he had given to questions which had then been edited and tightened, so that he in effect appeared to give different answers to the questions than he had actually given. We did not have to conduct a hearing to find that out, we had excerpts which were admitted by both CBS and Mr. Hingan to be true which showed that to be a fact. We set all that out in our opinion. We stated in the case of Souvanna Phouma: That it was somewhat difficult, looking at the material, to tell whether he was quoting or whether it was his own information, and we said that whether or not it was a distortion was so close that we were not going to proceed further.

In the case of Mr. Hingan, we said that we felt that this raised a very fundamental question, because I think the average person, seeing a question and answer format on a television screen, assumes that the answer that is given is to the question that was asked. Nevertheless, we said that in this case we would not interfere because we felt that the interference of the government in that practice was really more dangerous than the practice itself. We did commend to the network self-action in cleaning up this procedure. As a matter of fact, since "The Selling of the Pentagon," Dr. Stanton has changed the rules of the road for CBS. And I don't think that that particular situation can exist again.

Now, if someone wants to characterize that as a deliberate distortion or a deliberate staging, that perhaps is their privilege. We did not go that far in our decision, and we did not choose to take further action.

Senator Hruska. Thank you, Mr. Chairman.

Incidentally, I would want the record to be clear that when I referred to the Pentagon situation I meant the CBS film on "The Selling of the Pentagon," not another incident involving that very ornamental structure across the river.

Mr. Burch. Yes, sir.

Senator Ervin. I had hoped that you could unscrew the unscrewable and enable me to understand the difference between passing on the truth and passing on whether the news is slanted.

Senator Hruska. Well, I passed that one over to the Chairman of the Commission, and he has cited the authority and the results of their investigation.

Mr. Burch. I think perhaps "The Selling of the Pentagon" is the classic case in which I tried to make the distinction. First of all, we did not have to ask anybody what Mr. Hingan actually said in his interview, we did not have to go out and hold a hearing, there was a transcript of that that was taken at the time he made the statement. We also had a transcript of that which was broadcast. And obviously there was a difference between those two things. Extrinsic evidence indicated that what he had said was not what was broadcast. We didn't have to go hold a hearing as to what he actually said. What he said and they said he said were something different. Nevertheless, despite that we did not interfere in that particular proceeding.

I hope that clears it up somewhat.

Senator Ervin. As I understand from your statement, you declined to take action with respect to "The Selling of the Pentagon" on the basic ground that for the government to undertake to determine what is truth would do more injury to the freedom of the press than attempting to set the record right in that particular case.

Mr. Burch. Yes, sir; that is exactly what we say.

Senator **Ervin**. That is what worries me. Being from a tobacco growing State and a cigarette manufacturing State, I think that is precisely what the FCC undertook to do and did do in respect to the application of the fairness doctrine in denying the cigarette manufacturer an opportunity to reply to spot announcements injurious to tobacco.

Mr. **Burch**. Senator, I think you are talking about perhaps the so-called second cigarette ruling.

Senator **Ervin**. Yes, I complained about it.

Mr. **Burch**. After the Congress had ordered cigarette commercials off the air, is that correct?

Senator **Ervin**. Yes. I complained of the action of Congress in the first place, and then I complained even more strenuously of the action of the FCC.

Mr. **Burch**. There is nothing I can say to you about the action of the Congress.

Senator **Ervin**. I can say it myself; I don't think it is within the constitutional power of Congress to forbid advertising of something which it is legal to sell to the general public.

Mr. **Burch**. Well, Senator, that question is being raised in a number of contexts now. There are those who would take all over the counter drug commercials off the air on the ground that they are questionable, too.

Senator **Ervin**. Well, it is illegal to sell drugs to the general public.

Mr. **Burch**. No, sir; I am talking about aspirin, and Anacin and Alka-Seltzer.

Senator **Ervin**. Aspirin?

Mr. **Burch**. Yes, sir. There is a school of opinion which would take that off the air on the ground that it helps with the drug problem.

Senator **Ervin**. I think if Congress can pass a law forbidding the advertising of one item, it can pass a law forbidding advertising of any other item.

Mr. **Burch**. I would like to, if I may——

Senator **Ervin**. And I think that Congress has no more right to usurp the function of answering Pontius Pilate's question, what is truth, than the FCC has.

Mr. **Burch**. Perhaps I could say just a word about our ruling which you criticize.

First of all, we did not say to the broadcasters that they could not allow the tobacco industries to put on prosmoking commercials or prosmoking discussion. First of all, we weren't asked that. The question we were asked was whether, after cigarette commercials went off the air, and they were no longer allowed, and a station chose to run a public health type commercial which knocked cigarettes, whether that raised a controversial issue. We held that based upon the actions of the Congress and the Surgeon General and HEW, that if a licensee decided that it was not controversial, we would not upset his judgment. Perhaps that is begging the question somewhat, Senator, but that is actually what we decided.

Senator **Ervin**. On page 15 you said:

> In addition we have applied the fairness doctrine to the advertisement of one product, cigarettes. In 1967 the Commission issued a ruling that required licensees carrying cigarette commercials to inform their listeners to some

significant extent of the hazards of cigarette smoking. In doing so, the Commission stressed the unique nature of cigarettes as a health hazard authenticated by the Congress and other governmental entities.

I happen to know that there are many highly reputable physicians who state in a most unequivocal manner that there is no evidence which establishes a causal relationship between cigarette smoking and poor health. Yet the government took the position of what I call the political doctors, as distinguished from medical doctors, with the FCC saying in effect that Congress and these political doctors are in complete possession of all of the truth on the subject of cigarette smoking, and that those who disagree with them have none. Therefore, since all of the truth is possessed by one side in a very controversial subject, the truth cannot be contradicted on the broadcast media. If that is not government assuming the power to say what is truth on a controversial issue I don't know what it is.

Mr. BURCH. Senator, I would only offer you one analogy. Even in a capital case the government is only required to prove its case beyond a reasonable doubt. I doubt seriously that there is any subject on which every doctor in the United States would agree, including what time it is. On the other hand, I think that the record that the Commission had before it at the time did prove beyond a reasonable doubt that there were significant hazards that had been discussed. We did not say that cigarettes caused cancer, we said that there was a hazard of cigarettes causing cancer.

Senator ERVIN. There is a hazard to anything in life. Walking across the street is a hazard, but we can't stop crossing the street on that account. Eating Irish potatoes in too large quantities is a hazard, but I don't know anything in the fairness doctrine that keeps us from advertising Irish potatoes.

Mr. BURCH. Senator, there are many people who would like to see it extended.

Senator ERVIN. I can't escape the conclusion that both Congress and the FCC and the political doctors assumed authority to say what the truth is, and said that although smoking is a very controversial subject, anybody that disagrees with their version of what they claim to be the truth will be denied the right to use the airwaves. If the government can do that in the case of tobacco, it can do it in the case of anything else, and I think it is a very dangerous trend.

I don't believe argument can alter that fact. Every journey toward a given end starts with a single step, and I think this is the single step. I think if government assumes the right to say that a certain product, even though it is permitted to be sold, should not be mentioned on the air, then by the same reasoning they can apply the same action to any political candidate for example. And they may wind up doing that.

You make a very good case for the proposition that the government has to regulate the broadcast media. You state that government regulation is permissible because different standards are appropriate for different media of expression in light of their different natures. And the question is, if the people who own the postal system can subsidize the newspapers and magazines, and the government through building streets and highways in effect subsidize the newspaper delivery trucks, and it is understood that newspapers can enjoy certain subsidies and yet be free, why is it not true for the broadcast media? Is it because everyone recognizes at once that the newspapers are the press and the broadcast media are not?

Mr. BURCH. I don't think that is the case. I think the Supreme Court has stated that the word press, the generic phrase press applies to electronic journalism just as it does to the printed page. And I can't deny the attractiveness of those suggestions that you make that newspapers are subsidized, and magazines are subsidized, and airplanes are subsidized, and all the rest. The fact is, those arguments were made in *Red Lion*, they were made in the cigarette doctrine, and they have been made in a number of cases, and the courts simply have not felt that those arguments were persuasive enough. I don't know that I can add anything to the court's decision in this case.

Senator ERVIN. There certainly can be no doubt of the necessity for the Government to assign frequencies, otherwise the systems would be self-destructive insofar as electronic communications are concerned.

Mr. BURCH. That is true, Senator. But we could well have operated, for example, a sale of frequencies, we could have said, we are going to sell you channel 4 for $150 million or whatever, $50, I don't care. But Congress did not decide to do that, it decided to give licenses for a certain part of time, primarily, I believe, on the first amendment ground, otherwise people would be denied their right to know things.

Senator ERVIN. I notice that someone the other night on TV said that people should have a right to reply on electronic communications systems only if they paid for it. As I understand the fairness doctrine, it requires that where time is allocated to an individual who has been subjected to a personal attack, or where time is assigned to an individual or group to reply to an editorial, that time is allocated free.

Mr. BURCH. Yes.

Senator ERVIN. And considering the cost of electronic communications, wouldn't really be a denial of the First Amendment in respect to such communications systems to require the individual or the group that is given the right to reply to pay for the time?

Mr. BURCH. That was our holding in the *Cullman* case. In that case the problem arose over an extended series of programs called "The Lifeline" put on by Mr. Hunt. The argument was made that he presented one side of a controversial issue and that a person or group should be allowed to come on and present the other side. The station contended that "Lifeline" is sold time, and therefore we shouldn't have to give away time to answer time that is paid for. And the Commission knocked that argument down.

Now, that question has arisen most recently, I think, in the *Friends of the Earth* case which I mentioned to you earlier, in which the Court of Appeals held that advertising for leaded gasoline raises a fairness issue, and that the opponents of leaded gasoline must be given time, presumably free time, if there is no money available. And the difference in those two is that in the *Cullman* case you were talking about a program, a 15-minute discussion program, perhaps. In the *Friends of the Earth* case we are talking about a 30-second commercial. So if that goes to its ultimate conclusion we may get in the situation where you put on a commercial selling gasoline, and then you put on a 30-second commercial immediately behind it knocking gasoline, which is a peculiar way to run a commercial broadcasting system, I think you will agree.

Senator **Ervin**. As I understand your overall views, regulations other than those respecting the issuing of licenses, should be kept at a minimum.

Mr. **Burch**. Yes, sir.

Senator **Ervin**. Therefore, ordinarily the broadcasters should be allowed to select their own programs and broadcast the news that they select. It is only in very rare circumstances that the FCC, acting as an agency for the benefit of all the people, should step in the picture.

Mr. **Burch**. That is correct. And I might say that with very few exceptions we do that only on the complaint of agrieved persons.

Senator **Ervin**. About how often is a license revoked, or a renewal denied by the FCC?

Mr. **Burch**. Well, first of all, categorically, not very often. And secondly, for programing reasons, not very often at all. We did recently revoke a license for violation of the fairness doctrine, I think it was probably the first one that had ever been treated in such a manner. But the critics of the FCC will argue that we don't revoke enough licenses, that there is too much bad programing, and we should step in and take licenses away.

As you can undertsand, Senator, there is a very delicate balance that has to be maintained between section 326, which prohibits our censorship, and the public interest standard, which seems to say that we have an interest in programing. And it is frankly a very difficult tightrope to walk.

Senator **Ervin**. I take it that the FCC recognizes that if any great number of licenses are revoked, or it fails to renew a great number of licenses, that would have quite an inhibiting effect upon freedom of speech by the broadcast media.

Mr. **Burch**. It would not only have an effect on it, it would also have an obvious effect on the economic viability of the system. And we are concerned about that as well.

Senator **Ervin**. In addition, the FCC, as I understand it, recognizes that the interests of the country are best served by a free flow of information and the presentation of conflicting viewpoints, and for that reason it is reluctant to take action, except in extreme cases, which would have an effect of suppressing a free communication.

Mr. **Burch**. Yes, sir. We feel that the purpose of the First Amendment is to promote debate, not to inhibit it.

Senator **Ervin**. I imagine you receive much criticism. I received a letter yesterday from a constituent which said, nobody in his right mind would advocate suppressing free speech, but something certainly ought to be done about these lies and distortions.

Senator Hruska.

Senator **Hruska**. Mr. Burch, in his formal statement to the committee Dr. Stanton of CBS indicated that as a direct result of a Federal Communications Commission ruling—I believe it was in August, or sometime last year—his network dropped its so-called Loyal Opposition program format. To make the record complete, would you like to comment on that, or clarify his reference, and give some of your own views on that subject?

Mr. Burch. Yes. I think first of all it is not in the least true that the FCC caused the dropping of the "Loyal Opposition" program. Dr. Stanton can put that program on tomorrow if he likes, and the day after tomorrow, and the day after that. We have nothing to say about what programing he puts on or does not put on. All we held in that particular decision was that the format which was adopted did raise a fairness obligation, and that if he wanted to run it that way, namely, give the Democratic National Committee 30 minutes to use as it saw fit, not to answer any particular issue of controversial importance, but to use as it saw fit, that he must then make an appropriate offer to the Republican National Committee under the fairness doctrine. Now, had Dr. Stanton, for example, in the case in question, which you will recall took place shortly after the President had made a series of speeches on television concerning the war in Indochina, had he simply instructed the Democratic National Committee that, we have selected you, the loyal opposition, if that is the phrase, to present the other side of the Vietnam war issue, and you may do it any way you want. But that is the issue you will address; this case would never has arisen. The fact was, however, that Dr. Stanton told the Democratic National Committee, you simply have 30 minutes to use as you see fit. The argument was then made, and we think properly so, that the issue that was discussed in that program was not the Indochina war, but which party should govern, which is an entirely different issue than the Vietnam war. So I think even Dr. Stanton in his testimony before the Senate Commerce Committee admitted, in answer to a question about the "Loyal Opposition," after he had been shown that if it continued the way it had in the first show he would probably have to do something about it, because it had not lived up to its expectation, or words to that effect—I simply think Dr. Stanton is rather overstating his case considerably to suggest that we caused the show to be stopped.

Senator Hruska. Well, the text of his statement before this committee says in part:

> On the complaint of the Republican National Committee, however, the FCC held that the Republicans were entitled to reply to the Democratic broadcast—a reply, in other words, to a reply. Fourteen months later that issue was still in the courts and was argued,

and so on.

What you are saying, if I understand you correctly, is that the Democratic broadcast was not a reply to the President, and therefore there was not a reply to a reply, it was a reply to some new matter and something different in scope and in substance than what the President has said, is that what your position is?

Mr. Burch. That was exactly the position we took. The program itself was about 25 minutes long, of which 2 minutes were devoted to Vietnam, and 23 minutes of the program were devoted to—I think I could best characterize it as perhaps which party should govern, would be the issue. It was followed, then, by fundraising commercials which had been purchased by the Democratic National Committee. And there is nothing wrong with that. But it did tend to indicate that this was perhaps not simply a reply on the Vietnam war, it was a raising of an issue of which party should govern.

And that is why we did not accept the argument of CBS that this was simply a reply to the President.

First of all, in a series of cases, one of which I was personally involved in in 1964, the Commission has held that no one has a right of reply to the President of the United States as such. In other words, if the President speaks, whether he be a Republican or Democrat, there is no person in the United States——

Senator **Hruska.** No other President.

Mr. **Burch.** There is no other President. The issues that the President discusses in his talk are subject to the fairness doctrine. And we leave it to the licensee to determine how he will present the other side, whether he will do it in a 30-minute talk show or in his news, and who he will select to make the response.

You will recall that at the same time we made the "Loyal Opposition" decision, Senator Hruska, we denied the complaint of 14 U.S. Senators who felt that they had a right to reply to the President on the grounds that they were the sponsors of the end the war amendment, and they should be the appropriate spokesmen. In the same paper we denied the request of 11 U.S. Senators who felt that they should reply to the 14 U.S. Senators. So the cast of characters was complex, and the facts were complex in that case. What we basically held was, one, no one has a right to reply to the President as a person. The issues that are raised by the President are subject to the fairness doctrine, and the licensee has discretion in deciding how he will handle those responses.

In the case of the "Loyal Opposition" series, we held that they could not be construed as a reply to the President, since the licensee who has the responsibility for administering the fairness doctrine had abdicated any responsibility for what was covered by the Democratic National Committee; they had no way of knowing what was even going to be on the show. So it was a little hard to show that they were complying with the fairness doctrine. So it was their obligation, not the Democratic National Committee's obligation.

Senator **Hruska.** In another part of his testimony Dr. Stanton made some quite severe allegations about the FCC's independence, and in fact its integrity. This is what he said, and I am quoting from the record:

> When you recognize the FCC as the controller of our license, it is human nature to believe that men serving on the Commission look to the second highest office in the land, that is to say, to the Vice President, to get a clue as to how they conduct themselves.

Would you like to comment on that, Mr. Burch?

Mr. **Burch.** Yes; I would like to comment on that.

Dr. Stanton has promulgated the so-called conspiracy theory ever since the Vice President made his original statement on the networks in November of 1969. It has become a bit of folklore now which is highly prized by some of the broadcasters. And it goes like this: The Vice President said something. Then the FCC will move in and do the dirty work by taking away licenses or whatever. The only thing wrong with the theory is that it is false, and Dr. Stanton knows that it is false. And he can cite absolutely no evidence of any action on the part of the FCC which coincides with that particular theory. It just does not happen. The only action we have taken as a matter of fact with regard to the Vice President's speech was to write a letter to Mrs. Paul—and I would like to enclose a copy of that for the record—in which we stated that the FCC cannot interfere in questions of bias or slanting of the news, and that it is no function of ours to determine whether there will be instant analysis or not. In other words, we simply checked out of that particular debate. And I really am a bit disgusted that Stanton keeps bringing up this conspiracy theory, because it simply will not wash. There is no conspiracy, and there is no fact to base a conspiracy on.

Senator HRUSKA. Recently I have read reviews and some excerpts from Edith Efron's book, *The Newscasters*. Do you believe that it is a fair analysis of the network news coverage in the area it seeks to deal with?

Mr. BURCH. Senator, I have made no analysis of Edith Efron's book. I was sent a copy by the publisher. I glanced through it. I don't know whether it is correct, incorrect, partially correct, or whatever.

I have also read Mr. Salant's response on behalf of CBS to that particular book. Neither do I know whether his response is correct or incorrect. Basically the issue is not one that we should get involved in.

I would only point out one thing in regard to that book, and that is that in "The Selling of the Pentagon" case we asked that broadcasters accept criticism, examine it, and if applicable, try to profit from it.

There does seem to be a certain natural reluctance on the part of a broadcaster, particularly involving news, to concede that there could be anything wrong about any presentation that they make. And the fact is, we think that books or attacks or criticism should be taken seriously, and not always simply washed away as the efforts of the radical right or the radical left or the radical whatever.

So I don't know if her book is right or wrong. I would hope, however, that if it is true, that the networks will profit from it. If it is false, I think they should and will say that it is false.

Senator HRUSKA. I take it, then, that your knowledge of the book itself is not sufficiently comprehensive and detailed to be able to form an opinion of your own at this time.

Mr. BURCH. No. And I think in candor, Senator, the book contains a lot of methodology—one of the questions about the book is the methodology which was used. And it would take a great deal of independent study for me or anyone else to verify or refute the charges that are made.

Senator HRUSKA.. Well, it is a provocative thing.

And it is my hope, Mr. Chairman, that sometime in due course the author of the book could occupy the chair that is now occupied by the Chairman of the Federal Communications Commission.

Senator ERVIN. I hope so.

Senator HRUSKA. And give us in words what she has given in print.

Senator ERVIN. Of course I will have to admit that I am inclined to think that people twist the news when they don't state it the same way that I would state it.

Senator HRUSKA. I had a professor in logic one time who said, I make it a point never to say that the other man used bad judgment. I simply say, it is a judgment which I would not have exercised. And he being a professor, we took a cue from that.

Senator ERVIN. I might state, I haven't read Miss Efron's book and I don't know what its contents are, so I am not referring to her book. I hope to read it soon. I would certainly join you in inviting her to come before the subcommittee and give her views on this whole subject.

Senator HRUSKA. To appear as a witness.

Senator ERVIN. Thank you, Mr. Burch.

Mr. BURCH. Thank you, Senator.

Senator ERVIN. Counsel, I think, has a question or two.

Mr. BASKIR. From page 11 on you were talking about deliberate distortion in the staging of the news as opposed to mistakes. Apparently you say that your examination of such a case would be limited to investigating a direct order to slant the news. Do I understand that correctly?

Mr. BURCH. Well, I think there were two instances that I mentioned. One would be an act of the licensee—not the newsman, we are not talking about the newsman now. We are talking about the man who owns the station and who is our licensee. Assuming that the newsman is in authority, we would look into a statement by that employe that he had been ordered to slant the news, or distort the news, or whatever, because we feel that that is a high crime under the Communications Act.

The second situation—and we use this example in "The Selling of the Pentagon"—is that if distortion could be shown by extrinsic evidence, that the answer yes was changed to the answer no—in other words, completely invalidating the question and answer—that we would move in on a case like that. We have never had a case like that, and I sort of doubt that we would ever get a case like that. But that is the outside extremity that we mentioned.

Mr. BASKIR. With respect to that second point, we had a witness who testified as follows with respect to "The Selling of the Pentagon," and I quote from his testimony:

> Everybody knew that it was a falsification. It was deceit and fraud, that was evident from the record, they admitted on the witness stand that this is what took place. There wasn't any denial that they consolidated the answers to these questions and they put answers to other questions over in front of other questions, and they said, this is the record. They falsified the record. And we say there is a serious question in the public interest as to whether or not radio and television can falsify a documentary where it is a question and answer documentary.

This witness, Congressman Springer, had no doubt in his mind, and apparently a majority of the subcommittee and the committee had no question in their minds that this was deceit, fraud, deliberate falsification. It was the kind of case that you suggested would be in the second category of cases that would warrant the FCC intervening. Of course, when the FCC took up the issue, the FCC decided it wasn't their kind of case. Doesn't this suggest that what is truth and falsity and what is distortion or not distortion, is really in the eye of the beholder. If Congressman Springer were Chairman, and the other members of the committee were on the Commission, it would have been distortion, but since you and the other members of the FCC were there it was not, and that is the standard—the objective standard?

Mr. BURCH. I think the simple answer to that is that I know of no principle or practice that one could use so that he could say, this is in fact truth and this is in fact false. Obviously any principle that must be applied depends in great measure on who is applying it as to what are the facts. In that particular case we cited all the evidence that Congressman Springer cited in our decision. We said that there was some jiggering with the questions, that different answers were put together for the questions, but that we did not feel that based on that type of a record that we would interfere further, simply because we felt that governmental interference was more dangerous than the practice which was evident in that case, a practice which I suspect will not occur again.

Mr. BASKIR. If the majority of the members of the Commission felt this was a fact situation that fit within your principle, you did have the power to take action. It happened to be that a majority of the members of the Commission felt differently from a majority of members of the committee. The question of power was not at issue.

Mr. BURCH. I think the question of power was implicit in the whole thing. I think we have the jurisdiction to entertain the complaint and take action on it. Because if you have jurisdiction you have the jurisdiction to be wrong as well as to be right. On the other hand, I think quite clearly at some stage of the proceedings—and I suspect at the very first sage—we would have been met with the First Amendment argument which would have had to be dealt with. And how that would have come out I very candidly do not know. We did not choose, frankly, to force that issue, because we did not feel that it was a case where there was that much interest in our action.

Mr. BASKIR. This case, I think, represents a situation which demonstrates that any time a standard of truth, falsity, distortion, slantedness, is at all within the jurisdiction of the Commission, you inevitably have a first amendment question. You have the power to be wrong as well as the power to be right, you have the power to determine whether there was slanting. You just choose not to exercise it, but it is there, and you could then determine that "The Selling of the Penagon" was fraud, was distortion, and indeed penalize the station for putting it on.

Mr. BURCH. Yes. I think there is no gainsaying the fact that I am not going to sit here and suggest to you that the first amendment absolutely limits us from doing anything in the news field. I think that there is no question but what the first amendment as applied to the broadcast journalist, as the Supreme Court points out, is applied in a different way, perhaps, than it is in a newspaper. I don't know of any way of avoiding that, Mr. Baskir. It seems to me that that is just one of the dilemmas that we have to live with. And I think you are going to have to resort to the reasonable man doctrine, and that hopefully reasonable men will deal with these problems in reasonable ways.

Quite obviously, because you have FCC, if you assume a corrupt or power-mad FCC, I assume that you could hypothecate a situation which would be very, very bad. The fact is that history does not indicate that that is the case.

As a matter of history, let me make a couple of points. I read Dr. Stanton's testimony and I read Mr. Goodman's testimony about the inhibiting effect the FCC has on their news judgments and what not. It is interesting that in the entire history of the FCC there have been only three cases that were decided adversely to the networks in the fairness field. One of them was the Vietnam war case which we discussed earlier, which applied to all three of the networks. The second one was the loyal opposition series which Senator Hruska mentioned which applied only to CBS and the other was a case involving Chet Huntley some time ago on radio. He made an allegation that some of the meat inspectors in the Department of Agriculture were on the take, and it was held that that raised a fairness question. That is the extent of the fairness cases which have ever been decided adversely to networks.

The other two cases that Dr. Stanton mentioned, one involving a complaint about bullfighting, and the other involving a complaint about legalized gambling in Miami, neither of those cases was even brought to the attention of the Commission. In the first case Dr Stanton made a complaint that it took so long for the FCC to rule on that particular case. That is quite true, because all we did was receive a complaint from a man or a group in Miami, Fla., in the case of gambling. They asked for some time to submit additional information, and they got it. The staff denied the fairness request out of hand. The complainant then came back and asked for review by the Commission. Under our procedure whenever that request is made it is granted. At that point CBS was asked to reply. And they made a very short response. And the Commission denied the complaint.

In the other case the station was complained against because it had held a very hard-hitting program on the eve of an election. And again at the staff level it was held that they violated the fairness doctrine. And Dr. Stanton raised a point with which I am very sympathetic, he said that the staff counted lines to determine whether the fairness doctrine had been followed. If you will read my concurring statement in the Esso case, I really am very disturbed about how you make these decisions, do you count lines, do you count minutes, how do you decide which is proper, which is anti, which is neutral? It is a very, very difficult problem.

But unlike a philosopher in this field, we have to act. If somebody makes a complaint to us, we can't simply send it back and say, you raise very difficult issues, and we don't care to deal with it. We have to act, and we have to act the best way we know how. And thus far we haven't found any way to do it. Hence our inquiry.

Mr. BASKIR. The response to the last point you made, and the response to your earlier point that so far there has not been a FCC which was power-hungry or corrupt, and that we have to rely upon men of good will in the FCC, is perhaps in the Constitution, and the first amendment with respect to newspapers. It says, in effect, we will leave it up to the newspapers, and we won't rely on benevolent men assuring that there is robust debate, or that there is fairness or balance. We just won't take the chance. So if we have no control and leave it up to the people who are running the media, the newspapers or broadcasting, in the end it will all wash out, and we don't have to worry about making sure that we will have Dean Burches on the committee and not the people that would feel opposite.

Mr. **Burch.** Of course, Mr. Baskir, you can make that same comment on the court, if you assume that you have nine radicals on the Supreme Court who do not believe in the Constitution, or whatever, you can frustrate the Constitution that way. Congress can frustrate it, if you have 100 members who do not believe in it.

Mr. **Baskir.** Certainly it does with respect to the executive and legislative branches in the absolute sense, it says that they shall not make a law restricting the freedom of speech and the press. Yet with respect to broadcasting it is difficult, in that you can regulate and control broadcasting as long as you do it in a benevolent way, which is not what the First Amendment says with respect to the freedom of the press.

Mr. **Burch.** Of course, radio was an unknown quantity at the time the First Amendment was put out. The First Amendment, I think, was couched in terms of print, it authorized a man to go out and prepare a tract and distribute it to his neighbors, and that sort of thing. Perhaps it is not a real distinction, but it is a distinction.

And second, the Congress went through a period of 7 years, from 1927 to 1934, at which point the Secretary of Commerce was authorized to give licenses, to allocate frequencies, but was not authorized to enforce any of the laws. Herbert Hoover went through that period. And then in 1934, they came up with the Communications Act. And it was quite clear that Congress at that time decided, based on its knowledge and experience during that previous period, that something more had to be done than simply policing the technical aspects of the allocation policy. Now, if it is contrary to the First Amendment, it has been contrary to the First Amendment since 1934. And yet the Supreme Court has ruled in numerous cases that it is not contrary to the first amendment.

Mr. **Baskir.** Of course the Supreme Court could be wrong, and it could decide 5 years from now or tomorrow morning that it had been wrong, as it seems to do almost everyday. But the question is not whether it had been decided correctly, the fact remains that it has been decided.

Mr. **Burch.** That gets us back to where we started. If you assume that nobody believes in the Constitution and nobody wants to enforce it, then we are in trouble.

Mr. **Baskir.** The question of loyal opposition seems to me to raise questions as to what is an issue, whether it is the Vietnam war or which party should govern. The FCC had to determine what the issue was in that case.

Mr. **Burch.** Yes, sir.

Mr. **Baskir.** Also it had to decide, assuming that the issue was raised, the proper party to reply. The cigarette case seems to decide that when there is a controversy——

Mr. **Burch.** If I might interrupt, we do not normally in fairness cases say who will reply. That is up to the licensee. There is another doctrine, so-called quasi-equal opportunity doctrine which applies to political parties. For example, if on October 31, 1972, one of the networks decided to give the Democratic National Committee 30 minutes to use as it sees fit, we have held in an advisory opinion which was rendered to Senator Pastore's office that the only way that that could be counterbalanced would be by an equivalent amount of time to its counterpart, the Republican National Committee. It would seem a little silly to say, well, that is fair, all you have to do is cover that on "Today" by talking to some members of the Vegetarian Party or whatever. We simply held in that one isolated case that we would say that the only appropriate spokesman is the Republican National Committee.

The same thing is true in editorializing. If you editorialize against a candidate the candidate is the one that should come in and protect himself. It is only reasonable.

Mr. **Baskir.** I was referring to a discussion with Senator Hruska as to who would reply to the President on Vietnam, and who would reply to those repliers. Eventually you might have at least 100 candidates, every member of the Senate, and I can think of quite a few more.

Mr. **Burch.** That is why we leave it up to the licensees.

Mr. **Baskir.** But you can also stand a certain amount of oversight over their decisions to make sure it is adequate, and you might change their decision.

Mr. **Burch.** Yes. But as I told you, the basic precept of the fairness doctrine is not what we would have done had we been running the network, but, was what was done reasonable.

Mr. **Baskir.** Then the Commission and the courts decide, or the courts tell the Commission, that there is or is not a controversy with respect to cigarettes, and once having decided that there is no controversy, there need not be time given for a reply——

Mr. **Burch.** I can't believe that any American, despite his feeling about the constitutionality of the cigarette ruling, could have argued that there wasn't any controversy about it. In certain things it is quite obvious. It seems to me that there was a controversy about cigarettes in 1969.

Mr. **Baskir.** I am talking about the recent decision that said rebuttal time did not have to be given.

Mr. **Burch.** What we said was that a licensee who determined that he would not give rebuttal time would not be upset by us.

Mr. **Baskir.** In other words, there is no violation of the fairness doctrine, is what you are saying.

Mr. **Burch.** You can put it that way.

Mr. **Baskir.** And what you are really saying is that there is no more controversy with respect to cigarettes.

Mr. **Burch.** Not on that phase of it.

Mr. **Baskir.** And the court of appeals agreed with you.

Mr. **Burch.** The Court of Appeals in the Fourth Circuit.

Mr. **Baskir.** If I came to you and said, with respect to a coffee ad, that I think that drinking coffee raises a public issue, you don't have to give me an advisory opinion. I think that very few people would really say that coffee drinking raises a controversial issue, and yet there is a whole group of people in the United States, the Mormons, who I understand think that drinking coffee and drinking tea is very detrimental to the health. There is almost nothing you can name that isn't controversial to somebody.

Mr. **Burch.** That is right.

Mr. **Baskir.** In other words an agency, be it a court or the FCC, is in a position to say what is controversial, or what is not. Let's take for example, smoking marijuana, apparently you can't have songs on the air which seem to encourage drug taking——

Mr. **Burch.** I will stop you on that point too later on, but go ahead.

Mr. **Baskir.** In effect, when you decide whether or not there is a controversy, you are really deciding which side gets to speak over the air, which issue are up for public debate and which are not, for at least this one media.

Mr. **Burch.** Well, it is one of those things. If somebody says that it is 12 o'clock, and somebody else says it is 2 o'clock, and there is a requirement in the law that that decision be decided, somebody has to decide it. And that somebody is us. And you can bring out a list of horrible—and I agree with you, there are some decisions that we make that no human being ought to be called upon to make. But we have to make them. That isn't something that I applaud as the greatest role in the world. But it is a role that somebody has to play.

Now, if the suggestion is that what we ought to do is dissolve the FCC and turn all the licensees loose and give them their frequencies forever, that is something the Congress is certainly free to do.

Mr. **Baskir.** What I am trying to explore is whether or not the First Amendment requires that the FCC be only a traffic cop and nothing more. That suggestion has been made before to the subcommittee, and I suspect in the second series of hearings will be made again. Other people will say, as Professor Barron does, exactly the opposite.

Mr. **Burch.** I think the three networks and 7,000 licensees would agree with you. There are very few courts that would agree with you. That is the difference.

Senator **Ervin.** After all, the First Amendment is designed to keep government from abridging the freedom of speech or freedom of the press. I would say, and I don't know whether it gives the FCC any consolation or not, that I agree with their position in respect to the Pentagon program. I can't imagine anything that would do more to inhibit a free press or free broadcasts than for a congressional committee to arrogate to itself the power to say whether some broadcaster exercised his freedom of speech in a manner that met with the committee's approval. I think that the FCC correctly appraised the situation when it said that it would be injurious for the Government to make an adjudication as to whether the freedom of broadcast had been exercised wisely or foolishly in that particular case; it was a very wise decision, because government abridgement in any way to the freedom of speech is what the First Amendment is designed to prevent. Abridgement can be by a congressional committee, as well as by a very unwise decision on the part of the FCC, if it should make any such unwise decision.

I want to thank you again for your appearance here. You have made a very significant contribution to the subcommittee's study, and your testimony and the observations you have made will be of great help to the subcommittee.

Mr. BURCH. Thank you, Senator.

Mr. BASKIR. Mr. Chairman, our next witness this morning is Mr. Nicholas Johnson, member of the Federal Communications Commission.

Senator ERVIN. I wish to welcome you to the subcommittee and to express to you our deep appreciation for your willingness to come and give us the benefit of your observation and experience in a field in which you have had much experience and in which you are very knowledgeable.

STATEMENT OF NICHOLAS JOHNSON, MEMBER, FEDERAL COMMUNICATIONS COMMISSION

Mr. JOHNSON. Thank you very much, Senator.

Mr. Chairman and Senator Hruska, I cannot overemphasize my commendation of you, and enthusiasm for the task you have undertaken.

Caught up in the day-to-day business of governing, it is all too easy for those of us in the legislative and executive branches of government, and the regulatory commissions, to lose sight of the bedrock foundations of the institutions we temporarily occupy.

Ours is an exciting experiment here in America. We believe that if an entire people are well educated and fully informed they will be able to govern themselves—to identify and analyze the issues, to articulate their desires, and to carry them to fulfillment.

That proposition is at once the most conservative, and the most radical, of our distinctively American articles of faith. It is sometimes hard for us to greet with enthusiasm someone else's freedom to express the thought that we hate. And yet that is what the first amendment is all about. For there is no need to protect one's right to utter the platitudes that are widely accepted.

It is little wonder that freedom of speech is often misunderstood, ignored or abused. But it is especially unfortunate that there is often an almost inverse relationship between power (office, wealth, education, social status) and a marrow-deep commitment to the logical extensions of democracy and free speech. One need only begin to list the examples to dramatize the point—the administration's intimidation of the media and suppression of dissent, the occasional arrogance of the wealthy and educated towards the views of the working class and poor, the impediments in North and South alike to the basic rights of registration and voting, and the energetic opposition of broadcasters to the airing of sentiments they would prefer to censor. The list could go on and on.

So in the midst of hearings on ABM's, SST's, Lockheed loans, and other programs of socialism for the rich, it is refreshing to see distinguished Senators—to borrow from the language of radio and television—pause for a word on behalf of the principle that makes it all possible.

In your opening statement, Mr. Chairman, you raised a number of specific issues: (1) The subpenaing of newsmen, their notes and filmed out-takes; (2) the government's efforts to enjoin publication of newspapers, and the intimidation of the broadcast media; (3) the use of false press credentials by government investigators, and (4) regulation of the broadcasting industry.

I have written at length on some of these issues—some would say at somewhat greater length than one ought to write. In any event, rather than take up your time merely repeating statements, I am attaching some, summarizing others, and merely listing some more. In addition to this opening statement I will, of course, be pleased to try to respond to whatever questions or comments you or Senator Hruska may have.

(1) On February 12, 1970, I addressed the Nieman Fellows of Washington, D.C. ["Subpenas, Out-takes, and Freedom of the Press: An Appeal to Media Management"] urging a constitutional theory that the threat of sanctions, such as subpenaing reporters, may stem the free flow of information and news to the public. At that time management was taking what I viewed as a relatively weak position in failing to stand up on behalf of the newsman. And I tried to encourage them to take a little stronger position in that regard. That speech is attached. I have also urged the FCC to refrain from asking for newsmen's notes and filmed out-takes on a number of occasions—such as the Democratic National Convention, "Hunger in America," and "Selling of the Pentagon" cases.

(2) This administration's intimidation of the print and broadcast media should be a matter of great concern to all Americans of both parties. The full force of the administration's power can only be appreciated, however, when one reviews the sweeping range of its efforts to bend the media to its will. I tried to provide some samples of this range in a paper prepared for the International Association of Political Consultants entitled "Government by Television." That paper, as published in the March 1971, isue of *Earth* magazine is attached

(3)The matter of police or government use of false press credentials has never—or only rarely and tangentially—arisen before the FCC.

(4) The matter of broadcast industry regulation is, I presume, the principal reason why you have asked FCC Chairman Dean Burch and me to appear before you. I will spell out some thoughts on these issues in a moment, but first let me summarize my position:

a. There are occasions when Chairman Burch and I disagree, but this is not one of them. I fully concur in his explanation of the Commission's view as to the background and need for the fairness doctrine.

b. I also agree with Fred Friendly, who testified before you on October 12, 1971, that:

> I perceive very little FCC meddling in newsroom activities. The chilling hand that concerns me far more is the corporate concern for maximizing profits.

That is an issue that I have addressed on a number of occasions. Two chapters of my book, *How to Talk Back to Your Televisin Set* (Atlantic-Little, Brown/Bantam, 1970) are relevant to this problem (Chapter 2, "The Media Barons" and Chapter 3, "The Silent Screen"). "The Silent Screen" is a listing of many of the kinds of subjects which are not able to find their way onto commercial television. I should note for the record that Mr. Richard Salant of CBS answered my charges of corporate censorship in an article in *TV Guide*, "He Has Exercised His Right—To Be Wrong," September 20, 1969. My reply is attached. It was delivered to the Radio and Television News Directors Association Conference on September 26, 1969: "Is There a Salant in the News?" It was printed in the *RTNDA Bulletin*. January 1970, and the Congressional Record, and that *Congressional Record* reprint of the speech is attached.

c. The problems of access to the mass media were ably discussed before your committee by, among others, Prof. Jerome Barron on September 30, 1971. His early views on this subject—Barron, "Access to the Press, A New First Amendment Right"; Barron, "Access, The Only Choice for the Media"—have already gone a long way to becoming law. You are by now very familiar with the *Red Lion* decision as well as the more recent *Business Executives Move for Vietnam Peace* v. *FCC* decided by the U.S. Court of Appeals for the District of Columbia Circuit this year. I have written of these issues in a number of dissenting opinions and a recent article, which I coauthored with a brilliant young lawyer and former legal assistant. Tracy Westen: N. Johnson & T. Westen, "A Twentieth-Century Soapbox: The Right to Purchase Radio and Television Time."

That is a summary. I have some comments here in the statement which I would be happy to go on with.

I want to begin by emphasizing once again that I join in most of Chairman Burch's statement to you. He has ably outlined the premises and issues underlying the fairness doctrine as it applies to broadcasting. I fully agree with him that the leading constitutional teaching on this question is to be found in the *Red Lion* decision.

There are a great many people who will applaud these hearings on so vital a subject. As a former law professor, and having only seen the press reports of your sessions, I very much look forward to seeing the full printed hearing record. It should become a bestseller at law schools and journalism schools throughout our Nation.

The importance of these hearings, not only for those who participate in them, but for the entire Nation, was underscored by some comments that Senator Goldwater made on the floor of the Senate in April of 1970. In discussing a public opinion poll that CBS "Sixty Minutes" had sponsored, he said:

> The findings of the poll were extremely interesting and, to quite an extent, disturbing and frightening. What it shows is that a rather large percentage of our people think that there are amendments incorporated in the Bill of Rights which should be repealed.

On freedom of the press the poll results showed:

> [W]ell over one-half of the people (54 percent) would not give everyone the right to criticize the government, if the criticism were thought to be damaging to our national interest; and, a comparable number (55 percent) feel newspapers, radio and television should not be permitted to report some stories considered by the government to be harmful to our national interest (wartime censorship was excluded in the question).

I would share Senator Goldwater's characterization of these results as disturbing and frightening. If we truly believe that freedom of speech and press are important constitutional liberties—important to the functioning of a representative democracy—then surely we should be concerned if the general populace finds them unnecessary. I am confident that most Americans would support the guarantees of freedom of speech and press—if the issues were ever presented and considered thoughtfully.

I hope that your hearings, and the dialogue they stimulate, will encourage this thoughtful consideration. Those of us who support these great freedoms, in government, in journalism and elsewhere, need to tell the American people by words and actions why these guarantees are important—not because they protect the right of businessmen to make money, or to pour abuse on someone, but because they protect the right of the American people to know. It is ironic that the media is now suffering, in part, because it has not done this educational job as well as it might have.

It is useful quickly to sketch how the system of broadcasting was established in this country, why the system of regulation was adopted, and why the fairness doctrine was devised.

The radio spectrum and the right to broadcast were considered by the Congress a national resource, owned by the people as a whole, in much the same way that the public lands out West are owned. In deciding how that national resource was to be used, a number of alternatives were considered. A governmental broadcasting system could have been established, on the model of the French system, or a more independent public corporation like the British Broadcasting Corp. Each special interest group could have been given its own station. But neither of these alternatives were chosen. Instead, this national resource was not given to private users, nor was it sold. Under the Communications Act of 1934, Congress determined that private licensees would be chosen by the FCC to operate stations as fiduciary trustees of the American people as a whole. Private profit would be permitted, but Congress clearly contemplated that nonremunerative programing would also be required. The public was thought to be entitled to a public service in exchange for the profitable use of its property. It is essential to grasp this idea of a fiduciary trust that underlies the scheme of broadcast regulation in this country. The act expressly spells out—the first section of the Communications Act dealing with broadcasting—that a broadcaster does not own a license in the way that a newspaper company owns its right to print.

I do not mean to suggest that the regulation of broadcasting could never involve the use of unconstitutional methods. It could. That has been the issue in a number of court decisions, including *Red Lion*—where the industry unsuccessfully argued the unconstitutionality of the fairness doctrine. One of the series of FCC decisions of which I am proudest is our steadfast refusal to discipline the networks in any way in response to charges of distortion in news and documentaries. These decisions, most of which have been unanimous, are something for which I have worked very hard within the Commission. Chairman Burch has noted most of them in his footnote 25, and the only one that I would add is the Commission's unanimous action on complaints regarding the networks' November 3, 1969, analysis of President Nixon's Vietnam speech. He later referred to that. It is a letter to Mrs. J. R. Paul, dated November 20, 1969.

I believe it would be unconstitutional for the FCC to engage in the task of validating the news performance of licensees. But I can't help but speculate what would have happened had the Pentagon Papers story been broken by a broadcaster. What would have been the governmental reaction? What would have been urged on the FCC? What would have been the FCC reaction? I would like to think the FCC would have affirmed the right of the broadcaster to broadcast any story and viewpoint he wished, subject only to the fairness doctrine. I would like to think the actions of the FCC would have been as sound as the view Justice Black expressed, quotation from which I have used to lead this testimony.

The discussion leads me to a fundamental issue. Why should the fairness doctrine, or for that matter, the provisions on equal time in political campaigns, apply to broadcasting when they do not apply to the print media? As Chairman Burch has pointed out to you, the right to broadcast is controlled by the Government, and is not available to all. Of couse, there are technological and economic barriers to entering any of the media. It is not easy to get in the newspaper business either. But there is no comparable governmental barrier in any other field. Moreover, as a 1964 note in the "Harvard Law Review" pointed out, there is also a distinction in the way in which newspapers and broadcast stations make decisions vital to the exercise of first amendment freedoms. The point, in summary, is that a broadcaster is trying to maximize his audience every minute of the broadcast day. A newspaper, by contrast, is trying to maximize his audience in part by appealing to special interest groups with special sections of his newspaper, so that there are some people who buy the newspaper just to read the comics or just to read the sports, or just to read the woman's page, or just to do the crossword puzzle, or whatever. And the newspaper publisher hopes that by gathering together a sufficient number of these special interest groups he can build a larger circulation.

Even after you exclude advertising, news and public affairs in broadcasting are not more than 10–15 percent of the programing. Broadcasting is basically an entertainment business. In newspapers the reverse is true.

Since *Red Lion* the courts have continued to stress that fairness and access may be constitutionally compelled. A second circuit case decided in May of this year has received less attention than I think it deserves. This involves our so-called prime time, cutting back on the network's programing of prime time. The argument was made that this was a constitutional abridgement of a station's right to run the network program. And the court—I quote from the opinion on page 12 of my statement—dismisses that argument. I will just quote from the final paragraph:

> To argue that the freedom of networks to distribute and licensees to select programming is limited by the prime time access rule, and that the First Amendment is thereby violated, is to reverse the mandated priorities which subordinate these interests to the public's right of access. The licensee is in many ways a 'trustee' for the public in the operation of his channel.

I think this is terribly important to note here, because this point is very often either ignored or misrepresented by the broadcasting establishment. It is very important to note that no broadcaster is denied by the fairness doctrine his right to put on any person or viewpoint he chooses. I understand that the Pentagon Papers story was presented to the networks and refused by them. If that is so, it was not the fairness doctrine that prevented their breaking this story. All the fairness doctrine requires is that diverse views are also presented on controversial issues of public importance. And I think it is terribly important to distinguish between a Government commanding someone in the media, broadcast or print, that he cannot put on a particular point of view and a rule that tells him that he must put on a particular point of view to balance up something he already has put on. It may be that either or both of those are desirable or undesirable policies, but they are in any event different policies, and they must be differently addressed.

The fairness doctrine keeps no ideas or voices from the audience —quite the contrary. Recently Dr. Clay Whitehead, Director of the President's Office of Telecommunications Policy, recommended the fairness doctrine be abandoned. Even he, however, recognized the need for a statutory right of access for pay to be applied to broadcasting. I do not believe he recommends such a statute to be applied to newspapers; and thus he also finds some relevant differences between newspapers and broadcastings.

Some suggest that entry into the newspaper business is just as economically and technologically difficult as entry into broadcasting, and therefore the same governmental standards on regulation should apply to broadcasting as they do to print. That view was demolished by the *Red Lion* decision, and simply will not withstand scrutiny. There is no right to start a broadcast station, absent governmental permission. No governmental license is required to publish or to write. There is nothing comparable to the growth of the underground press in broadcasting, and indeed there could not be. Nor, I might note, nothing comparable to the growth of suburban newspapers which have grown up around so many major markets in the United States in the last decade. Two fellows who tried now find themselves confronting indictment. Entry into broadcasting requires governmental permission to use a public resource, and this fact totally distinguishes broadcasting from newspapers. There was another case last year, *Rosenbloom* v. *Metromedia*, written by Mr. Justice Brennan, in which he is suggesting in footnote 15 a comparison between the *Red Lion* concept and the right of reply on libel that the first amendment grants to individuals.

It is not difficult to conceive what the result would be without a fairness doctrine. Broadcasters, acting as public trustees of a publicly owned resource, would be free to present only their viewpoint, or viewpoints they wished to present, and could censor out all others, as many of them are trying to do today, with moderate success, depending upon court actions. In a political campaign a broadcaster would be able to present and report only one candidate—his candidate—to the exclusion of all others. He could give free time only to one; or sell time at low rates to one and at exorbitant rates to the other. And there would be no recourse for those who were excluded.

If the broadcast campaign reform legislation becomes law, we will remove some of the equal time restrictions. But one of the reasons the Congress and the FCC have been willing to consider such a change has been the restraints of the fairness doctrine. I think the American people, through their elected representatives, have decided they want their public resource used fairly. I think it would be bad policy to do otherwise. And I believe the Constitution requires that this public resource be used fairly, with the public being afforded the guarantee to hear diverse viewpoints and information on controversial issues, without worrying whether an individual broadcaster may decide in his own discretion to give them that opportunity.

The fairness doctrine is not the only way to deal with this problem. The problem is that the power over the mass media in this country is concentrated in the three networks, and beyond that even in communities where there is competition, it is at least limited to a chosen few selected by the FCC.

The fairness doctrine is one way to guarantee that all points of view will get a hearing, that there will be robust, wide-open debate, and that viewpoints will not be excluded from the American people. But there are other systems which will help guarantee the public's right of access and right to know. Cable television, if it were a reality for the vast majority of the population, and if it included the opportunity for any citizen to get access to express his views, then the rights that the first amendment seeks to protect could very well be achieved in that way. And the guarantees of the fairness doctrine must be no less on cable television than they are in over-the-air broadcasts.

But I don't think broadcasters can have it both ways. Today they oppose the expansion of cable television as a threat to their right to make money from their control of access to the public. They oppose the public's efforts to gain access to their own stations. And at the same time they want us to do away with the fairness doctrine. Such a posture is not only internally inconsistent and unjust, it raises some very serious questions about the motives of the broadcasting establishment. I am not concerned that they oppose the fairness doctrine, I am concerned that they not only oppose the fairness doctrine but also cable television and access to cable, and also access to their own station, because it leaves them in the posture of suggesting that they do want to retain total control on the ideas and information reaching the American people, and they don't want to have any check upon that arbitrary power. Their position is simply intolerable; but they have urged it again and again before the Commission, the courts, and in Congress—so far, I am pleased to say, in largest measure unsuccessfully.

I would agree with Chairman Burch that we have not perfected the administration of the fairness doctrine. You have heard a lot of complaints, and you have raised some questions yourself. And I am sure you desire improved administration in many of these areas.

But frankly I think the broadcasters are crying wolf again. As Fred Friendly told you, it is not the FCC that is censoring broadcasting. The limited intervention of the FCC through the fairness doctrine is to insure that, after broadcasters have wielded their censor's knife the public at least gets the right to hear diverse and antagonistic viewpoints with regard to what is on the air. But all agree that the administration of the fairness doctrine can be improved. We have undertaken that task with our new hearing. And I think Chairman Burch is entitled to considerable commendation for turning us in that direction.

No; it is not the FCC or the fairness doctrine that stands in the way of the broadcaster's first amendment freedoms as a trustee for the public. It is the broadcaster himself who censors—censors in the name of saving money, censors in the name of currying favor with advertisers, politicians, or others whose predilections he would rather not offend. The fairness doctrine stands as a constitutionally required protection to the public. I am perfectly willing to consider alternatives that would retain this protection for the public, of the kind I have mentioned. But I am unwilling to give up the protection of the fairness doctrine without a substitution for it. I do not believe that Dr. Whitehead's proposals, as initially put forward, would retain the full protection the Constitution requires.

There is one other major subject that I would like to touch upon. There can be no doubt that broadcasting, and especially television, is an extremely important aspect of achieving and retaining high political office, and indeed in the resolution of political issues in this democracy. When we examine broadcasting and the First Amendment, we must inquire into broadcasting as it functions in our political life. Nor is it any criticism to observe that the role of the Presidency and the executive branch as become totally intertwined with a concern over the way that the media reports and comments on the political decisionmaking in our Nation. I have reviewed the recent history of this phenomenon in a speech and article written last December that I am offering for the record. But the basic conclusion I reach is that there is a tremendous imbalance in the ability of the President and the executive branch to gain access to the media unbalanced by opposing views. This imbalance is manifested in two ways. There is an imbalance for the President as the political leader of one party vis-a-vis the opposing parties who are out of power. And there is an imbalance between two supposedly coequal branches of Government—branches that are supposed to be equal—the executive and the Congress. I do not say that a President ought not to be able to speak to the American people when he feels it appropriate. Of course he should. But I do wonder about the justice of permitting the President to seize all three networks, as well as the radio networks, to force the American people to hear him to the exclusion of everything else at no cost to himself, when we then turn around and forbid 14 U.S. Senators to answer, at their expense, on one network.

During the past 3 years we have witnessed increasing proficiency in executive control of broadcasting. As Larry Michie put it in "Variety" last week:

> As has been the case since Vice President Spiro T. Agnew began criticizing the network news, the theory goes, the Administration has kicked broadcasting in the news department while patting them on the bottom line.

Eliminating the fairness doctrine will not make broadcasters any less vulnerable. We can only rely on the professionalism of the broadcasters, the protections of access and the fairness doctrine, and the good sense of the American people.

I would like to conclude by again telling you how important I believe these hearings are. There is no subject of more importance to the functioning of a free society. If you have questions, I will try to be as helpful as I can.

(Prepared statement follows:)

TESTIMONY OF COMMISSIONER NICHOLAS JOHNSON, FEDERAL COMMUNICATIONS COMMISSION, BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE SENATE JUDICIARY COMMITTEE, OCTOBER 20, 1971

There is no sanctuary in the First Amendment for unlimited private censorship in a medium not open to all. * * * It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.

—Justice Byron White,
for the Court in *Red Lion Broadcasting Co. v. FCC* (1969).

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government.

—the late Justice Hugo L. Black,
concurring in *New York Times vs. United States* (1971).

Mr. Chairman, I cannot overemphasize my commendation of you, and enthusiasm for the task you have undertaken.

Caught up in the day-to-day business of governing, it is all too easy for those of us in the legislative and executive branches of government, and the regulatory commissions, to lose sight of the bedrock foundations of the institutions we temporarily occupy.

Ours is an exciting experiment here in America. We believe that if an entire people are well educated and fully informed they will be able to govern themselves—to identify and analyze the issues, to articulate their desires, and to carry them to fulfillment.

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It is little wonder that freedom of speech is often misunderstood, ignored or abused. But it is especially unfortunate that there is often an almost inverse relationship between power (office, wealth, education, social status) and a marrow-deep commitment to the logical extensions of democracy and free speech. One need only begin to list the examples to dramatize the point—the Administration's intimidation of the media and suppression of dissent, the occasional arrogance of the wealthy and educated towards the views of the working class and poor, the impediments in North and South alike to the basic rights of registration and voting, and the energetic opposition of broadcasters to the airing of sentiments they would prefer to censor. The list could go on and on.

So in the midst of hearings on ABMs, SSTs, Lockheed loans, and other programs of socialism for the rich, it is refreshing to see distinguished Senators —to borrow from the language of radio and television—pause for a word on behalf of the principle that makes it all possible.

In your opening statement, Mr. Chairman, you raised a number of specific issues: (1) the subpoenaing of newsmen, their notes and filmed "outtakes," (2) the government's efforts to enjoin publication of newspapers, and the intimidation of the broadcast media, (3) the use of false press credentials by government investigators, and (4) regulation of the broadcasting industry.

I have written at length on some of these issues. Rather than take up your time merely repeating statements, I am attaching some, summarizing others, and merely listing some more. In addition to this opening statement I will, of course, be pleased to try to respond to whatever questions or comments you may have.

(1) On February 12, 1970, I addressed the Nieman Fellows of Washington, D.C. ["Subpoenas, Outtakes, and Freedom of the Press: An Appeal to Media Management"] urging a constitutional theory that the threat of sanctions, such as subpoenaing reporters, "may stem the free flow of information and news to the public." That speech is attached. I have also urged the FCC to refrain from asking for newsmen's notes and filmed "outtakes" on a number of occasions—such as *Democratic National Convention*, 16 F.C.C.2d 650 (1969); *Hunger in America*, 20 F.C.C.2d 143 (1969); *Selling of the Pentagon*, 30 F.C.C.2d 150 (1971).

(2) This Administration's intimidation of the print and broadcast media should be a matter of great concern to all Americans of both parties. The full force of its power can only be appreciated, however, when one reviews the sweeping range of its efforts to bend the media to its will. I tried to provide some samples of this range in a paper prepared for the International Association of Political Consultants, entitled "Government by Television." That paper, as published in the March 1971 issue of *Earth* magazine is attached.

(3) The matter of police government use of false press credentials has never —or only rarely and tangentially—arisen before the FCC.

(4) The matter of broadcast industry regulation is, I presume, the principal reason why you have asked FCC Chairman Dean Burch and me to appear before you. I will spell out some thoughts in a moment, but first let me summarize my position.

a. There are occasions when Chairman Burch and I disagree, but this is not one of them. I fully concur in his explanation of the Commission's view as to the background and need for the Fairness Doctrine.

b. I also agree with Fred Friendly, who testified before you on October 12, 1971 that:

I perceive very little FCC meddling in newsroom activities. The chilling hand that concerns me far more is the corporate concern for maximizing profits.

Two chapters of my book, *How to Talk Back to Your Television Set* (Atlantic-Little, Brown/Bantam, 1970) are relevant to this problem. (Chapter 2, "The Media Barons" and Chapter 3, "The Silent Screen"). Mr. Richard Salant answered my charges of corporate censorship in an article in *TV Guide*, "He Has Exercised His Right—to Be Wrong," September 20, 1969. My reply is attached. It was delivered to the Radio and Television News Directors Association Conference on September 26, 1969, "Is There a Salant in the News?" It was printed in the *RTNDA Bulletin*, January 1970, and the *Congressional Record*, 115 *Cong. Rec.* E10178 (daily ed. Dec. 1, 1969). Other relevant dissenting opinions and statements are cited.

c. The problems of "access" to the mass media were ably discussed before your Committee by, among others, Professor Jerome Barron on September 30, 1971. His early views on this subject [Barron, "Access to the Press—A New First Amendment Right," 80 Harv. L. Rev. 1641 (1967); Barron, "Access—The Only Choice for the Media?" 48 Tex. L. Rev. 766 (1970)] have already gone a long way to becoming law. See, *e.g.*, *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969); *Business Executives Move for Vietnam Peace v. F.C.C.*,—— F.2d—— (D.C. Cir. 1971). I have written of these issues in a number of dissenting opinions, which are collected in the bibliography. A recent article, which I co-authored with a brilliant young lawyer and former legal assistant, Tracy Westen, is attached [N. Johnson & T. Westen, "A Twentieth-Century Soapbox: The Right to Purchase Radio and Television Time," 57 Va. L. Rev. 574 (1971).]

Let me begin my discussion by empasizing that I join in most of Chairman Burch's statement to you. He has ably outlined the premises and issues underlying the Fairness Doctrine as it applies to broadcasting. I fully agree with him that the leading constitutional teaching on this question is to be found in the Red Lion decision.

There are a great many people who will applaud these hearings on so vital a subject. As a former law professor, and having only seen the press reports of your sessions, I very much look forward to seeing the full printed hearing record. It should become a bestseller at law schools and journalism schools throughout our nation.

The importance of these hearings, not only for those who participate in them, but for the entire nation, was underscored by some comments that Senator Goldwater made on the floor of the Senate in April of 1970. In discussing a public opinion poll that CBS' "Sixty Minutes" had sponsored, he said:

> The findings of the poll were extremely interesting and, to quite an extent, disturbing and frightening. What it shows is that a rather large percentage of our people think that there are amendments incorporated in the Bill of Rights which should be repealed. 116 *Cong. Rec.* 13137–38 (April 27, 1970).

On freedom of the press the poll results showed:

> [W]ell over one-half of the people (54%) would not give everyone the right to *criticize* the government, if the criticism were thought to be damaging to our national interest; and, a comparable number (55%) feel newspapers, radio and television should not be permitted to *report* some stories considered by the government to be harmful to our national interest (wartime censorship was excluded in the question).

I would share Senator Goldwater's characterization of these results as "disturbing and frightening." If we truly believe that freedom of speech and press are important constitutional liberties—important to the functioning of a representative democracy—then surely we should be concerned if the general populace finds them unnecessary. I am confident that most Americans would support the guarantees of freedom of speech and press—*if* the issues were ever presented and considered thoughtfully.

I hope that your hearings, and the dialogue they stimulate, will encourage this thoughtful consideration. Those of us who support these great freedoms, in government, in journalism and elsewhere, need to tell the American people by words and actions why these guarantees are important—not because they protect the right of businessmen to make money, or to pour abuse on someone, but because they protect the right of the American people to know. It is ironic that the media is now suffering, in part, because it has not done this educational job as well as it might have.

It is useful quickly to sketch how the system of broadcasting was established in this country, why the system of regulation was adopted, and why the Fairness Doctrine was devised.

The radio spectrum and the right to broadcast were considered a national resource, owned by the people as a whole. In deciding how that national resource was to be used, a number of alternatives were considered. A governmental broadcasting system could have been established, on the model of the French ssytem, or a more independent public corporation like the British Broadcasting Corporation. Each special interest group could have been given its own station. Instead, this national resource was not given to private users, nor was it sold. Under the Communications Act of 1934, Congress determined that private licensees would be chosen by the FTCC to operate stations as fiduciary trustees of the American people as a whole. Private profit would be permitted, but Congress clearly contemplated that non-remunerative programming would also be required. The public was thought to be entitled to a public service in exchange for the profitable use of its property. It is essential to grasp this idea of a fiduciary trust that underlies the scheme of broadcast regulation in this country. The act expressly spells out that a broadcaster does not own a license in the way that a newspaper company owns its "right" to print.

I do not mean to suggest that the regulation of broadcasting could never involve the use of unconstitutional methods. That has been the issue in a number of court decisions, including *Red Lion*—Where the industry unsuccessfully argued the unconstitutionality of the Fairness Doctrine. One of the series of FCC decisions of which I am proudest is our steadfast refusal to discipline the networks in any way in response to charges of distortion in news and documentaries. These decisions, most of which have been unanimous, are something for which I have worked very hard within the Commission. Chairman Burch has noted most of them in his footnote 25, and the only one that I would add is the Commission's unanimous action on complaints regarding the networks' November 3, 1969 analysis of President Nixon's Vietnam speech. [Letter to Mrs. J. R. Paul, FCC Public Notice No. 41437 (Nov. 20, 1969).]

I believe it would be unconstitutional for the FCC to engage in the task of validating the news performance of licensees. But I can't help but speculate what would have happened had the Pentagon Papers story been broken by a broadcaster. What would have been the governmental reaction? What would have been urged on the FCC? What would have been the FCC reaction? I would like to think the FCC would have affirmed the right of the broadcaster to broadcast any story and viewpoint he wishes, subject only to the Fairness Doctrine. I would like to think the actions of the FCC would have been as sound as the view Justice Black expressed.

This discussion leads me to a fundamental issue. *Why should the Fairness Doctrine, or for that matter, the provisions on equal time in political campaigns, apply to broadcasting when they do not apply to the print media?* As Chairman Burch has pointed out to you, the right to broadcast is controlled by the government, and is not available to all. Of course, there are technological and economic barriers to entering any of the media. But there is no comparable *governmental* barrier in any other field. Moreover, as a 1964 note in the *Harvard Law Review* pointed out, there is also a distinction in the way in which newspapers and broadcast stations make decisions vital to the exercise of First Amendment freedoms:

> Perhaps the most satisfactory distinction lies in the nature of the two types of communication organs. Free competition in broadcasting would probably result in the presentation of only the most popular views and programs; newspapers, on the other hand, are sold as a unit rather than by time. There is far less economic impetus for publishers to maximize their audience for each page than there is for broadcasters to maximize their audience for each time period. Indeed, economic motivation might lead publishers to give space to less popular topics, since those who are specially interested in these areas will be encouraged to buy the entire publication. Thus, *minority interests and the general public interest in the free exchange of information and ideas—protection of which underlie the first amendment—are fostered by FCC regulation.*

Note, "Regulation of Program Content by the FCC," 77 Harv. L. Rev. 701, 714 (1964); and see Young, "Fairness Doctrine: Television As a Marketplace of Ideas," 45 New York Univ. L. Rev. 1222 (1970). Even after you exclude advertising, news and public affairs in broadcasting are not more than 10–15% of the programming. Broadcasting is basically an entertainment business. In newspapers the reverse is true.

Since *Red Lion* the courts have continued to stress that fairness and access may be constitutionally compelled. A Second Circuit case decided in May of this year has received less attention than I think it deserves. In 1970 the FCC decided that television stations of a certain class would be required to take one of their four prime time hours from a source other than the three major networks. This was a decision by a divided Commission, although those who dissented did so on policy grounds. On appeal, the argument was made that this decision was an unconstitutional abridgment of a station's right to program what it wished. Judge Hays, speaking for the court in *Mt. Mansfield Television v. F.C.C.* relied on *Red Lion*, and wrote:

> When viewed in the light of these principles, the prime time access rule, far from violating the First Amendment, appears to be a resonable step toward fulfillment of its fundamental precepts, for it is the stated purpose of that rule to encourage the "diversity of programs and development of diverse and antagonistic sources of program service" and to correct a situation where "only three organizations control access to the crucial prime time evening television schedule." The specific arguments raised by the petitions reflect basic misconceptions of that purpose and of the First Amendment principles outlined above.
>
> Thus, while the rule may well impose a very real restraint on licensees in that they will not be able to choose, for the specified time period, the programs *they* might wish, as a practical matter the rule is designed to open up the media to those whom the First Amendment primarily protects—the general public.
>
> To argue that the freedom of networks to distribute, and licensees to select programming is limited by the prime time access rule, and that the First Amendment is thereby violated, is to reverse the mandated priorities which subordinate these interests to the public's right of access. The licensee is in many ways a "trustee" for the public in the operation of his channel.

Judge Hays has provided us a very good statement of the purposes behind both the prime time access rule and the Fairness Doctrine.

Please note, because it is an essential that is often ignored or misrepresented, that no broadcaster is denied the right to put on any person or viewpoint that he wishes because of the Fairness Doctrine. I understand that the Pentagon Papers story was presented to the networks and refused. It was not the Fairness Doctrine that prevented their breaking it. The Fairness Doctrine *only* requires that *diverse* views are also presented on controversial issues of public importance. It guarantees the public's right to know. The Fairness Doctrine keeps no ideas or voices from the audience—quite the contrary.

Recently Dr. Clay Whitehead, Director of the President's Office of Telecommunications Policy, recommended the Fairness Doctrine be abandoned. Even he, however, recognized the need for a statutory right of access for pay to be applied to broadcasting. I do not believe he recommends such a statute to be applied to newspapers; and thus he also finds some relevant differences between newspapers and broadcasting.

Some suggest that entry into the newspaper business is just as economically and technologically difficult as entry into broadcasting, and therefore the same governmental standards on regulation should apply to broadcasting as they do to print. That view was demolished by the *Red Lion* decision, and simply will not withstand scrutiny. There is no right to start a broadcast station, absent governmental permission. No governmental license is required to publish or to write. There is nothing comparable to the growth of the underground press in broadcasting, and indeed there could not be. Two fellows who tried now find themselves confronting indictment. Entry into broadcasting requires governmental permission to use a public resource, and this fact totally distinguishes broadcasting from newspapers.

In a radio station libel case before the Supreme Court last term, Mr. Justice Brennan wrote for the Court:

> If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern.[15]
>
> One writer, in arguing that the First Amendment itself should be read to guarantee a right of access to the media not limited to a right to respond to defamatory falsehoods, has suggested several ways the law might encourage public discussion. Barron, "Access To the Press—A New First Amendment Right," 80 Harv. L. Rev. 1641, 1666–1678 (1967). It is important to recognize that the private individual often desires press exposure either for himself, his ideas or his causes. Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly.

Rosenbloom v. Metromedia, 403 U.S. 29, 47 (1970) (footnote in original).

It is not difficult to conceive what the result would be without a Fairness Doctrine. Broadcasters, acting as public trustees of a publicly owned resource, would be free to present only their viewpoint, or viewpoints they wished to present, and could censor out all others. In a political campaign a broadcaster would be able to present and report only one candidate—his candidate—to the exclusion of all others. He could give free time only to one; or sell time at low rates to one and at exorbitant rates to the other. And there would be no recourse for those who were excluded.

If the broadcast campaign reform legislation becomes law, we will remove some of the equal time restrictions. But one of the reasons the Congress and the FCC have been willing to consider such a change has been the restraints of the Fairness Doctrine. I think the American people, through their elected representatives, have decided they want their public resource used fairly. I think it would be bad policy to do otherwise. And I believe the Constitution requires that this public resource be used fairly, with the public being afforded the guarantee to hear diverse viewpoints and information on controversial issues, without worrying whether an individual broadcaster will give them that opportunity.

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[15] Some States have adopted retraction statutes or right of reply statutes. *** Cf. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

There are other systems which would help guarantee the public's right of access and right to know—rights protected by the First Amendment. If cable television were a reality for the vast majority of the population, and included the opportunity for any citizen to get access to express his views, for free or by paying a small sum, then rights the First Amendment seeks to protect could very well be achieved in an alternative way, and the guarantees of the Fairness Doctrine might be less necessary. But I don't think broadcasters can have it both ways. Today they oppose the expansion of cable television as a threat to their rights to make money from their control of access to the public. They oppose the public's efforts to gain access to their own stations. And at the same time they want us to do away with the fairness doctrine. Such a posture is not only internally inconsistent and unjust, it raises some very serious questions about the motives of the broadcasting establishment. Their position is simply intolerable; but they have urged it again and again before the Commission, the courts, and in Congress— so far, I am pleased to say, in largest measure unsuccessfully.

My affirmance of the Constitutional importance of the Fairness Doctrine does not mean that the Commission has perfected its administration. You have heard a lot of complaints, and have raised some questions. Frankly I think the broadcasters are crying "wolf" again. As Fred Friendly told you, it is not the FCC that is censoring broadcasting. The limited intervention of the FCC through the Fairness Doctrine is to insure that, after broadcasters have wielded their censor's knife the public at least gets the right to hear diverse and antagonistic viewpoints with regard to what *is* on the air. But all agree that the administration of the Fairness Doctrine can be improved. As the Chairman has told you, the FCC is presently undertaking that very task. What the Chairman has not told you is that he is the one who has exercised the leadership in getting this proceeding going.

No, it is not the FCC or the Fairness Doctrine that stands in the way of the broadcaster's First Amendment freedoms as a trustee for the public. It is the broadcaster himself who censors—censors in the name of saving money, censors in the name of currying favor with advertisers, politicians, or others whose predilections he would rather not offend. The Fairness Doctrine stands as a constitutionally required protection to the public. I am perfectly willing to consider alternatives that would retain this protection for the public, of the kind I have mentioned. But I am unwilling to give up the protection of the Fairness Doctrine without a substitution for it. I do not believe that Dr. Whitehead's proposals, as initally put forward, would retain the full protection the Constitution requires.

There is one other major subject that I would like to touch upon. There can be no doubt that broadcasting, and especially television, is an extremely important aspect of achieving and retaining high political office, and indeed in the resolution of political issues in this democracy. When we examine broadcasting and the First Amendment, we must inquire into broadcasting as it functions in our political life. Nor is it any criticism to observe that the role of the Presidency and the Executive Branch has become totally intertwined with a concern over the way that the media reports and comments on the political decisionmaking in our nation. I have reviewed the recent history of this phenomenon in a speech and article written last December that I am offering for the record. But the basic conclusion I reach is that there is a tremendous imbalance in the ability of the President and the Executive Branch to gain access to the media unbalanced by opposing views. This imbalance is manifested in two ways. There is an imbalance for the President as the political leader of one party vis-a-vis the opposing parties who are out of power. And there is an imbalance between two supposedly co-equal branches of government, the Executive and the Congress. I do not say that a President ought not to be able to speak to the American people when he feels it appropirate. But I do wonder about the justice of permitting the President to seize all three networks, as well as the radio networks, to force the American people to hear him to the exclusion of everything else at no cost to himself, when we then turn around and forbid 14 U.S. Senators to answer, at their expense, on one network.

During the past three years we have witnessed increasing proficiency in Executive control of broadcasting. As Larry Michie in *Variety* put it last week:

> As has been the case since Vice President Spiro T. Agnew began criticizing the network news, the theory goes, the Administration has kicked broadcasting in the news department while patting them on the bottom line.

Eliminating the Fairness Doctrine will not make broadcasters any less vulnerable. We can only rely on the professionalism of the broadcasters, the protections of access and the Fairness Doctrine, and the good sense of the American people.

I would like to conclude by again telling you how important I believe these hearings are. There is no subject of more importance to the functioning of a free society. If you have questions, I will try to be as helpful as I can.

Senator ERVIN. The subcommittee appreciates your commendation of its action in holding these hearings.

We have in the constitution of my State of North Carolina a provision which was written in 1776 to the effect that a frequent recurrence to fundamental principles is absolutely necessary for the preservation of liberty. If the history of the world teaches anything it teaches that liberty is always in jeopardy, and particularly so in times of national stress and strain. Eternal vigilance is the price of liberty and that is the price that we are going to have to pay if we are going to retain it. It is for those reasons that the subcommittee felt that it would be worthwile, in addition to considering the proposed legislation that is before us, to have just a recurrence of these basic liberties which are embodied in the first amendment. First Amendment freedoms are always in jeopardy. Those in power don't like things to be said about them that are uncomplimentary. They would like to curtail the freedom of speech and the freedom of the press, because of a very human instinct. When they don't like what somebody is saying, they would just want to silence them. The reason the First Amendment was set up, and I think you put your finger on the objective of the First Amendment, is to give the freedom of speech to everybody without distinction. I believe the courts have gone so far as to hold that it gives people freedom to advocate the overthrow of the Government even by unconstitutional means such as violence, as long as they stop there and do not advocate the action to carry out what they proclaim in this respect. If I construe your statement correctly, you have expressed the thesis that it is highly important in our system of government, in fact a necessity, to have an expression of diverse and antagonistic views on all subjects of public importance; that is the fundamental purpose of the first amendment.

So it behooves all of us to be sure that we respect the right of people to express thoughts which we hate. As has been exhibited by the licensing of publications in England, and also by the seditious libel law, Government would suppress freedom of speech unless constrained from so doing. So the first amendment was written to prevent the Government from abridging that right.

You point out, I think, in a very lucid manner that in the very nature of things there are some fundamental differences between the printed word and the broadcast word. In order to prevent electronic communications from making a bedlam where no voice could be heard, it is necessary for the Government to designate some agency of government to allocate frequencies among those who apply for them. And while anyone, theoretically at least, can start a newspaper, because of the limited number of frequencies with only a minimum number of persons being assigned broadcast frequencies, the Government, of necessity, must grant licenses to use the airwaves.

And you point out also that the theory underlying the law on this subject has been that the airwaves belong to the people, and were not given to the networks as their private property; the networks are permitted to use them, but they are permitted to use them on a fiduciary basis. I infer from your statement that you believe in permitting the networks to have complete freedom of expression of their viewpoints, subject only to the fairness doctrine, and you state, I think, that very succinctly on page 10.

Mr. **Johnson**. Yes, sir.

Senator **Ervin**. The fairness doctrine, you state in substance, was created to make certain that the American people would hear both sides of a highly controversial public question. For that reason, in your view, the fairness doctrine is not only perfectly consistent with the First Amendment freedom for the broadcasters to express their own viewpoints, or to broadcast any story that they wish, but that it is necessary to make the first amendment right of the people effective.

Mr. **Johnson**. Yes, sir.

Senator **Ervin**. I like to think that all news media are protected by the first amendment for a twofold purpose. In the first place, I think the founding fathers put the First Amendment in the Constitution for philosophical reasons, that they recognized that unless we had freedom of speech and freedom of the press the people of our Nation would be in danger of being subjected to tyranny of the mind. Furthermore, the institutions that have been created for the government of our country cannot possibly function in the absence of the highest possible degree of freedom of speech and freedom of the press, because the people cannot act intelligently unless they know the issues and have an opportunity to hear all sides and viewpoints on controversial questions.

Is that a fair summation.

Mr. **Johnson**. Yes, sir. I think you have demonstrated more comprehension of my statement, perhaps, than even I have.

Senator **Ervin**. Thank you. And of course since all of these things have to be operated by human beings, and have to be judged by human beings, there could be some imperfections in both operations and decisions respectively.

Mr. **Johnson**. Yes, sir.

Senator **Ervin**. But that is a risk that we have to take as the risk we have to take with respect to freedom of speech. Although it can occasionally cause trouble, it certainly frees us in the long run.

Senator **Hruska**. Mr. Johnson, I want to concur with the chairman of this subcommittee in his expression of appreciation for your appearance here and for your testimony.

Mr. **Johnson**. Thank you, Senator Hruska.

Senator **Hruska**. There is one place in your statement where you say that one of the series of FCC decisions of which I am proudest is our steadfast refusal to discipline the networks in any way in response to charges of distortion in news and documentaries.

Could you envision or conceive of any situation in which such distortion could be so flagrant and so extreme that the public interest would require the Federal Communications Commission intervention.

Mr. **Johnson**. Senator Hruska, I think I stand on Chairman Burch's statement on that. We are not in the truth-finding business. The Commission is concerned about the character qualifications of its licensees. Anyone would be disturbed by a management order to newsmen that the news be distorted or that inaccurate information be portrayed. But it has been the Commission's view—and I underscore the fact that it has been a unanimous view—on often highly charged partisan issues, such as the coverage of the democratic national convention, and the Vice President's criticism of the networks for their commentary on President Nixon's speech—it has been the consistent and the unanimous position of the Commission that we should not get into the business of making judgments about the way in which a news story is edited, or what facts are presented, or whether or not the story is true or what not, unless there is extrinsic evidence that there is deliberate effort on the part of management to distort.

There have been such instances in the past, some rather infamous cases, in which management has made it very clear that they want the news distorted. Chet Huntley blew the whistle on a broadcaster out on the West Coast when he was just an up-and-coming young newsman, where the owner of a station directed his newsmen to distort the news in a particular political campaign.

But barring that kind of a situation, I think it is good policy and law for the FCC to stay out of that level of detail, and we have done so.

Senator **Hruska**. At any rate, those situations which have come to your attention where the decisions have been to refuse to discipline, they have not partaken that type of conduct to which you refer as a possible basis for intervention or for discipline?

Mr. **Johnson**. That is correct. And here again, I would emphasize what Dean Burch said. You are ultimately, fortunately or unfortunately, dependent upon the quality of the appointments to the FCC. One can hope that you will have men there, and women, who are conscientious and have a sense of responsibility, and nonpartisanship, and commitment to the Constitution of the United States, and that they will carry out those commitments with intelligence and dedication to their daily task. And if they will, the system works pretty well. If they don't, we have some serious problems in our country. Which is one of the many reasons why we require the President to come over and get the advice and consent of the U.S. Senate on these appointments.

Senator **Hruska**. Thank you very much.

That is all I have, Mr. Chairman.

Senator **Ervin**. When you get into the area of communications there us always a great controversy about what is truth.

Mr. **Johnson**. Yes, sir.

Senator **Ervin**. It seems to me that you could say that the first amendment was written to make Americans politically, intellectually and spiritually free, and it is not a proper function of the Government to tell the American people what is the truth in any of these areas. It is the purpose of the First Amendment to give all Americans the right to discuss what they think is the truth in all of these areas.

Mr. JOHNSON. Yes, sir.

Senator ERVIN. And so I commend your statement on page 9, where you made the statement that Senator Hruska called attention to, "one of the series of FCC decisions of which I am proudest is our steadfast refusal to discipline the networks in any way in response to charges of distortion in news and documentaries."

Wouldn't a different policy require the FCC to undertake the very difficult and impossible and forbidden task of saying what truth is?

Mr. JOHNSON. Yes, I think so.

I might add at this point, Mr. Clairman, that one of the issues we don't discuss too much in this country when we talk about first amendment freedoms, one I think is just absolutely crucial today, is the restraints on free speech that comes about through corporate power.

What the founding Fathers were concerned about was not just restraints on the opportunity for everyone to speak his mind that might be imposed by Government. They were concerned about restraints coming from any direction. At that time it seemed to everyone that the only really meaningful threat would be the Government. That is what they were used to in the 17th and 18th centuries. Today we see a far more serious threat in my judgment to free speech coming from large corporations and corporate power. There are restraints on free speech on the part of their employees—who happen to constitute an incredibly large proportion of the total American population—people who are essentially written out from under the protections of the First Amendment because their corporate supervisors say, "we don't want you speaking on issues that may be embarrassing to our company." There are also the restraints that come from corporations in terms of their control over progam content, either by direct order from advertisers or by an acquiescence on the part of networks to what they believe to be the desires of their advertisers.

There was a book published by John Cobley called "*Black-listing*" which you might want to examine. It describes in detail a very black period in the history of American broadcasting where broadcasters were dictated to by advertisers as to who could and could not appear on the airwaves.

I have made it a point during the last few years to get to Los Angeles from time to time and talk to some of the writers and producers and people out there who work in the television business. And they can tell you a set of horror stories to curl your hair about the limitations that are imposed upon them, the subjects they cannot discuss, the dramas they cannot write and put on television, the political satire that they are forbidden from doing.

Tommy Smothers in his experience with CBS told me that 75 percent of the programs that he produced for CBS had something or other censored out of them. The examples are legion. He couldn't put Dr. Spock on because he was a convicted felon, said CBS. He couldn't have Pete Seeger sing a song, "Waste Deep in the Big Muddy." Joan Baez couldn't dedicate a song to her husband because he was in jail.

And then we had a case last year of ABC sports which, in covering the Buffalo-Holy Cross game, refused to cover the half time because they were going to sing some songs about peace, and ABC thought that was a controversial subject that the people shouldn't be exposed to. And yet a couple of weeks later they trotted out the Chairman of the Joint Chiefs of Staff at the Army-Navy game ABC sports didn't find that controversial.

I have had some personal experience of my own in this regard. The most recent, that was reported in the *New York Times*, was an episode on the Merv Griffin show, an entire section where we were discussing the impact of advertising upon mental illness and the general health of the American people, and it was simply excised from the show in its entirety.

There are hundreds of examples of this. And I think in my own judgment this is a problem that is far more serious today, and one on which your committee might well want to get testimony from those most directly involved in Hollywood or in terms of the volumes that have been written in which these episodes have been documented. That is a far more serious problem, in my judgment, than any now imposed by Government. For someone who has not greeted Spiro Agnew's antics with enthusiasm, that is saying considerable on my part.

Senator ERVIN. I certainly do agree that the Government doesn't pose the only threat to freedom of speech. I think that some of the most powerful threats come from the area of advertisement.

Counsel?

Mr. BASKIR. Mr. Johnson, currently I understand WMAL in Washington is undertaking an editorial campaign entitled "Get the Guns off the Streets." Without asking for an ex cathedra judgment as to how the fairness doctrine applies, I would like to use that as an example for a few questions. Do you think you could give us a description of what is the minimum the fairness doctrine would require with respect to an editorial campaign of this magnitude.

Mr. JOHNSON. Well, I suspect that again, without knowing the precise details here, and without obviously passing judgment on them, since I don't know them all, often stations will handle this by simply announcing at the end of the editorial that contrary views are not only welcome but are sought by the station.

Anything broadcast by the station is subject to the fairness doctrine. But the balance could be provided anywhere in its programming. It may have an interview program in which someone taking the opposite view of the station is interviewed in some Sunday afternoon talk show. It may have some items on its daily news program dealing with it. Or it may provide direct time, an equal amount of time for somebody to answer in that editorial slot.

Mr. BASKIR. This campaign apparently, as I saw in a newspaper story about it, is unique in its size and frequency and perhaps strength throughout broadcasting history. I am not in a position to judge that conclusion. But apparently it is continually on the air at all hours many, many time daily and they intend to continue it indefinitely.

Would the fairness doctrine require, let's say, equivalent or fair access in terms of the time and the magnitude for the presentation of opposing points of view?

Mr. JOHNSON. The short answer to that is yes. The longer answer is a little more complicated.

Mr. BASKIR. I am interested in the short answer.

Mr. JOHNSON. I don't have many of those.

Mr. BASKIR. On an issue like this why couldn't that be taken care of by the fact that certainly in Washington, as all over the country, gun control is quite obviously a controversial issue, and such an editorial campaign will undoubtedly provoke letters to editors, it may provoke other television and radio stations to take other points of view, and will provoke speeches by public officials in the Federal Government both in the Congress and the executive branch, and by local officials? The opposing point of view on this issue will be aired and when you look at the totality of how controversies are discussed in the public arena, this, rather than requiring WMAL to present the other side, will take care of the problem.

Mr. JOHNSON. You may be asking two questions. The first I have already addressed. That is to say, if the issue is widely debated in the Washington, D.C. area, one would presume that WMAL carried that debate as a part of its normal news coverage, and one could argue that therefore there was balance in its programming.

The second question you may be asking is why not permit a station to be as biased, propagadistic as it chooses—if I may state your case most strongly—because there are in Washington, D.C., an ample number of competing, newspapers, radio, and television stations, expressing viewpoints of one type or another. And my answer to that is the same that I gave to Senator Ervin, and that he stated more eloquently than I, that this is a limited media, and one in which the fairness doctrine should apply.

Mr. BASKIR. Let's take the implications of Government licenses and put that aside for a second and go to the substance of the argument with respect to the fairness doctrine and other kinds of Government regulations. On page 15, all of the criticisms you have with respect to the consequences of and the absence of the fairness doctrine apply in substance to newspapers; there are newspapers that follow their news page with the editorial judgment of the owners, that do distort, that do slant, there are indeed newspaper markets in which there is basically one newspaper—the voice of one group of persons, there are very bad newspapers in very many parts of the country. All of these criticisms that apply to broadcasting also apply to newspapers. It would seem to me that, once we have put aside the licensing difference because of the frequency scarcity, the logic of these arguments either says that the same controls apply to broadcasting as apply to newspapers, or the same lack of controls applying to newspapers should apply to broadcasters.

Mr. JOHNSON. But saying that we are going to put aside the matter of licensing is rather like saying, "once we put aside the reason for the distinction, there is no reason for the distinction." And I guess I would have to agree with that.

There are those who argue that the fairness doctrine, or some variant of it, ought to apply to newspapers. And indeed the doctrine of access has been applied in a smattering of cases to newspapers that have refused to accept, for example, newspaper ads with political content. So if you are asking whether or not there would be—in terms of desirable social policy—reasons for requiring more balance on the part of newspapers in their reporting, I think probably I would agree, yes, there may very well be good reasons for doing that. The reason we don't, however, is historical, it is technological, it is legal, and to some extent constitutional, and is involved in the licensing—the distinction when you ask that I set aside.

Mr. **Baskir**. There is a halfway point at which to stop, and that is to have the Government role only that of a traffic cop, leaving the rest of the issues to be decided the same way we have them decided or resolved in the area of newspapers, the free for all.

Mr. **Johnson**. A traffic cop?

Mr. **Baskir**. Just restricting the Government's role to being a traffic cop with respect to frequency allocations.

Mr. **Johnson**. What would a traffic cop do with frequencies?

Mr. **Baskir**. Make sure that people drive on one side of the road and don't hit each other. In other words, you have this frequency, that is yours to do with as you choose, and nobody can have that frequency.

Mr. **Johnson**. That is right. Congress could have taken that path in 1934. It chose not to do so.

Mr. **Baskir**. I wonder if you could discuss the problem of the drug lyric songs.

Mr. **Johnson**. One problem with the drug lyric songs is that they provide a little refutation to the chairman's suggestions that there was absolutely no evidence of a conspiracy between Agnew and the FCC. I have never charged a conspiracy that I am aware of. But it is true that shortly after Vice President Agnew discovered rock music, and found that he didn't like it, there was a meeting held at the White House, to which record company executives and broadcasters were invited, at which Dean Burch was present, in which they were all urged to please not play such music any more. And shortly following that the FCC issued its own ill-fated and now notorious order. And while the substance of it is now occasionally debated, it is now interpreted that rock music dealing with the subject of drugs should no longer be played on radio stations.

I had a slightly different view in that case, and I would be happy to supply that dissenting opinion as well as a speech on the subject, as reprinted by the *New York Times*, for the record should you wish it.

Mr. **Baskir**. The reason I raised this is that some people, at that time, came to the subcommittee staff office and objected on two grounds: First, that this was a violation of the First Amendment because it controlled a cultural expression; and second, that in perhaps a more political sense it was a violation of the First Amendment because the advocacy of taking drugs should be permitted if there are even just a few people that think that it should be permitted and public and social policy ought to be changed.

Mr. Johnson. I would agree with you on both counts, although I don't feel I need to reach the second in terms of the issues involved.

And I did in fact express views to that effect in the dissenting opinion at the time. It is a very dangerous business for the Government to involve itself in the creative content of speech. We don't even need to reach political speech, we don't even need to reach the second point about whether or not, there being some advocates of marihuana smoking in the country, they ought to be permitted the right to run commercial announcements encouraging pot smoking, because that issue was not before us.

The issue was whether or not a songwriter who is writing about what is going on in the country, and who believes the issue of marihuana smoking or hard drug usage is an issue in the country—and I gather even President Nixon and Vice President Agnew agree that it is—is dealing with that subject in an artistic format that should be heard. It seems to me obvious that the Government should not be in that business. And I am sorry to see my colleagues on the other side of the issue.

Senator Ervin. One fundamental distinction, it seems to me between broadcasting and the printed page—it is a legal distinction given by the laws of economics and not by Federal law, and may not be as much of an actual distinction, because we do have economic forces that, have given newspapers something in the nature of an option—is that in the case of licenses for broadcasters, the Government gives them something in the nature of a monopoly from which others are necessarily excluded. I would infer from your statement that the fairness doctrine is to insure that the purpose of the first amendment be carried out and that diverse views should be presented.

Mr. Johnson. That is right. Situations simply change. We are no longer living in an age when standing up at your town meeting and speaking your piece, or greeting your neighbors as they come out of church on the village square on Sunday morning, or putting up a few handbills around in the stores, is going to be an adequate way of communicating your views.

Today there is only really one lecture hall and theater and soap box, that makes any difference, and that is radio and television. And it is just simply—you simply cannot equate the ownership of a television station with the right to put up handbills, Once you get that kind of power you necessarily are in a business where you have got to make your facilities available to others.

How you do it? As I have said, it can be done in a lot of ways: Through access to cable, through access to over the air stations, or through the fairness doctrine. But when the broadcasters say that none of those alternatives are acceptable you simply must object.

Senator Ervin. I want to thank you for a very fine statement, which gives us not only the scientific but also the philosophical basis for the control that is exercised by the FCC of electronic communications system

Mr. Johnson. Thank you very much, Mr. Chairman.

Mr. Baskir. Mr. Chairman, our final witness this morning is Mr. Richard Barron, President of the North Carolina Association of Broadcasters.

STATEMENT OF RICHARD BARRON, PRESIDENT, NORTH CAROLINA ASSOCIATION OF BROADCASTERS; ACCOMPANIED BY WADE H. HARGROVE, GENERAL COUNSEL

Mr. Barron. Thank you, Mr. Chairman.

With me is our general counsel, Mr. Hargrove.

Senator Ervin. I want to welcome you to the subcommittee and express our appreciation for your willingness to appear.

And also I want to take this occasion to commend the members of the North Carolina Association of Broadcasters, who to my observation have been extremely fair.

Mr. Barron. Thank you, sir.

I want to thank you for the opportunity you have extended to our association to appear and be heard. The association is comprised of some 200 radio and television broadcast stations in North Carolina and is the third largest State broadcast association in the nation.

I commend you, Senator Ervin, for your very incisive opening statement at the commencement of these hearings. I believe your statement has set a proper tenor for this inquiry and accurately reflects the recent distressing developments in the relationship between the government and the news media. We in the broadcasting industry are deeply troubled at these developments and are fearful of the implications they portend for the future of the first amendment and broadcast journalism in general. It is a time for sober reflection.

Perhaps no single development has caused more concern than recent expansions of the FCC's so-called fairness doctrine. It is to the practical day to day problems in this area that the thrust of my remarks will be directed.

While to the unwary the fairness doctrine might seem a perfectly simple and reasonable requirement, the evolutionary decisions of the FCC and the courts have spun a webb of supertechnical and seemingly contradictory legalistic concepts which boggle even the shrewdest of legal minds.

The recent extension of the doctrine to implicit matters contained in product advertising is an example. With every commercial announcement we broadcast now, there is the very real possibility that some group will go to the FCC with a demand for free time to oppose it. As the Chairman of the FCC recently observed, broadcasters will not be in business much longer if they must give away anticommercials to counterbalance commercials. Advertisers will simply go to other less regulated media.

An excellent article on this issue recently appeared in the *Wall Street Journal*. The article is brief, and if it has not already been introduced into the record of these hearings, I would offer it at this time for that purpose.

Senator Ervin. We would be glad to have that article. And it will be printed in the record immediately after your testimony.

Mr. Barron. Thank you, sir.

I sincerely believe that broadcasters on the whole strive to be fair in the presentation of controversial programing. But we have reached the point now where the instinctive first question asked by the average broadcaster each morning is not so much whether his programing for the day will be fair as the man on the street or members of his community would regard fairness but rather whether his programming might inadvertently run afoul of one of the many legal subtleties laid down by his government under the guise of fairness.

In today's climate the broadcaster keeps one eye on his programing and the other on his lawyer's telephone number. Large stations are in continuous communication with their lawyers about program decisions. Small stations simply cannot afford to pay for the kind of continuing legal counsel necessary to second guess the Commission and the courts on the latest technical interpretation of the fairness doctrine. So, rather than put his license and his livelihood on the line with every program, the broadcaster has been tempted to play it safe—to steer away from controversial programing. I do not believe, realistically, that he could be expected under these circumstances to do otherwise. However, as a result of a recent D.C. Court of Appeals decision, stations will now be compelled to sell time for controversial programing and many, I assure you, will find only too late that their good faith judgments failed to square with that of their government.

In preparation for this testimony, I have conferred with the managers and owners of some forty radio and television stations across North Carolina to solicit their views about, and problems with the fairness doctrine. Some of the stations were large, with staffs of 150 people—some were small, operating with only a handful of employees.

As president of this association I have at one time or another worked closely with most of these men. They are not hucksters. They are responsible, honorable, conscientious members of their community . . . men who are vitally interested in local public affairs and in the welfare of their communities.

A television station manager in one of North Carolina's largest cities told me:

> The fairness doctrine has a tendency to gag broadcasters. It was written with a noble purpose, but now with the nit picking and harassment we are getting from Washington, it is having a stifling effect on community oriented programming.

A radio station owner-operator in a small Piedmont Carolina city told me. "We just don't air anything controversial. We have to stay out of trouble. With today's interpretations of the fairness doctrine, and the legal fees we would incur, and the time and worry, we are forced, by economics, to play it safe." He continued, "I realize we might be derelict in our duty to the community, but we just don't have the time or the resources to fight."

Another radio owner-operator, this one in a small eastern Carolina community told me, "We have consciously avoided controversial programing, because there are time when we didn't know what we could or could not do. And why get burned by doing the wrong thing?"

A television station manager responded, "We run a nightly editorial and, happily, through these editorials, we have been able to bring much needed reforms to the attention of our community.

However, now that the fairness doctrine has been expaned so drastically, we have given serious consideration to taking the editorials off the air, because of the potential of so many splinter group requests for air time."

He said, "In airing something of a controversial nature, you never really know about the amount of free reply time you are going to have to give. It is not sufficient to cover two sides of an issue. We have to provide time to cover many sides no matter how ludicrous."

Another television manager in a large city said, "In order to try to keep abreast of all the rules and regulations and court decisions these days, I seem to stay on the phone constantly with our legal counsel in Washington. And, on many issues, the lawyers throw their hands up in bewilderment. Our legal fees, because of these matters, have doubled in the past 2 years. We live in the constant fear that one day we are going to be penalized for doing something wrong."

A radio station manager in a medium sized town in "Piedmont North Carolina" said that the recordkeeping is unreasonably burdensome and took an inordinate amount of time away from running his station. He said he felt he could provide a better service to his community if he were not required to devote so much time to the problem of keeping up with FCC and court rulings.

A television station manager in a medium sized city in eastern Carolina said that because of the extension of the fairness doctrine first to the advertising of cigarettes, then to powerful automobile engines, and now with its potential to include aspirin, cold remedies and other nonprescription drugs and a limitless number of other products and services, that he really fears for the future of this industry. He asked, "How can we possibly provide free time for all sides in all of the probable controversial categories and still generate sufficient revenue to provide quality news and public affairs programming?"

Mr. Chairman, so-called "public interest" groups all across the country are taking up the cry of the fairness doctrine, harassing stations and demanding under the threat of government action that their views be broadcast. We have created, in the words of one distinguished Washington observer, a brazen form of "private" censorship which even the Government would not dare undertake.

To illustrate, the following demand for broadcast time was recently made by one group on several North Carolina radio and television stations. I believe the demand misstates the law, but note that it arrogantly contends "overall" program balance is not enough —that spot announcements must be countered by antispot announcements.

> We hope you will want to run our material on its own merits; but we must, in any event, advise you that in the opinion of our attorneys you are obligated, under the fairness doctrine as set forth in recent decisions of the Federal Communications Commission and the Federal courts, to provides time for the broadcast of our side, equal to time provided for the council's side. If you carry the advertising council spots, you will have made spot announcement time available, free of charge, for the direct exposition of a viewpoint on an important public issue. In such circumstances, your legal obligation could not be absolved by reference to "overall balance" in your coverage of the issue. It is our counsel's judgment that opposing views would be entitled to "equal opportunities" within the meaning of section 315 of the Communications Act.

This is the road down which a Government-imposed doctrine of fairness has led us, and I feel sincerely that the country is not being well served by it. While intended to assure a diversity of view, the doctrine, in practice, has tended to choke them off. In an experiment in freedom, I urge you to consider a legislative repeal of the doctrine.

Thank you.

Senator **Ervin**. Senator Thurmond.

Senator **Thurmond**. Thank you, Mr. Chairman. Mr. Barron, I just want to compliment you on a very fine statement.

Mr. **Barron**. Thank you, sir.

Senator **Thurmond**. Also I want to compliment you on having with you Mr. Wade Hargrove, whom I happen to know is a very able attorney and a very fine citizen.

Mr. **Hargrove**. Thank you.

Senator **Ervin**. Isn't one of the difficulties of Government regulation an inordinate tendency on the part of officials who regulate to overregulate? You agree, I take it, that the purpose of the free speech and free press provisions is the first amendment is to encourage the expression of views and the furnishing of information. And you say as a result of the demands that are made on television and radio broadcasters under the fairness doctrine there is a very strong tendency to curtail the expression of ideas and the expression of information on matters of great importance to the community in which these media operate.

Mr. **Barron**. Yes, sir. According to my unofficial informal survey, that is what has happened as a practical matter.

Senator **Ervin**. There is no doubt of the fact that the people who engage in this field every day have the best of opportunities to understand the implications of the Federal regulations, in other words, those whose oxes are gored are more likely to know about the goring and what the effect of the goring is.

Don't you think that one of the most powerful restraints upon any person who acts within the view of the public is the understanding of the people of their community? In other words, I believe that the most important asset that any business has, whether it is the broadcasting business, the retail business, or any other kind of business, is the goodwill of the customers.

Mr. **Barron**. Yes, sir.

Senator **Ervin**. And isn't the desire to have the goodwill of the people of the community served by the communications system a very powerful deterrent from conduct which is manifestly unfair, and a very strong incentive to engage in the kind of operations of business which will generate goodwill.

Mr. **Barron**. Well, I would heartily agree with that statement. Had you not made it I think I would have. I think that the great majority of broadcasters, at least in North Carolina—and I would have to extend this opinion to include the rest of the country—are conscientious, community minded businessmen. They know that it is good business to be concerned with the major issues which affect their respective communities. They know that this is the only way in which they can be accepted as businessmen and as conscientious citizens in their community. So therefore I would think that it would be certainly a logical extension of this that they would treat the major issues in their community fairly, regardless of whether or not there was such a thing as the fairness doctrine.

Senator ERVIN. One of the most important functions which any communications system can perform for the public is to educate the public on the needs of a community, and what needs to be done by way of a change in the system or adopting a new system with respect to governmental matters. That is one of the most important functions that can be discharged by any facet of the communications business, whether it is a newspaper, radio, or television; is it not?

Mr. BARRON. Yes, sir.

Senator ERVIN. And, of course, most all matters that call for a change in what a community is doing governmentally are likely to be controversial, because there are always some people who adhere to the status quo, as well as those people who champion what is to be considered a reform. Under the fairness doctrine, if you are required to give every group who may have diverse views free use of the communications system, you are going to be in a right bad fix.

Mr. BARRON. Yes, sir. The thing that really concerns us—I would have to say that the country has been relatively well off with the fairness doctrine as it has been interpreted, I would not argue with that—but I think one of the most unfortunate recent developments has been the extension of the fairness doctrine to include product advertising. I could foresee where it would have the effect of destroying the system of commercial broadcasting as we know it today. I honestly don't know how we as commercial broadcasters could cope with this on a practical day-to-day basis.

I would not begin to have the answers.

Senator ERVIN. I have very strong convictions about this phase of it, because I don't think it is the business of the FCC or any other agency of Government to try to tell the American people what they should eat, what they should drink, or what they should wear, or how they should act insofar as their personal needs and desires are concerned. When the Government goes to extending the fairness doctrine to the question of advertising, I think it is assuming the right to say what truth is, and that is exactly the reason the first amendment was written, to keep government from ever assuming the power to try to tell the American people what the truth is in respect to political matters or in respect to intellectual matters or in respect to their daily lives. Counsel.

Mr. BASKIR. I would like to explore the fairness doctrine with you as I did with Mr. Johnson, but on another example.

Let's assume that instead of a long series of articles in the *New York Times*, the *Washington Post* and other newspapers, on the Pentagon papers, you are one of the stations in North Carolina who decides to have a whole series—let's say Sunday afternoons—on the Pentagon papers doing exactly what the *New York Times* did with the broadcasting format. I wonder what your understanding of the fairness doctrine would be with respect to such a series, let's say, of a dozen hour programs reported in a sense as the *New York Times* did the contents of the Pentagon papers.

Let me throw a new hypothetical question at you. Do you think that you would have to give access to the persons that were mentioned as having played certain kinds of roles in the Pentagon papers to let them respond to what their roles were thought to be? Do you think you would have to give time to pro and con theories as to how we got into the war and how we waged the war?

Do you think you would have to give, let's say, time to people in favor of and opposed to the war and of various ways to get into or get out of the war? And do you think you would have to give time to persons with different theories as to how we got into the war in the first place, as well as, I suppose, many other issues? How would you handle something like the Pentagon papers in the manner in which you think the fairness doctrine requires.

Mr. **Barron.** First of all, I think that it is good—here again this is the good judgment—I think it is a matter of good judgment, to air opposing views. And I think that the public wants to know the sides of an issue. I think a conscientious broadcaster in a community is doing justice not only to his community but to his station to air those sides.

Mr. **Baskir.** Isn't the difficulty with the Pentagon papers that you can't say there were two sides because there were many different facets to the Pentagon papers? There is quite a controversy as to what the Pentagon papers say or don't say; it is not a matter of, are you in favor of or against the Pentagon papers, like you can be in favor or against gun control. We don't know what the issues are, and I wonder how you would handle something like that.

Mr. **Barron.** Of course we would not have to give time to specific individuals unless they are personally attacked.

Mr. **Baskir.** For example since Mr. Bundy's role was discussed, he might claim it was a personal attack on him, because it did not show what this role actually was. Maybe you would have to give him time.

Mr. **Barron.** Let me give you my personal viewpoint as a broadcaster. Again, I have no quarrel with these things. I think if you are doing justice to your community and to an issue, whether or not the fairness doctrine is in existence, I think it is good information to the community; I think it exercises your role as a conscientious member of the community to get as many people on the air as you judge are necessary to talk about all sides of an issue.

Mr. **Baskir.** The fairness doctrine is a legal requirement superimposed over your journalistic judgment, and if you were to handle something like the Pentagon papers you might find that although your journalistic judgment was satisfied that you had handled it properly, the Government might decide that you hadn't handled it properly.

So you have to rely on more than just your journalistic judgment in a case like this; you have to anticipate, as you said in your statement, what the legal governmental judgment about fairness should be. It seems to me that in a situation like this which is not one dimensional, where you have all different classes of individuals attacked, it would be impossible to put on the Pentagon papers and be sure that you could handle it under a legally imposed fairness doctrine. You might find yourself taking up all of your broadcast time for a couple of months in making sure that you had taken care of every aspect of what the fairness doctrine as required by the FCC might require you to do.

And the simple solution to that is not to do it at all.

Mr. BARRON. I think we have a practical consideration here today say, for example, we do take up all our—not all of our broadcast time for a couple of months, but suppose we aired a series of public affairs programs over a period of a couple of months, one a week, or every 2 weeks, I think the programs would be successful only inasmuch as you continue to generate interest on the part of your viewers and listeners about the subject matter.

Now here again I realize that you get into various shadings and gray areas and black and white areas, and you say, what is the general interest? Is it a majority interest? Is it a minority interest? Where do you make a judgment? Where are you going to cut these programs off as being not interesting to the viewers and the listeners any more?

Senator ERVIN. You advocate the abolition of the fairness doctrine in its entirety?

Mr. BARRON. I would urge you to consider a legislative repeal of the doctrine. To restate my point, to repeat myself possibly, I think the country has been fairly well off under the fairness doctrine as it was originally interpreted. But the extension of it, the expansion of it is what bothers us very much. I favor "fairness," but I do not believe our Government imposed standard of fairness is working well. Perhaps it was inevitable that Government entanglement in this area would lead to the present state of chaos.

Senator ERVIN. That is one of the great dangers of regulation, we started out there is always a danger to overregulate, and you get so much red tape in regulation that you really tie up essential freedoms.

Mr. BARRON. Yes, sir.

Senator ERVIN. I appreciate very much the very fine statement you have made.

Mr BARRON. Thank you for the privilege of being here.

Senator ERVIN. The subcommittee will stand in recess subject to the call of the Chair.

(Whereupon, at 12:50 p.m., the subcommittee was adjourned, subject to the call of the Chair.)

S. 1311—FREEDOM OF THE PRESS

TUESDAY, FEBRUARY 1, 1972

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:45 a.m., in room 1202, New Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the subcommittee) presiding.

Present: Senators Ervin (presiding), and Kennedy.

Also present: Lawrence M. Baskir, chief counsel; and Bill Pursley, counsel.

Senator ERVIN. The subcommittee will come to order.

I want to apologize to everybody concerned for the delay. I attended a prayer breakfast at the White House and there was such a traffic jam up there, I had trouble getting away. Then I had to go and testify before another congressional committee.

I have an opening statement which I will not read. I will have it inserted in the record at this point.

(The statement referred to follows:)

Today the Senate Subcommittee on Constitutional Rights resumes its hearings on the state of freedom of the press. This series of hearings, to continue on February 2, 8, and 17, follows eight days of Subcommittee hearings in September and October of 1971 on the same subject.

In the course of our previous hearings we have examined a number of current problems associated with the First Amendment's guarantee of freedom of the press. Among other matters, we have considered the increased government subpoenaing of newsmen, the government's attempt to enjoin several newspapers from publication of the so-called "Pentagon Papers," the controversy surrounding the CBS program "Selling of the Pentagon," alleged harassment by government of the "underground press," and the expanding scope of government regulation and control of the broadcast media. During this second series of hearings we will continue to focus on these subjects.

In addition, the Subcommittee for the first time will examine developments in "cable television" and public broadcasting with a view toward understanding their impact on First Amendment principles and government communications policy. These are important developments which will receive increasing attention in our country. Indeed, a special commission studying the future of cable television has said:

> "Cable technology, in combination with other allied technologies, seems to promise a communications revolution. There have been such revolutions before. Some 500 years ago the hand-written manuscript gave way to the printed book, and where earlier the store of man's knowledge and judgment and imagination had been available only to a few thousand of the wealthy or the learned it abruptly was laid bare to all who wished access to it. Some hundred years ago the first telephone wires were strung, and where earlier a man could readily make immediate contact with no more than those persons he chanced to find in his own neighborhood, quickly he

> began to find the whole city, the whole nation and ultimately the whole world within the sound of this voice. The revolution now in sight may be nothing less than either of those. It may conceivably be even more." (Sloan Commission, p. 2)

Developments in technology, new concepts in the communication of ideas, and proposals for new government communication policies will be presented to the Subcommittee. By considering these matters in the context of First Amendment principles, I believe we can help assure that the purposes of the First Amendment—to secure the political, intellectual, and spiritual freedom of all Americans—will be better served.

Last fall the subcommittee heard a number of distinguished Americans express their doubts as to whether government any longer shares the faith of our Founding Fathers in the value of an unbridled, robust press free from government control and intimidation. They brought to our attention far too many instances in which government has appeared anxious to silence its critics by official sacntion or the threat of official sanction.

Of course there has always been a state of tension between government and the press. This is as it should be. This is what our Founding Fathers contemplated when they wrote the First Amendment. Government officials have every constitutional right to express criticism of newspaper stories and television reports which they believe to misrepresent the government's policies and intentions. Indeed, recent experience demonstrates that the freedoms protected by the First Amendment are fully appreciated and frequently availed of by this Administration's spokesmen. Our concern is not, nor should it be, with the exercise by government officials of their own First Amendment rights. Rather, our concern is directed to evidence that the government is not respectiful of the First Amendment rights of its critics. The press cannot perform its function as a watchdog for the public if government views it as an enemy of the public and acts accordingly.

Among other distinguished witnesses scheduled to testify during four days of hearings, we will hear from Mr. Andrew Heiskell, Chairman of the Board of Time-Life; Mr. Elie Abel, Dean of the Columbia University Graduate School of Journalism; Professor James Q. Wilson, Harvard University Political Science Professor and member of the Sloan Commission on Cable-TV; Mr. Clay Whitehead, Director of the Office of Telecommunications Policy; Miss Edith Efron, author of the vook *The News Twisters*; Mr. Bill Monroe of NBC News; and Mr. Norman Lear, writer for the popular television program, "All in the Family."

Our first witness today is Mr. Daniel Schorr, a news correspondent with the Columbia Broadcasting System. The Subcommittee invited Mr. Schorr to discuss reports of an FBI investigation of him conducted last year. Following press reports of this investigation, many Americans expressed their concern over the impact of this incident on freedom of the press. The Subcommittee itself has received a large number of inquiries and comments, about this matter. Consequently, I extended an invitation to Mr. Schorr and to two White House officials, Mr. Charles Colson and Mr. Frederic Malek—who reportedly authorized the investigation—to use these Subcommittee hearings as a forum for setting the record straight. Unfortunately, neither Mr. Colson nor Mr. Malek have agreed to testify. The only official Administration response to our Subcommittee inquiry of this matter, made by letter, has come from Mr. John W. Dean, III, Counsel to the President. By-passing a number of specific questions which I posed in my letter of inquiry of November 12, 1971, to the President, Mr. Dean wrote on behalf of the President:

> "This matter has been fully and carefully reviewed. There are no indications of any intent on the part of anyone on the White House staff to harass or intimidate Mr. Schorr by initiating an investigation into his background."

I have written letters of inquiry to Mr. J. Edgar Hoover, Director of the Federal Bureau of Investigation; Mr. Robert Hampton, Chairman of the Civil Service Commission; and Mr. William Ruckelshaus, Administrator of the Environmental Protection Agency. From them I hope to learn what government positions were open at the time of the Schorr investigation, who ordered the investigation and when, what information the FBI was asked to obtain, to whom they were to report, and what has happened to information collected about Mr. Schorr. Mr. J. Edgar Hoover has written an immediate and most helpful response to my letter. I would like to insert Mr. Hoover's letter in the hearing record immediately following my statement.

I want to have faith that the Executive Branch is fully responsive to the Congress and the American people and that it is willing to tell the Congress and the people what they have a right to know about its actions and policies. But the White House's refusal to make available to this Subcommittee a single spokesman in the course of these hearings has caused me to question my own faith. Not only has the Subcommittee been unable to obtain testimony from a White House spokesman concerning the FBI investigation of Mr. Schorr, but it has been unable to obtain any other White House official to discuss generally the problems between the White House and the press. We invited Mr. Herb Klein, the President's Director of Communications, to testify in the first series of hearings. In turning down our invitation, Mr. Klein wrote, "I wish to advise you that, as a member of the immediate staff of the President, I must respectfully decline the invitation to testify."

This use of "executive privilege" is a great mystery to me. The Administration seems to be granting to itself an unprecedented privilege from setting forth for the public its policies and attitudes toward the First Amendment, the keystone of our freedom and our democracy. How can a government be responsive to the people if it will not answer the people's questions, explain its actions, and describe its policies to the only national body directly responsible to the people?

Despite the fact that we have been unable to explore fully the problems between the Administration and the press, I am confident that this second series of hearings, like the first, will result in a greater understanding of and appreciation for the freedoms protected by the First Amendment. I want to express my appreciation to the individuals and groups that have contributed greatly to the development of these hearings.

Senator ERVIN. Do you have a statement, Senator?

Senator KENNEDY. I want at the start of these hearings to recognize the very significant contribution that you have made and this subcommittee has made to the protection of the free speech and free press rights in this country. I think the work that was done by this subcommittee, and you in particular, in the area of military surveillance will be recorded as some of the most effective work done by any congressional committee to protect the civil liberties of American citizens. I think it is entirely appropriate that these hearings be held at a time when, over the period of the last 3 years, we have seen the heavy hand of Government and its use against the press of this Nation and the television networks; the attacks that have been made by the Vice President against the networks and many of the major newspapers, the efforts which have been made to make newsmen involuntary agents by subpenaing them and subpenaing their notebooks, the efforts that were made to keep silent the pentagon papers, and now the very mysterious set of circumstances that have been raised surrounding Mr. Daniel Schorr and the activities of the FBI in investigating him.

I personally feel that the press and speech in this country are as threatened as at any time in the history of our Nation since the passage of the Alien and Sedition Laws. I feel that the work you have done in this area and the work of the subcommittee, is some of the most important work done by any congressional committee in the last few years. I just want to express great satisfaction that these hearings are being held and say thank you for the initiative you provide in this area.

Senator ERVIN. I want to thank you for your statement and say, on my own behalf, that whatever good the subcommittee has done in this field has been due in large measure to the fact that you have strongly supported this activity.

Will counsel call the first witness?

Mr. **Baskir.** Mr. Chairman, our first witness this morning is Mr. Daniel Schorr, news correspondent for CBS television.

Senator **Ervin.** I want to thank you for your acceptance of the invitation extended to you by the subcommittee. I think your appearance here will either help clarify the state of confusion that exists, or make the state of confusion—in light of the newspaper article or evidence supplied by the White House—more dense, I do not know which.

STATEMENT OF DANIEL SCHORR, NEWS CORRESPONDENT, CBS

Mr. **Schorr.** Mr. Chairman, thank you. I doubt that what I say will totally clarify events, many of which still remain a mystery to me. But whatever help I can be, I am delighted, because I share your concern and the concern of this subcommittee about relations between the Government and the press and people of the press in this country.

I am Daniel Schorr, resident of Washington, D.C., a correspondent of CBS News for the past 19 years, for many of those years a foreign correspondent in the Soviet Union, Poland, Germany, and elsewhere; for the past 6 years in Washington, where I also had previous assignments.

Mr. Chairman, you have invited me to testify concerning the FBI investigation of me and related matters. I am happy to respond, sharing your concern for the state of freedom in the press and the relationship between the Government and the press. I have not until today given any public recital of this singular episode because of a conviction that a reporter of events should try to avoid, if he can, becoming part of the events. But, in the interests of this subcommittee's inquiry, I shall be as helpful as I can. In a sense, it is somewhat embarrassing for me to be making my debut as a witness, because in some part, I feel we should be on the other side of those lights and not have to stand in front, but I think the episode has made it necessary. I would not myself have reported it on the radio or on television, but since it has become a subject of inquiry, I am glad to be here.

CBS has not been consulted about my testimony, and I speak entirely for myself. The facts are as I experienced them. The administration has at no time, until today, undertaken to give me any official explanation of its investigation.

On Friday, August 20, 1971, at about 10 a.m., an agent of the FBI appeared, without prior appointment, at the Washington office of CBS News, saying that he wished to interview me and my bureau chief, William Small, and to consult personnel files on me as part of an investigation undertaken, he said, because I was being considered for a high Government position.

Mr. Small declined to cooperate unless advised of the nature of the position, which the agent said he did not know. Interviewed separately, I replied to initial questions, but then declined further answers pending some indication of the position for which I was being investigated. The agent asked if I had any objection to pursuance of the investigation elsewhere, or of the FBI's pursuing the investigation elsewhere. I said, yes, I did object, because such an investigation could be a source of embarrassment and, at the very least, create the impression that I was considering a change of employment. The agent promised to report my observations to his superiors.

In fact, embarrassment for me had already begun. Early that morning the FBI Bureau in New York had telephoned the home of Richard N. Salant, president of CBS News, apologizing for the early call by speaking of a crash investigation that had to be completed by the following Monday. Other CBS executives were contacted during that day. I had some difficulty in allaying their concern that I was planning to leave CBS. They found it incredible—as did I—that a full field investigation should be in progress, connected with a possible appointment of which I had no inkling. My relations with CBS News are, happily, on the whole, rather stable. Otherwise, they could easily have been placed under a great strain.

From information volunteered to me by others who had been approached by the FBI, it appeared that agents interviewed or telephoned previous employers, various colleagues, including an NBC correspondent who served with me in Moscow; residential neighbors, one of whom reported what appeared to be surveillance of my home: and neighbors of my brother, Prof. Alvin L. Schorr, dean of the School of Social Work at New York University.

There was naturally intense speculation among all of us within CBS about the purpose of the investigation. Perhaps more trusting than most, I inclined to the belief that there is more bungling than conspiracy in Government, and that the investigation had perhaps preceded a job offer, which would eventually emerge. Others in CBS leaned more to a harassment theory because of the general climate of pressure on the broadcasting industry, the history of my relations with the administration, which I shall go into in a moment, and especially because of the timing of my investigation.

The administration and its supporters had, on several occasions, expressed displeasure over my reporting. Senator Dole had inserted a statement in the Congressional Record criticizing my reporting on nutrition matters. President Nixon had accused me, in speaking to a group of newspaper women, of "telling a little lie" because of a report indicating that the President had privately, at one point, expressed misgivings about the Safeguard ABM system. White House Press Secretary Ronald Ziegler had criticized me at briefings in printable language, and other White House officials had expressed themselves privately in less printable language. And on August 19, the day before the start of the FBI investigation, I was invited by the White House to a meeting with officials to hear objections to my report on the CBS Evening News the previous day raising doubts about the concrete effects of President Nixon's promise to assist the Catholic parochial schools in their financial plight.

To me it seemed highly doubtful that the administration would beef to me one day and set the FBI on me the next—if only because this would set some kind of bureaucratic speed record. But my belief that a job offer would surface in fact began to weaken with the passage of time. My informal inquiries of friends in Government produced no enlightenment. On October 8 on a social occasion, I asked Frederick V. Malek, White House specialist in recruiting, if he knew what kind of job the FBI had been investigating me for. Mr. Malek professed ignorance and surprise, promised to check and call me that next day. Mr. Malek never called.

By early November I was close to agreeing with the cynics in my organization that the investigation had not been benevolently intended. What else could an oft-criticized reporter believe about an ostensibly job-connected investigation that, 2 months later, had produced not the slightest whisper of a job offer, but only avowals of ignorance from the White House talent scout?

Then, amidst the mysterious silence about the investigation, the criticism was renewed. On November 4, Charles Colson, special counsel to the President, telephoned Dr. Frank Stanton, vice chairman of CBS, Inc., to object to a report I had made the previous day about conflict within the Pay Board. As I understand it, Dr. Stanton referred Mr. Colson to Mr. Salant, the President of CBS News. My own knowledge of the telephone call is sketchy because neither Dr. Stanton nor Mr. Salant has discussed it with me. I imagine they were seeking to insulate me from administration pressures. Gordon Manning, vice president of CBS News, did ask me for factual material to get in a position to reply to Mr. Colson's objections.

Now, let me tell you what I was thinking at that time. In such a situation, a reporter has a problem, or several problems. First of all, whether to disclose the FBI story. With the concurrence of my CBS News superiors, I decided not to because to my mind this was a "no win" situation. That is to say, to become the purveyor of news about my problems with the Government could only cast me in the role of an interested party and tarnish my journalistic neutrality. I thought one had to stick to the position that, no matter how emotional the administration was about me, I had to try to avoid becoming emotional about the administration because if the administration could push me into the role of its open antagonist, that would serve its purpose as well, or perhaps better, than intimidating me into pulling my punches.

This leads to the larger problem of how you conduct yourself as a reporter from then on; trying to make sure that you are still covering the administration on its news merits, not leaning backward, not leaning forward; trying to put out of your mind that CBS, however valiantly it seeks to protect you from intimidation, is itself under strong pressure, and the thought that you might be contributing to the woes of your employer. I tell you about these inner thought processes because I think it important for you, the subcommittee, to know some of the more subtle ways in which Government actions can affect the exercise of press freedoms.

Let me give you a concrete example of the problems created for me. On November 11, the story of the FBI investigation was published in the *Washington Post* by Ken W. Clauson, then a Post reporter. The White House offered public explanations, which I shall not go into because I was not present for any of them and they are available to you. The episode received widespread publicity, and I became somewhat better known as the guy investigated by the FBI than as a news professional, which bothered me some. You must understand that I never considered myself as having any problem with the FBI per se. I believed the FBI had acted quite properly, routinely and on instruction.

Early in December, I was asked, from within the CBS News organization, to investigate a tip that the President's Commission on Federal Statistics had completed its report, and that this report criticized the FBI's system of keeping crime statistics. We talked about it in CBS, because there was the possibility that the idea of this being done by a reporter who had been recently subjected to a FBI investigation and actually widely publicized, there would be snickers here and there. But we generally agreed that for me to steer clear of a story involving the FBI, simply because my name had been linked with the FBI, would depart from the "normalcy" we were determined to try to maintain. On December 9, I reported the story on the CBS Evening News. Subsequently, Tom Bishop, Assistant Director of the FBI, telephoned CBS News, suggesting that I bore some animus against the FBI and calling attention to a letter which, he said, the Chairman of the President's Commission had written to the *New York Times* criticizing my report as having been, among other things, prematurely released. As far as I know, no such letter has appeared in the *Times*, and I took the trouble yesterday to check with the *Times* and found that no such letter has appeared in the *Times*. How Mr. Bishop knew about a letter from the Chairman of the President's Commission on Crime Statistics and his motive for calling CBS News about this letter, these are matters for surmisal.

Those are the facts. Let me present a few purely personal observations about these matters.

The primary issue in the FBI of me is not whether or not a possible job offer lay behind it. You may have read in the *Post* today that an unnamed White House source is now telling the *Post* that there was a job considered, and the job involved being an assistant to Russell Train, Chairman of the Council on Environmental Quality, and might have had something to do with preparing television productions. It is news to me. I have had no word at any time from the administration on why there was this investigation, what the job was if there was a job, or any other communication from the administration. I find it rather weird, I must say, that in a matter of this sort, the White House, on the day before this hearing, chooses to speak through anonymous sources, apparently regarding this as a more sensitive matter than Mr. Kissinger's negotiations on Vietnam, for which he was permitted to surface himself and tell the story. But I would not presume to advise the White House on public relations.

But job or no job, the launching of such an investigation without consent demonstrates an insensitivity to personal rights. An FBI investigation, I can now tell you from experience, is not a neutral matter. It has an impact on one's life, possible impact on relations with employers, neighbors, friends, and colleagues. For me, the effects, though I do not wish to exaggerate them, persist still. I am still constantly everywhere in Washington and outside Washington asked whether my FBI shadow is with me, whether it is safe to talk to me on the telephone, whether I am still in trouble with the FBI. President Nixon is said to have issued instructions that, in the future, there will be no such investigations without advance consent of the person involved. But, in a system that relies more on laws than on men, I think most Americans would feel more comfortable if there were legal safeguards against such intrusion into their lives. That I say for all citizens.

The issue acquires a special dimension when a journalist is involved. I doubt that this episode would have received such attention if it had not happened to a television reporter, especially a television reporter who had previously drawn administration fire. I also do not believe it would have been such a big story had it not arisen in the context of other episodes of conflict between the Government and the press—the speeches of Vice President Agnew, the controversy over the publication of the Pentagon papers, the public discussion of Government credibility and news manipulation.

Against that background, what is important to the free functioning of the press is not only what the Government intends, but how its intentions are perceived by the news media and their working practitioners of the news media. Most of my colleagues believe that I was subjected to harassment, whether I was actually or not. Perhaps that general feeling, in the face of official denials, is itself a reflection of the current climate of suspicion and skepticism between press and Government. But the objective fact is that most of my colleagues found the "Schorr-FBI" story chilling.

Let me say that I do not think that many reporters will be directly intimidated. We are, on the whole, a pretty hardy lot. We generally cannot be deterred by Government, but only by our employers. And, it is our employers who feel the real pressure—especially in the regulated broadcast industry where networks can be subjected to pressure in many direct ways, and in some indirect ways through the affiliates which give the networks existence.

Anyone concerned about the freedom of the press must be concerned about the climate of suspicion, hostility, and nervousness that I think the administration has helped to create. Vice President Agnew says that we are not immune to criticism, and of course that is right. But then the administration will have to bear its responsibility for how far it goes in its criticism, and by what means. If the administration was misunderstood about the FBI investigation of me, it was because of so much that had gone before.

As for me, I should like to think that I have not been affected by the whole episode. The insidious thing about it is that I do not know what subtle effects it may have on me, or on my colleagues.

Thank you.

Senator ERVIN. When the matter became known to the subcommittee, the subcommittee sent letters to the White House and to the FBI asking for information about this matter. The subcommittee also requested the White House to permit the two gentlemen who were reputedly concerned with the affair to come down before the subcommittee to testify.

I received a letter from Mr. J. Edgar Hoover, dated January 27, 1972, in which he says:

> My dear Mr. Chairman:
>
> Reference is made to your letter dated January 24, 1972, regarding the investigation of Mr. Daniel Louis Schorr.
>
> Investigation of Mr. Schorr was requested on August 19, 1971, by a member of the White House staff, authorized to request federal personnel background investigations.

I digress to note that the committee has been given no information as to who this member of the White House staff was.

I think this is a very significant statement in Mr. Hoover's letter:

> The investigation was referred to our field offices, but no inquiries were conducted until the morning of August 20, 1971. Mr. Schorr was contacted at approximately 8:30 a.m. on August 20, 1971, to obtain appropriate background data. He was informed of the investigation and later that morning made background data available to us. At approximately 3:00 p.m. on the same day, we learned from officials of the Columbia Broadcasting System that Mr. Schorr desired the investigation to be discontinued. The investigation was discontinued at approximately that hour pursuant to instructions from the White House. Prior to the discontinuance of our investigation, 25 persons were interviewed concerning Mr. Schorr.
>
> This Bureau was not specifically requested by the White House to obtain any particular type of information during the investigation. The investigation was requested as a routine background investigation for possible federal appointment in which we make inquiries regarding a person's character, loyalty, general standing, and ability.
>
> The incomplete investigation of Mr. Schorr was entirely favorable concerning him and the results were furnished to the White House.
>
> Sincerely yours, J. Edgar Hoover.
>
> This Bureau was not specifically requested by the White House to obtain any particular type of information during the investigation.

I say that is a very significant statement because of my own experience on many occasions when I have been questioned by FBI agents concerning some individual under consideration for a Federal appointment. In every case in which the FBI has sought information from me, I have been advised not only of the name of the individual that they were seeking information about, but the office that the Government contemplates appointing him to. For that reason, I find great difficulty—although, as you say about yourself, I am a rather trusting individual—in believing that anybody at the White House or any member of the White House staff would initiate the FBI investigation with a view to determining one's qualifications for a job without ever first asking that individual whether he would accept the job if it was offered to him. Undoubtedly, it is a source of great embarrassment for a man to have 25 of his associates questions about him by the FBI, it would certainly be a source of great embarrassment to me. Despite the fact that most of the statutes of limitations have expired on most of my misdeeds, I would be very embarrassed by that and I can understand why you would have personal embarrassment about that.

Now, this subcommittee specifically requested the White House to permit Mr. Frederick V. Malek and Mr. Charles W. Colson to appear before the subcommittee and give us what information they could. The subcommittee has never heard from Mr Malek and Mr. Colson directly, but it has received this letter from Mr. John W. Dean III, counsel to the President, written on White House stationery. It says:

"Dear Senator Ervin:

"This is in response to your letter of December 3, 1971, to the President, Mr. Frederick V. Malek and Mr. Charles W. Colson concerning the investigation of Mr. Daniel Schorr. You have indicated in your letter to the President that your inquiry was prompted by concerns and suspicions which have arisen in connection with this matter and the need to put them to rest.

"We fully agree that any concerns and suspicions which have arisen must be eliminated and we have moved to do just that by publicly stating the precise reason the investigation of Mr. Schorr was conducted.

"Also upon reviewing this matter, the President has made it the policy of this administration that such preliminary job clearance investigations will not be initiated without prior notification to the person being investigated."

It is rather peculiar that so much of this administration has gone by before it arrived at that conclusion that that is a good rule to follow. But I am glad that at long last, it has agreed that it is going to use that commonsense approach to these matters in the future.

"Despite some inaccurate conjecture to the contrary, the facts in this situation are quite simple. Mr. Schorr was being considered for a post"—and they emphasize this—"that is presently filled and a routine job investigation was commenced without notifying Mr. Schorr. Mr. Malek's office was performing in his general area of talent searching in this matter. Mr. Colson's office was not involved in the matter at all. Given these facts, there is nothing more we believe can be added to clarify the situation.

"With respect to your request for the appearance of Mr. Malek and Mr. Colson before your subcommittee, it has been a matter of long-established principle and precedent that members of the President's immediate staff do not appear before congressional committees to testify in regard to the performance of their duties as members of the President's staff. This practice is indeed fundamental to the operation of our system of government. Therefore, I wish to advise you that Mr. Malek and Mr. Colson respectfully decline the invitation to testify."

So we got a letter in response to our request for witnesses, but when you search for truth, you are somewhat handicapped when the only information you can get is in the form of a letter because you cannot cross-examine a letter.

Now, cross-examination is a great weapon in the search for truth. When all you have is a letter, it can conceal more than it reveals. We are not told to this day who initiated this investigation, and until this morning, I never heard of anything that indicated what kind of a position you were allegedly under consideration for.

I have seen and heard you many times on TV, reporting news which affected the Government, and I am frank to state that I have always been impressed by your objectivity.

Mr. Schorr. Thank you.

Senator Ervin. Sometimes the news you reported was very prejudicial to the governmental activities that the news referred to, and sometimes the news you reported did not reflect too much credit on the governmental activities involved. I think that is true in reporting any news. But evidently from your statement, you did not enamor yourself to Mr. Colson, or some other members of the White House staff. It appears here that on several occasions, they protested—quite naturally, because none of us likes to hear unfavorable news about ourselves. I plead guilty to being one of those individuals, myself, so it is understandable to me.

But I think you have to draw one of two conclusions here; either the Government really had you under consideration for a high Government position, or they were trying to intimidate you or harass you. I do not see any other conclusion. If there was any other possible conclusion, we could have learned a little more about it if some witness had come down to testify and been subject to being questioned. That is rather necessary.

I remember an old story we lawyers used to tell about a man who ran into a train at a crossing on a dark night. The question was asked whether he was given any warning of the presence of the train on the crossing. This old night watchman testified very positively that he stood out beside the train and waved his lantern back and forth; but despite that fact, the driver of the car just crashed into the train. And the jury evidently believe the night watchman, because they returned a verdict in favor of the railroad.

After the verdict was returned, the railroad lawyer was complimenting the night watchman on his testimony and he said, "You were so cool and calm on the stand." And the night watchman said, "I might have appeared that way, but I was scared to death—scared all the time that they were going to ask me whether my lantern was lit."

So they sent us a letter and by sending the letter, they have us in a position where we cannot ask them whether the lantern was lit.

Now, there are some things that are interesting to me in this matter. One is that Mr. John W. Dean III, in a letter which was handed to me just a few days ago, said this:

"Mr. Schorr was being considered for a post that is presently filled." And I read to my consternation in the *Washington Post* this morning that some unknown person—maybe that John Doe the grand juries have been looking for so unsuccessfully all these years—had an interview with a reporter from the Washington Post and had this to say about the job that Mr. Dean said is presently filled:

"* * * but he said the job had not been filled."

If I had been White House counsel, I would have told the witnesses that they had better try to reconcile their testimony instead of making a contradictory statement of that kind.

Now, your statement is to the effect that after this matter arose and you got no enlightenment from any source about the job for which you were allegedly under consideration, on a social occasion, you asked Frederick V. Malek, White House specialist in recruiting, if he knew what kind of job the FBI had been investigating you for. Then you state that Mr. Malek professed ignorance and surprise, promised to check and call you the next day, and never called.

Now, in this same article of this interview by this undesignated White House official, it says this which is the latest on the subject from the White House: "The official told the *Washington Post* that Schorr's name was considered for the position by Frederick V. Malek, Chief White House Recruiter." Your statement says that Mr. Malek told you that he was ignorant about it at the time, and was surprised to hear about it.

Mr. SCHORR. I must, in justice to him, say that he has since that time given various newspaper interviews in which he has said that he wanted to let me down easy and he didn't want to tell me on that occasion that I had been considered and rejected.

Senator ERVIN. He wanted to let you down easy. In other words, his subsequent explanation was that he had been so reluctant to tell you the truth at the social occasion that he decided to tell it to you later and let you down easy?

Mr. SCHORR. Yes, but he did not tell me later, either.

Senator ERVIN. One thing about it, if he had been willing to come down here and testify, we could have asked him and given him the opportunity to elucidate on the situation and at least dissipate some of the confusion about whether he knew or did not know about it. I do not think that the White House would have fallen into ruins if he had come and given this information, which I think the subcommittee is entitled to. The subcommittee has found that so many Americans have come to fear the Government, because the Government is always snooping around and trying to investigate them. In the absence of any testimony I think I will just have to put these two letters in the record, and also this article from the Washington Post of today.

(The items referred to follow:)

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, D.C., January 27, 1972.

Hon. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights,
Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

MY DEAR MR. CHAIRMAN: Reference is made to your letter dated January 24, 1972, regarding the investigation of Mr. Daniel Louis Schorr.

Investigation of Mr. Schorr was requested on August 19, 1971, by a member of the White House staff, authorized to request federal personnel background investigations. The investigation was referred to our field offices, but no inquiries were conducted until the morning of August 20, 1971. Mr. Schorr was contacted at approximately 8:30 a.m. on August 20, 1971, to obtain appropriate background data. He was informed of the investigation and later that morning made background data available to us. At approximately 3.00 p.m. on the same day, we learned from officials of the Columbia Broadcasting System that Mr. Schorr desired the investigation to be discontinued. The investigation was discontinued at approximately that hour pursuant to instructions from the White House. Prior to the discontinuance of our investigation, twenty-five persons were interviewed concerning Mr. Schorr.

This Bureau was not specifically requested by the White House to obtain any particular type of information during the investigation. The investigation was requested as a routine background investigation for possible federal appointment in which we make inquiries regarding a person's character, loyalty, general standing, and ability.

The incomplete investigation of Mr. Schorr was entirely favorable concerning him and the results were furnished to the White House.

Sincerely yours,

J. EDGAR HOOVER.

THE WHITE HOUSE,
Washington, D.C.

Hon. SAM J. ERVIN, Jr.,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: This is in response to your letters of December 3, 1971 to the President, Mr. Frederick V. Malek and Mr. Charles W. Colson concerning the investigation of Mr. Daniel Schorr.

You have indicated in your letter to the President that your inquiry is prompted by concerns and suspicions which have arisen in connection with this matter and the need to put them to rest. We fully agree that any concerns and suspicions which have arisen must be eliminated and we have moved to do just that by publicly stating the precise reason the investigation of Mr. Schorr was conducted. Also, upon reviewing this matter, the President has made it the policy of this Administration that such preliminary job clearance investigations will not be initiated without prior notification to the person being investigated.

Despite some inaccurate conjecture to the contrary, the facts in this situation are quite simple. Mr. Schorr was being considered for a post that is presently filled and a routine job investigation was commenced without notifying Mr. Schorr. Mr. Malek's office was performing in its general area of talent searching in this matter. Mr. Colson's office was not involved in the matter at all. Given these facts, there is nothing more we believe can be added to clarify the situation.

With respect to your request for the appearance of Mr. Malek and Mr. Colson before your Subcommittee, it has been a matter of long-established principle and precedent that members of the President's immediate staff do not appear before Congressional committees to testify in regard to the performance of their duties as members of the President's staff. This practice is, indeed, fundamental to the operation of our system of government.

Therefore, I wish to advise you that Mr. Malek and Mr. Colson respectfully decline the invitation to testify.

Sincerely,

JOHN W. DEAN III,
Counsel to the President.

[From the Washington Post, Feb. 1, 1972]

WHITE HOUSE WEIGHED JOB FOR SCHORR

(By Carroll Kilpatrick)

A White House official said yesterday that CBS correspondent Daniel Schorr was under consideration last year to be assistant to the chairman of the Council on Environmental Quality.

The official told The Washington Post that Schorr's name was considered for the position by Frederic V. Malek, chief White House recruiter, and that his discussion of Schorr's name with aides triggered the FBI investigation of the correspondent.

Schorr is scheduled to testify today at the opening of hearings called by Sen. Sam. J. Ervin (D-N.C.) on press freedoms. Ervin is chairman of a Senate constitutional rights subcommittee.

Ervin charged last night that the White House has refused to permit any of its officials to testify at the hearings.

He said he had requested Malek, Special Counsel Charles Colson and Communications Director Herbert G. Klein to testify to set the record straight, but all declined.

Ervin said the only response was a letter from John W. Dean III, counsel to the President, who wrote, "This matter has been fully and carefully reviewed.

There are no indications of any intent on the part of anyone in the White House to harass or intimidate Mr. Schorr by initiating an investigation into his background."

Ervin also released a letter from FBI Director J. Edgar Hoover supporting the White House explanation that Schorr was considered for an administration job.

"My mind is open on whether there was a job," Schorr said yesterday when informed of the White House official's comment.

"That is not the issue. The issue is whether the administration should have the FBI investigate anyone not accused of a crime without his consent."

Schorr said he had heard nothing about a job offer or the nature of the job from the time the FBI first began investigating him last August to the present.

After the news broke that the correspondent was under investigation his name was dropped from consideration. Since then other well known TV newsmen have been interviewed in connection with the job, the official said. He declined to give their names, but he said the job had not been filled.

There are plans to undertake the project, whether under the direction of someone brought in from the outside or by someone already in the government, the official said.

The FBI investigation of Schorr brought accusations that the administration was seeking to intimidate Schorr, who had been critical of administration policy on a number of occasions.

Schorr had never been told he was under consideration for a job and had not sought one. He said in November when news of the investigation broke, that he did not believe there was a job to be offered.

"Out of curiosity, mostly, I have checked every source who might know without the slightest indication that I was ever considered for any post," he said in November.

White House press secretary Ronald L. Ziegler said at the time that the administration definitely had a job in mind for Schorr, but he declined to say what it was on the grounds it would make it more difficult to fill the post.

Ziegler did say that it was in the environmental area, and he promised to disclose the nature of the job later.

The official who gave The Post the information yesterday said Schorr had been considered because of his prominence and experience as a TV newsman and because he had done important work in the environmental area. Schorr's broadcasts have included reports on environment issues.

Malek knew that Schorr had been critical of the administration on occasion, the official said. But Malek was under instructions from President Nixon to find ways to encourage individuals to do more to help clean up the environment.

Malek and Russell E. Train, director of the Council on Environmental Quality, agreed that the best way to enlist public support for individual initiative in the environmental field was with a series of television programs, the official explained.

The President was not told that Schorr was being considered. When criticism developed over the FBI investigation, the President, according to Ziegler, directed that in the future no FBI investigations be started on a person being considered for a job without his knowledge.

Senator Ervin. I am sorry the subcommittee is left without evidence from anybody from the White House, because notwithstanding that I am a very trusting person and a very charitable minded person and do not like to draw wrong conclusions about any event. I am left with the opinion that there is either some stupidity in the way this matter was handled—that is, having the FBI investigate a man for a job of which he knows nothing—or a certain amount of duplicity. I hate to have to make a choice which requires me to draw one of two conclusions, either stupidity or duplicity. In the absence of a statement from the White House, I am left in a state where those are the only two possible choices I see.

Senator Kennedy?

Senator Kennedy. Thank you very much, Mr. Chairman.

Senator Ervin. Before you begin, let me express to you, Mr. Schorr, our appreciation for your coming here, because I think that one unfortunate thing about government is that it sometimes yields to the temptation to try to intimidate citizens whose activities, whether they be reporting or some other activities, it does not fully appreciate. I think you have struck a blow by your appearance here for the right of reporters to be allowed to report news objectively without being embarrassed and intimidated by Government. I hope we will have less of this in the future than we have had in the very recent past.

It is particularly disturbing to me because the broadcast media sit at all times under the Damocles sword which is held by the FCC.

Please proceed, Senator.

Senator Kennedy. Thank you, Senator Ervin.

I, too, want to extend a word of welcome to you. Mr. Schorr. Senator Ervin, in his comment about observing you report on news matters over a considerable period of time, which all of use have—he stated quite well that he has always been impressed about your fairness and objectivity and the judiciousness with which you have handled that assignement, and I share, as well, that view. There are not too many times that Senator Ervin and I agree on various matters, but I think on this, we are in wholehearted agreement. I want to underline that comment that he made.

In trying to evaluate the two different alternatives that the chairman has presented, whether, in effect, this was an effort toward intimidation or a legitimate kind of job offer, I was reviewing your testimony. As I understand, in looking through it on page 2, there are approximately five different instances where either the White House or high Government officials or the President himself had criticized you. First of all, you mention Senator Dole had inserted a statement in the Congressional Record criticizing your reporting on nutrition matters. Then President Nixon had accused me of telling a little lie because of a report indicating that the President had privately, at one point, expressed misgivings about the Safeguard ABM system." White House Press Secretary Ron Zeigler "criticized me at briefings in printable language." And "other White House officials had expressed themselves privately in less printable terms."

Then, "On August 19, the day before the start of the FBI investigation. I was asked by the White House to a meeting with officials to hear objections to my report on the CBS Evening News the previous day." and so on.

Was it these kinds of obervations being made either by the chairman of the Republican National Committee or by the White House or by the President himself which added heavily to your own view that the idea that your were under consideration for a job was really highly speculative?

Mr. Schorr. Well. Senator. it did strike me as weird. in view of my relations with the administration. that they would consider me for job. I was willing to allow for the possibility. It would have been an extraordinarily openminded thing for them to have done.

Senator Kennedy. You mention as well in your testimony about the questions that were being asked neighbors of your brother in

New York and you talk about your own neighbors. Did you ever talk to them or did you get any kind of idea from them of the kinds of things that they were asking during that investigation? What sort of questions were they asking?

Mr. SCHORR. As far as I can ascertain, the questions that were being asked had no specific purpose other than to simply gather a great deal of information. They were the normal checklist questions that the FBI asks, simply finding out—in the case of the neighbors of my brother, one of the questions was, "Can you tell us the kind of people who come and go at your neighbor's house?" I must say that the neighbor of my brother was thrown into a state of shock by the visit from the FBI agent, because one of the spin-offs of this kind of thing is that everybody who was visited by the FBI thinks he is under investigation. One of the hard effects of this has been, I was told by a person recently appointed to high office by President Nixon, he told me that his appointment was delayed because his investigation had been retarded by people refusing to answer FBI questions about him, saying, you are not going to drag us into another Schorr affair. Then he had to call them with pleas, trying to get them to answer the questions, saying I am trying to get appointed to a job. So there are side effects by people themselves when they are investigated by the FBI.

To answer your question, as far as I know, there was nothing imporper about the questions, except that people just generally tend not to accept at face value the purpose of the question. People say, yes, I know they may be asking just what he did when he was here, who he sees, what time he gets up in the morning, but they may be looking for something else. There is such an atmosphere of distrust which surrounds the entire thing.

Senator KENNEDY. You have indicated in your testimony that there never was a time when anyone within the administration had spoken to you about being under consideration for a job. But was there any time, once this became public, that the FBI communicated with you to indicate that this had been a mistake or give you any kind of explanation of what they were doing or why they were investigating you or any kind of comment?

Mr. SCHORR. No, sir. There were a great many comments being made after the story broke in the *Post*. None of those comments were made to me.

Senator KENNEDY. They never communicated to you at all why they were made?

Mr. SCHORR. No, sir.

Senator KENNEDY. Tell me, are you now still covering the White House for the CBS?

Mr. SCHORR. I do not cover the White House as such. I have a rather broad assignment which is more based on situations than on any particular place. But to answer your question, I am not assigned to the White House.

Senator KENNEDY. Your range of interests would cover matters which would relate to the White House and White House activities, would they not?

Mr. SCHORR. Yes, sir.

Senator **Kennedy**. Since this became public, have you felt any difference toward you?

Mr. **Schorr**. Yes, all of it favorable. I sense a certain attempt by some people in the administration to lean backward in order to demonstrate to me that no one has anything against me.

Senator **Kennedy**. You mentioned in your testimony the importance of trying to provide some kind of safeguards for individual citizens who might very well be subjected to the same kind of harassment. I am wondering if you thought at all about that, the kinds of things that you think might be included in attempting to protect individuals so that they would not be subjected to the same kinds of intimidation?

Mr. **Schorr**. Senator, I have thought about it. I am not a lawyer or a legislator. I do not happen to speak in terms of legislation. But as I said in my statement, we rely more on laws than on men. If President Nixon can give instructions that in the future, no persons can be investigated without his consent, then it means it is possible for it to have happened in the past and it is possible for it to happen under some future President or under the same President when he changes his instructions. I believe that the law knows of suits by citizens when they are under investigation seeking to limit the investigation to the probable cause of it. I see no reason why legal language could not be written which would require that a citizen be safe from investigation unless there was a probable cause, or unless it has to do with a job in which he has been consulted and authorized the investigation.

Senator **Kennedy**. That would not appear to be a terribly complicated administrative decision to be set up, would it, notifying an individual or being sure that he is notified prior to the time of the investigation?

Mr. **Schorr**. Well, it is common practice. As far as I know, perhaps with rare exception, that the person being considered for the job is first sounded out and then told, we will come to you more formally after some necessary clearance, do you accept the idea that there may be some clearance that may bother you. But that has been normal practice.

Senator **Kennedy**. And that never happened in your particular situation?

Mr. **Schorr**. No, sir.

Senator **Kennedy**. You talk a little, Mr. Schorr, about the general climate of skepticism and suspicion among newsmen. You have been covering news now for a great many years, both in this country and abroad. What is different now? Why do newsmen feel differently about their handling the news today from how they did, say, in years past? What has changed?

Mr. **Schorr**. Well, the relationship between the press and Government has always been a relationship that is basically an adversary relationship. In every administration, there will be instances of criticism, occasionally directly expressed. President Johnson used to pick up the phone and bawl people out if he did not like a report. What is changed, it seems to me now, is that it has taken on a rather concerted quality, not simply to blow off about a natural indignation that any official may feel when he finds that his thing has been jeopardized by a report, but rather a concerted thing saying, we can cow the press, we can manipulate them, we can set the public against them.

What has changed is that I have never before felt, until after Vice President Agnew started making speeches, I have nver before felt that to a great many citizens of this country, it is no longer a honorable thing to be a news broadcaster. Somehow, the administration has set a segment of the country against us, apparently by some design. Because if you can discredit the press, then it does not matter much more what they say and what they write.

Senator KENNEDY. Do you feel as a professional that either the networks, which you have had a great deal of experience with, or the broadcasters themselves have been affected by this climate of intimidation? Have they responded to it or reacted to it?

Mr. SCHORR. Senator, the honest answer is, I do not know. Whenever a speech is made by the Vice President, whenever there is some incident involving the Pentagon Papers or involving CBS's "Selling of the Pentagon," the memoranda that come to us all say, don't allow yourself to be threatened, don't give in, the way you didn't before. But this is a very subtle thing we are dealing with. You read the memo and say, they must be feeling the heat up there, it is very brave of them to write us memos, but you are part of the family with them, and the opportunities for pressure, the opportunities for economic retaliation are so great in this field.

Senator Ervin mentioned the FCC. We are a regulated industry. But there are other things. We exist because of our affiliates. We hear from the affiliates, who sometimes in turn have heard from the administration. The affiliates express their dissatisfaction. Well, we do not like having unhappy affiliates. I say "We." I mean people upstairs, the executives.

Correspondents are not stupid. We are aware that we are running an industry that is fighting for its existence. We want to be as honest and frank as we can. Yet we do not want to bite the hand that feeds us.

The answer to your question is the answer that I gave at the end of my paper. I do not know what it does. I do not know.

Senator KENNEDY. But at least you have felt as a professional newsman a different climate because of these statements or charges by the Vice President, the restraints that have been put on the publication of the Pentagon Papers or the subpenaing of newspapermen's notes, or I suppose the activities that surrounded your own situation. I can understand how it is more difficult, perhaps, for you to get a view of this than perhaps some others. But certainly, you are convinced of a different climate now from what has existed at other times in your professional career as a reporter of news and events.

Mr. SCHORR. I would think so.

Senator KENNEDY. I want to thank you very much for your appearance here, Mr. Schorr. It is enormously helpful and valuable to the committee and I want to thank you for having the courage to be here.

Senator **Ervin**. I want to say I concur in your opinion that there should be no governmental investigation of a person without his consent unless Government has reasonable grounds to believe that that person has committed a crime or is about to commit a crime. I think that any investigation outside of that is not justified. I again want to thank you for your willingness to appear here.

Mr. **Schorr**. Thank you.

Senator **Ervin**. Counsel will call the next witness.

Mr. **Baskir**. Mr. Chairman, our next witness this morning is Mr. Aryeh Neier, executive director of the American Civil Liberties Union.

Senator **Ervin**. Mr Neier, I wish to welcome you to the subcommittee and to express the subcommittee's appreciation for your willingness to come and give us the benefit of your observations.

STATEMENT OF ARYEH NEIER, EXECUTIVE DIRECTOR, AMERICAN CIVIL LIBERTIES UNION; ACCOMPANIED BY MRS. HOPE EASTMAN, ACTING DIRECTOR, WASHINGTON OFFICE, ACLU

Mr. **Neier**. Thank you very much, Senator Ervin. With me, on my left, is Mrs. Hope Eastman, an attorney with the American Civil Liberties Union. She is acting director of our Washington office.

Senator **Ervin**. We want to welcome her here.

Mr. **Neier**. Mr. Chairman, when this committee held its hearing last fall, it heard about a number of attacks on the American press. I would like to submit my statement, rather than read it, but I would like to suggest a number of things which I think this committee can do to counteract these attacks upon the press.

Senator **Ervin**. As I understand, you want to express your views without reading the statement in full.

Mr. **Neier**. That is right.

Senator **Ervin**. That will be entirely satisfactory to the subcommittee, but let the record show that the witness' statement will be printed in full in the body of the record immediately after the witness' oral testimony.

Mr. **Neier**. Thank you very much, Senator.

Since the time of the hearings by this committee last fall which documented very fully the pressures which there had been upon the press, there have been a number of other incidents. You heard just now about the incident involving Mr. Schorr. There have also been continuing grand jury investigations of the publication of the Pentagon Papers; a number of reporters have been subpoenaed to testify before those grand juries.

In addition, there has been an episode involving public television in which a segment of a program, the "Great American Dream Machine," a segment on the FBI, was first cancelled and then subsequently aired in the context of a discussion program over whether it should have been canceled. That initial cancellation followed a letter from Mr. J. Edgar Hoover, written on Justice Department stationery, saying that he was referring the question of the production of the segment on the FBI to the Justice Department. That implied threat probably had something to do with the cancellation of that particular episode of the television program on the FBI.

I think these attacks, following upon the attacks which were documented in your hearings last fall, have taken their toll upon the press. I think Mr. Schorr's statements earlier this morning are eloquent evidence of the subtle but nevertheless real toll that has been taken by these attacks upon the press. The result has been a certain kind of self-censorship within the press, always the most difficult kind of censorship to document in any way, but perhaps eventually the most dangerous kind of censorship of all. An atmosphere of beleaguerment and restraint has been fostered in some segments of the press.

Nevertheless, I think there have been forces which have been moving in the opposite direction, forces which have been stimulating the press not to be restrained. Perhaps foremost among those forces has been the work of this committee. The very willingness of a prominent Senate committee to make itself known as a forum for the examination of these issues has been enormously important in preventing the attacks upon the press taking a larger toll than they have in fact taken.

There have been some other forces at work. One of the forces which I think has militated against self-censorship within the large instruments of the press, such as the *New York Times*, CBS television, the *Washington Post*—which have experienced the frontal attacks from the Federal Government—has been the existence of an alternate press within this country, a burgeoning alternate press, most of it which came into existence during the past decade. This alternate press includes all of the underground newspapers, the college newspapers, the high school newspapers which have emerged, the newspapers which serve such special communities as prisoners within prisons and soldiers on military bases and homosexuals. The press that has existed to serve these communities has had an important impact on the establishment press. I think it has served as a gadfly to the establishment press.

One of the especially useful developments in the past few years has been the emergence of a number of journals, usually published and distributed on a local basis, which are reviews of the activities of the press within their communities. The first of these publications was the "Chicago Journalism Review," which emerged after the Democratic Convention in Chicago in 1968. It was put together by working journalists in Chicago who were dissatisfied with the coverage of the convention and of the events surrounding the convention by their own newspapers and their own television stations. They published this journal in order to take the press to task and criticize it for what they thought were its inadequacies. I believe that the emergence of this kind of press has been very important in keeping the establishment press on its toes.

In my testimony, I note that perhaps the largest of the papers which fits into this category, the *Village Voice*, advertises itself with the slogan, "Keep Ahead of the Times." Its very purpose is to needle the *New York Times*. Hardly an issue passes without one or more articles critical of the way in which the *New York Times* has covered or not covered some story of interest.

I believe that kind of needling by the alternate press is a very desirable means of stimulating the press and preventing it from succumbing to the pressures or restraint that may be felt from the Federal Government.

But this alternate press also suffers from censorship. It is not the same kind as that suffered by the establishment press. The alternate press is really not significant enough for the Federal Government to spend much time on. Rather, it is usually local police agencies and local licensing agencies which have been responsible for harassment of the alternate press. The publications which fall into this category very often can't be distributed by commercial newsdealers and, therefore, rely on their own street vendors. These street vendors are very much subject to harassment by local police or minor pretexts. For example, if a person purchases a paper and throws it to the ground the vendor of the paper may be arrested on a littering charge.

Despite the fact that day-to-day harassment is a fact of life for the alternate press, if one reads these papers it does not seem as though they are terribly subject to the special evil of self-censorship. If anything, they are raucuous and rowdy and robust in their criticism of the establishment press and of public life generally. These are not successful commercial ventures and they are generally not subject to commercial pressures. They are, however, intensely competitive among themselves.

It is terribly important that this segment of the press be protected against the kinds of harassment to which it is subject. The number of incidents of local police harassment and the local licensing agency harassment often drives papers of this sort out of existence. I think they ought to be encouraged rather than driven out of existence, in part because of the effect that they have upon the establishment press.

In the broadcast industry, there is no equivalent of that alternate press that exists in the print media. I think there are opportunities which could be pursued to create an alternate press within the print media. I think there are opportunities which could be pursued to create an alternate press within the broadcast media. Unfortunately, I think the present tendencies suggest that these opportunities will be let go by. One of the opportunities is in the development of cable television as an important alternate broadcast medium. It could be a medium to which the public can have free and easy access and which will be a tremendous instrument for diversity upon the air. I am not an expert on cable television. However, in watching what has been taking place, it seems as though cable television is being allowed to become an adjunct of commercial broadcasting rather than the great instrument for diversity upon the air that it could be. I think this is one of the areas which this committee could look into very profitably. It could encourage cable television to be developed along lines which would make it the kind of gadfly to the predominant broadcasting industry that the underground press and the college press and the like are to the print media.

There was another opportunity that Congress launched in 1967 to create an alternate press in the broadcast industry. That was with the creation of the Corporation for Public Broadcasting. I think the hope was that public broadcasting would be a significant instrument for diversity upon the air. Unfortunately, funding has never been established on any kind of long term and secure basis. Public television is very much fearful of drying up its sources of revenue, and that exercises a pressure not to rock the boat very much. Therefore, public television, rather than being more outspoken and more creative than commercial television, often comes second best when compared with commercial television in its willingness to be creative and innovative and to express controversial points of view on the air. I think this committee could do a singular service in examining the pressures of conformity which exist upon public television and engaging in actions which will help to stimulate diversity on the air through the development of public television in accordance with its true potentials.

I should say in this regard that the ACLU has commissioned a study of public television which is virtually complete. We will have it ready within a few days and will submit it to you at that time.

Senator **Ervin**. We would certainly like to have a copy of that report, because I think that the lack of independent sources of funding has prevented public television from performing the functions that it is capable of performing.

Mr. **Neier**. One of the possibilities of giving public television security of funding would be to give it a tax base. The Congress should consider at an early stage the possibility of a franchise tax upon commercial television which would support noncommercial television. Proposals of that sort deserve to be examined so as to establish secure funding which will allow public television to develop as an appropriate alternative and gadfly to the commercial television networks.

To summarize my statement, I think that when one examines the dynamics of freedom of the press, it is important not only to look at those actions of Government which exercise pressures for conformity and restraint, but it is also necessary to examine those elements which can stimulate the press to be more imaginative, more innovative, more daring in the news coverage that it presents to the American public.

The ACLU approaches this entire area from the standpoint of trying to create opportunities for diversity in the press. Ultimately, our theory is that through the expression and availability of diverse points of view, the American public can make its own decisions and can exercise responsibility in determining the directions which this country has to take. It can only do so when it has available the full range of diversity of points of view that exist within the country. It requires a vigorous press in order to have access to that full range of points of view.

(Prepared statement follows:)

STATEMENT OF ARYEH NEIER, EXECUTIVE DIRECTOR OF THE AMERICAN CIVIL LIBERTIES UNION, BEFORE THE SENATE SUBCOMMITTE ON CONSTITUTIONAL RIGHTS HEARINGS OF FREEDOM OF THE PRESS

February 1, 1972

My name is Aryeh Neier. I am Executive Director of the American Civil Liberties Union and I appear here today on behalf of the ACLU. I am grateful for the opportunity to appear before you and even more grateful for the work that has been undertaken by this committee. Under the chairmanship of Senator Sam Ervin, Jr., this committee has emerged as one of the most important forces in American life in safeguarding the values embodied in the First Amendment.

The liberty of the press is under attack today. For the most part, the attacks are subtle. Occasionally, they are heavy-handed. Most of the more prominent attacks have failed. The Supreme Court refused to restrain the publication of the Pentagon Papers. The House of Representatives voted against citing CBS for contempt for declining to comply with a subpoena for the film used in the production of "The Selling of the Pentagon." The U.S. Court of Appeals for the Ninth Circuit excused Earl Caldwell from appearing before a grand jury in San Francisco.

Nevertheless, the attacks have taken their toll. They have created an atmosphere of beleaguerment in some segments of the press. The result has been self-censorship.

I have attached to this testimony a report prepared for the ACLU by Fred Powledge entitled "The Nixon Administration and the Press: The Engineering of Restraint." This report documents the application of pressure by the government and the resulting self-censorship. Subsequent to the publication of this report last fall, there have been additional instances of governmental pressure on the press. Reporters associated with the publication of the Pentagon Papers have been subpenaed to appear before federal grand juries. The F.B.I. has investigated the life and activities of a CBS television reporter known for his critical attitudes towards this administration. Following receipt of a letter from J. Edgar Hoover containing an implied threat of reprisals, a segment of a program on public television was deleted (though it was subsequently aired in the context of a discussion program on public television about its deletion.)

One of the reasons for the atmosphere which produces self-censorship is that the victories that the press has won against outside censorship have been excessively narrow. The Supreme Court upheld publication of the Pentagon Papers—but a majority of the Justices indicated they would support some kind of press censorship. The House of Representatives refused to cite CBS for contempt—but 181 members of the House voted for contempt citation. The implications are clear: an extra step and the decision might go in the other direction.

CBS, *The New York Times* and *The Washington Post* are giants of the press. They can afford to spend huge sums of money on attorneys to defend their interests. They have powerful friends and they are powerful themselves. Yet they only narrowly escaped government censorship.

There have also been attacks on the freedoms of those segments of the press which do not have available to them the financial, legal and political resources of CBS, *The New York Times* and *The Washington Post.* I am talking about attacks on the freedoms of the "alternate" press—the underground press and the press which services such groups as college students, high school students, soldiers and prisoners. However, while the general impact of the attacks on the giants of the press has been to produce self-censorship, no such result has followed attacks on the "alternate" press.

Any examination of the "alternate" press will readily show that it is robust in its expression of dissent—if not the raucous and rowdy. Precisely these characteristics of the "alternate" press lead to such forms of harassment as arrests of paper vendors, denial of press passes, overbroad and harassing application of obscenity statutes and illegal searches and seizures. For the "alternate" press, these forms of harassment act as prior restraints as effectively as a court injunction against publication of the Pentaon Papers would have imposed prior restraint on *The New York Times* and *The Washington Post.* For many of the newspapers and magazines which make up the "alternate" press, sales by their own street vendors are the basic form of distribution.

In the attached report by Fred Powledge, there is an account of a lawsuit involving two Washington D.C. underground newspapers, *The Washington Free Press* and *The Quicksilver Times*. In this case, 8 vendors for the papers who appeared as witnesses testified to about 300 episodes of harassment by the District of Columbia police. (Examples of these episodes appear at p. A–10 of the Powledge report.) Yet despite such intense harassment, it would be difficult to read these newspapers and find many traces of self-censorship.

I want to try to suggest some of the reasons for the different responses to government harassment from the different segments of the press. In addition, I want to try to analyze the relationships between the different segments of the press. For the sake of convenience, I will use labels, which are necessarily inexact, and call the one segment the "establishment" press and the other segment the "alternate" press.

The "establishment" press is a big business. Large amounts of money are at stake in its operation. When government moves against it, the result may be great financial loss to people only marginally related to the dissemination of news. This is especially true in the broadcast industry which is most vulnerable because it is directly subject to federal regulation.

Those intent on restraining the press have deliberately played on the susceptibility of the "establishment" press to economic sanctions. In his November 1969, Des Moines speech, Vice President Agnew attacked the television networks and, at the same time, reminded them that they had "a monopoly sanctioned and licensed by government." A week later, the Vice President spoke in Montgomery, Alabama and coupled his attack on the newspapers with a reminder about "monopolization."

As if to demonstrate that the Vice President is not just a paper tiger, the F.C.C. has demonstrated its willingness to act on his criticisms of the press. Right after the Vice President attacked the television networks for their "querulous criticism" of a speech by the President, it was learned that the Chairman of the F.C.C. has asked the networks for their transcripts of commentaries on the President's speech. A few months after the Vice President attacked the lyrics about drugs in popular songs, the F.C.C. told broadcasters that questions would be raised about "whether continued operation of the station is in the public interest" if they broadcast drug lyrics.

Self-censorship has come about because the press can never be sure what will get it into trouble with the government. As professor Thomas Emerson of the Yale Law School has pointed out: "The infinite varieties and subtleties of language and other forms of communication made it impossible to construct a limitation upon expression in definite terms." Therefore, in order to steer clear of trouble it is necessary for the press to guess at what might be offensive to government and to give such potentially offending communications a wide berth. In this manner, self-censorship becomes the most sweeping kind of censorship.

By and large, the "alternate" press does not share the business characteristics of the "establishment" press. The owners of the means of publiation are, therefore, not likely to be forces for restricting the content of these publications. Some of the publications which make up the "alternate" press are fly-by-night publications with erratic publication schedules. Others, such as New York City's *Village Voice* are solidly established. (The weekly circulation of the *Voice* is climbing towards 200,000). There is often a lively competition among the publications which make up the "alternate" press. Many cities across the United States have two or more weekly newspapers which can be classified under this rubric. Another characteristic of these publications which militates against self-censorship is their acquired habit of allowing columnists to carry on running disputes with each other within the pages of the same publication. Again, to use New York's *Village Voice* as an example, it is not at all unusual to have several different columns within the same edition of the paper expressing widely divergent views on a single subject. Censorship is a fact of life for the "alternate" press—but not self-imposed censorship.

The "alternate" press, though largely immune to self-censorship, is highly susceptible to direct government harassment. The ACLU has undertaken large numbers of cases in which papers have been barred from military bases, prisons and high schools. The College Press Service estimates that some 60 college papers were censored during the 1970–71 academic year. And yet, all the indications are that the "alternate" press is growing ever more aggressive in utilizing its First Amendment rights.

Not only is the "alternate" press itself relatively invulnerable to self-censorship, it is also a force which works against self-censorship in the "Establishment" press. It is a part of the purpose and the effect of much of the "alternate" press to serve as a gadfly to the "establishment" press.* Moreover, the "alternate press expands its circulation as segments of the public sense that self-censorship has set in at the "establishment" press and become suspicious of the news that is being purveyed.

Recently, several papers have appeared which have as their main purpose criticism of self-censorship in the "establishment" press. The first of these papers was the *Chicago Journalism Review* which was organized by working journalists in Chicago dissatisfied by the coverage in their own newspapers of the events surrounding the 1968 Democratic Convention. Subsequently, similar journals have appeared in about a dozen other cities around the country. These publications are playing a significant role in prodding the "establishment" press to exercise its rights under the First Amendment. They supplement the role of other segments of the "alternate" press as a counter-weight to the pressures of the government upon the "establishment" press.

Much of the harassment of the "alternate" press has been based on fear that it is revolutionary. Prison administrators, high school principals, military commanders, police and others have harassed publications because of their fear of the ideas contained in those publications. Unfortunately, these fears tend to be self-fulfilling. The suppression of ideas which results from these fears is more likely to have revolutionary impact than the ideas themselves.

De Tocqueville understood the relationship between complete liberty of the press and social stability. He observed that:

"The general principles of the (American) government are stable, and the opinions most prevalent in society are generally more durable than in many other countries. When once the Americans have taken up an idea, whether it be well or ill founded, nothing is more difficult than to eradicate it from their minds . . . I attribute this consequence to a cause which may at first sight appear to have a very opposite tendency, namely, to the liberty of the press. The nations among which this liberty exists are as apt to cling to their opinions from pride as from conviction. They cherish them because they hold them to be just, and because they exercised their own free will in choosing them; and they maintain them not only because they are true, but because they are their own."

Or, to state the point the other way round, those societies which have been most subject to violent upheavals have been those in which dissident ideas were prohibited.

I believe that there are some important steps that could be taken by this Committee to enhance the capacity of the "alternate" press to exert pressures against self-censorship in the "establishment" press. They include

(1) Conduct an investigation of censorship of the press in prisons, army bases, schools and other compulsory institutions and of harassment of the underground press and of the college press.

The ACLU is prepared to supply this committee with information on large numbers of cases in which this segment of the press has been subject to censorship and harassment. In some instances—such as censorship at military bases or in federal prisons—Congressional action would be the most appropriate way to establish First Amendment rights.

(2) Investigate means of stimulating an alternate electronic press.

For example, cable television may have the capacity to act as a counterweight to the stultification of expression in the established broadcast industry. The ACLU believes that by developing cable television as a common carrier it can become the broadcast equivalent of the alternate press. Unfortunately, there is presently underway a headlong rush to develop cable television along commercial lines comparable to the established broadcast industry. Under such circumstances, it is doubtful that cable television will fulfill its potential to offset the impact the government presently has in promoting self-censorship in the established broadcast industry.

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* The *Village Voice* advertises itself with the slogan "Keep Ahead Of The Times."

(3) Conduct an investigation of the role of the federal government in dimming the bright prospect that public television would serve as another "alternate" medium and as a major force for diversity of programming on the air.

Congress enacted legislation in 1967 establishing the Corporation for Public Broadcasting. The ACLU supported the legislation because, as we testified before Congress at that time, we saw it "as a means for providing the public with a diversity of programming which commercial television, because of its marketplace orientation, does not present sufficient to the public need". However, we noted that unless financing was established so as to immunize the Corporation from political pressures, there was a danger "that the spirit of inventiveness which can create new and different programs [would] be impaired, resulting in a new brand of broadcasting conformity."

Recent developments in public television suggest that the absence of a secure financial base is resulting in the cut back of precisely those aspects of public television which have best served the purpose of diversity.

The ACLU will shortly issue a major report on public television which, we think, will touch on many of the issues which deserve consideration by this committee.

I want to comment on one other matter that has come before this committee.

The ACLU supports the general thrust of S. 1311. However, we believe that certain improvements can be made. They are:

(1) We believe that the exception for reports on grand jury proceedings should be eliminated.

The entire institution of the grand jury requires reexamination. Its secrecy was originally designed to protect potential defendants. However, it is usually used today as an arm of the prosecutor's office. The potential defendant is sometimes better protected if there is public knowledge of a grand jury's actions. No attempt to protect the secrecy of a grand jury belongs in this bill.

(2) We believe that the language is too broad which would permit exceptions for information "required to prevent a threat to human life, espionage, or foreign agression."

An indication of the overbreadth of this language is provided by the attempt to restrain the publication of the Pentagon Papers under the Espionage Act. Under this provision, the government might subpena newsmen to discover the source of the Pentagon Papers.

We suggest that this exception should be limited to crimes involving serious injury to persons or property.

A fuller exposition of our views on this issue appears in the ACLU's *amicus* brief in the *Caldwell* case which I submit as a supplement to this testimony.

Mr. NEIER. At this time, I will be happy to respond to any questions that you may have.

Senator ERVIN. You state in your prepared testimony that the ACLU favors S. 1311 with certain amendments.

Mr. NEIER. Yes.

Senator ERVIN. I have always had the sort of tentative belief that in view of the fact that the *Caldwell* case and two other similar cases, have been accepted by the Supreme Court for review, it might be wise for the subcommittee to postpone determination of whether it should favorably recommend S. 1311 until after the Supreme Court has ruled on those cases.

Mr. NEIER. I would not quarrel with that at all.

Senator ERVIN. I have the feeling that the Supreme Court has the chance to render some landmark decisions determining the constitutional rights of reporters to collect and disseminate information without having their efforts chilled by being subpenaed before grand juries and other investigative bodies. I have a little more confidence in the linguistic ability of the men who wrote the Constitution than I have in the linguistic ability of those of us who are now serving in the Congress. Failure to properly fashion a bill, which may be necessary in the absence of a great decision on the point, might tend to restrict rather than to secure these rights that I think are essential.

Mr. **Neier**. I think, Senator, that is a judgment in which I have to concur. The decision will come down by June and I think the Congress might be well advised to wait until the decision comes down.

Senator **Ervin**. I think the opinion of the circuit court in the *Caldwell* case was certainly written by a man who proved himself to be a real judicial statesman. If the court can adopt the view expressed in that opinion, I think the press will be able to fulfill its mission of keeping the American people informed, not only as to ordinary news but as to the unusual kind of news that is necessary for the public to know what is going on in the country.

Mr. **Neier**. I am hopeful that the Supreme Court decision will be as good as the circuit court decision.

Senator **Ervin**. I want to thank you for a very excellent statement —both your oral statement and what I have read of your written statement.

I want to commend you on your statement with regard to what you called the "alternate press," because of the recent testimony we received concerning that press indicating that it was subjected to harassment by local officials, and unfortunately the established press did little to justify or defend the alternate press' right to freedom of the press.

Mr. **Neier**. Senator, there are two aspects of that segment of the press which, really, are controlled by the Federal Government. One is the press which is distributed on military bases. There are now better regulations within the Armed Forces on the distribution of newspapers on military bases than there have been before, but there is still a substantial number of incidents in which base commanders do not respect the rules which now exist. That is one area where the Federal Government has a direct responsibility.

Another area where the Federal Government has a direct responsibility is in connection with the newspapers which are circulated at Federal prisons. There is a concomitant concern there. That is the ability of newspaper reporters to cover what takes place within the Federal prisons.

I should note that the ACLU filed suit here in the District of Columbia just a couple of weeks ago in behalf of a number of reporters seeking access to Federal prisons and seeking the ability to interview prisoners about conditions within the prisons. I think that is something which the Federal Government can take direct action on.

Senator **Ervin**. Do you have any questions, Counsel?

Mr. **Baskir**. Yes, Mr. Neier, last night on NET, there was a program with respect to surveillance. There was reference in that program to a study that Mr. Donner is doing, I think——

Mr. **Neier**. Yes.

Mr. **Baskir**. Perhaps the study has been completed——

Mr. **Neier**. No, it has not been completed.

Mr. **Baskir** (continuing). Some of which had to do with surveillance of the alternate press. Are you familiar with last night's program and the question?

Mr. NEIER. I did not see last night's program, but I may be familiar with some details of it.

Mr. BASKIR. Apparently, there is a statement there that Mr. Donner is being investigated presumably because of his investigation of surveillance of newspapers.

Mr. NEIER. Well, I do not know about any investigation off hand, but it would not surprise me at all. I think that any person who becomes concerned with kinds of issues which he has become concerned with—that is, the full range of surveillance activities by local agencies and by agencies of the Federal Government—almost has to expect that he himself will become a target for those surveillance activities.

Senator ERVIN. Thank you very much. We are very greatly indebted to both of you for your appearance here.

Mr. NEIER. Thank you.

Mr. BASKIER. Mr. Chairman, our next witnesses represent the National Newspaper Association, the Newspaper Association Managers, Inc., and the Suburban Newspapers of America.

Congressman Waldie is present and would like to introduce them.

Senator ERVIN. Congressman, we are delighted to have you with us.

STATEMENT OF HON. JEROME R. WALDIE, A REPRESENTATIVE IN CONGRESS FROM THE 14TH CONGRESSIONAL DISTRICT OF THE STATE OF CALIFORNIA

Mr. WALDIE. Thank you, it is a pleasure to be here.

I am introducing today a constituent of mine, Mr. Dean Lesher, who comes before this committee with the following credentials: He is a graduate of Harvard Law School, he has been a newspaper publisher in California since 1941, a considerable length of time. At the pesent time, he owns a number of newspapers in the State. He owns six daily newspapers, eight weekly newspapers, and an ABC affiliated radio station. In addition, he is the president of the California Newspaper Publishers Association and director of an organization known as the Suburban Newspapers of California.

I have introduced a number of constituents before congressional committees as a courtesy that all Congressmen and Senators extend to constituents and I am not in every instance in agreement with their views. I am in agreement with the views of Mr. Lesher.

May I make one statement on my observation of the hearings today and from following the activities of this committee? Really, I think it is an enormously valuable contribution to the situation that exists in our country. Though we might occasionally be confronted with an irresponsible or an arrogant publisher or owner of the media or an incompetent or arrogant or irresponsible reporter in the media, to such extent as abuses occur from that activity, they pale into insignificance beside the extent of abuse that an arrogant and irresponsible Government control of this means of communication would cause. I think the committee is doing a splendid job in informing the people that the First Amendment has meaning today as it always has had.

Senator **Ervin**. Thank you very much. I appreciate your understanding of the first amendment. I think it can be said of freedom of the press as with every other freedom, that they are sometimes going to be abused. The only way we can put an end to abuse of freedom is to destroy freedom and that would be the worst calamity the country could suffer. It is better to suffer abuses of all our freedoms than to have them regulated in an irresponsible manner.

Mr. **Waldie**. Thank you.

Senator **Ervin**. I believe Mr. Lesher is accompanied by Dr. Earl English of the National Newspaper Association. Please introduce the other gentlemen accompaning you for purposes of the record.

STATEMENT OF DR. EARL ENGLISH, NATIONAL NEWSPAPER ASSOCIATION; ACCOMPANIED BY RICHARD W. CARDWELL, PRESIDENT, NEWSPAPER ASSOCIATION MANAGERS, INC.; THEODORE A. SERRILL; EXECUTIVE VICE PRESIDENT, NATIONAL NEWSPAPER ASSOCIATION; AND WILLIAM G. MULLEN, GENERAL COUNSEL

Dr. **English**. Mr. Chairman, I have with me Mr. Theodore Serrill, executive vice president of the association; and Mr. Wiliam G. Mullen, general counsel. And Mr. Lesher has been introduced.

My name is Earl English, dean emeritus and professor in the School of Journalism, University of Missouri-Columbia.

I am sorry, I did not introduce Richard Cardwell, general counsel of the Hoosier State Press Association and president of the Newspaper Association Managers, on my right.

Senator **Ervin**. I am delighted to have all you gentlemen here. We appreciate your appearance for what I think is a very good cause, the cause of freedom of the press.

Dr. **English**. I am here at the invitation of the National Newspaper Association, accompanied by Mr. Theodore A. Serrill, executive vice president of the association, and Mr. William G. Mullen, its general counsel. The national Newspaper Association is composed of approximately 7,000 small daily and weekly newspapers with offices here in Washington.

While I have been involved in journalism education for many years, I am also a practicing newspaperman. I learned the printing trade on a weekly newspaper as a boy before engaging in a wide variety of newspaper responsibilities. During the past 19 years I have held top responsibility for a daily teaching newspaper of general circulation in Columbia, Mo.

We are honored indeed to have the opportunity to appear before this committee.

The weeklies and small dailies of this country have great interest in these important hearings and the particular problems being discussed. None of these papers is likely to be found in the national spotlight as the result of the publication of a classified 43-volume Government document. But throughout the country hundreds of editors, publishers, and reporters each day face up to most of the basic issues with which your committee is concerned.

These are not the kinds of problems and issues that make the wire services. The fact is they may appear of minor importance when removed from their local scene. The advertising people have a slogan that all business is local, and it seems to me we can say something similar about first amendment guarantees and the people's right to know. Most of the problems are local ones and the individual gains and losses in the struggle are not necessarily large ones. But the total effect, because of precedence and loss of public confidence, may be considerable.

I asked an editor of a metropolitan newspaper the other day how he felt about the difference in publishing community and metropolitan newspapers so far as courage and responsibility are concerned. His experience has included both. He did not hesitate to say that the often isolated editor or publisher in the small cities and towns carrier a greater burden of responsibility along with the need for courage to live dangerously than that required by their well-counseled counterparts on the large-circulation press. The small daily editor who insists in print that a public official reveal the details of a closed public meeting may very well meet that official on the way to the post office.

This organization which we represent today recognized the need for support of this so-called grassroots press back in 1958 under the organization's earlier name, the National Editorial Association. It called on the Missouri School of Journalism with the assistance of several persons from other organizations to set up a Freedom of Information Center. Today the center includes thousands of clippings gleaned from daily newspapers and more than 500 professional journals and bulletins. Subject matter ranges over 1,100 different files from access to Government data to the underground press. The center publishes a bimonthly FOI Digest and has issued nearly 300 in-depth studies on right-to-know issues.

But its publications are only a part of the center's functions. Each day requests for the center's information and guidance pour in from newspapers, broadcast stations, public officials, businessmen, lawyers legislators, librarians, students, teachers, and private citizens. The center's 2,000 requests a year make it the largest clearinghouse in the world for information on the general subject of the people's right to know.

Time does not permit an examination of the variety of requests for help that come to the center. But a brief sampling will point out that the basic needs of the people seeking help is on the general order of the concern expressed by Senator Ervin at the opening of these hearings on September 28.

A city official wants to know about laws and court rulings on obscene publications; another about the release of information in criminal cases; a newspaper association inquires about open meeting laws and executive sessions; another about taxation of publications; another about a publication's right to refuse advertising; and a broadcaster tells of a dispute over his demand to inspect teachers' salaries.

The basic theme of these requests centers on a struggle of the press to obtain truthful information from sources with the power to withhold and to manipulate the facts which the public has a right to know. Well-meaning men seek to withhold at least part of the information of particular events and to postpone the day when even part of the story will be available. The main function of the press, they hold, is to present the Government's policies in the best possible light.

The press and Government as adversaries, whether in our courthouses or in the State and Federal capitols, is a condition of long standing. As in the past, each side finds it easy to blame the other and to contend that today's practices are worse than ever before. In blaming each other both sides appear to have overlooked the basic social issues involved today. The impact of television on our society and the effects of an economic system pushed to its limits have both caused changes in our society that are relevant to the issues of press freedom.

Television has changed for a large share of the people from an entertainment medium licensed to serve the public, to a No. 1 source of the news. Thus, it follows that this major news source is under Government control in very important ways, a condition at variance with time honored First Amendment principles.

We may point to the media's required role in recent years as the bearer of bad tidings, and a developing confidence gap between the public and the press to account for public apathy in today's free press controversy. The fact is, however, society today does not believe that press freedom is as important a function in our democratic system as it was 40, even 20 years ago.

The Freedom of Information Center has noted some informal surveys in recent months that reflect how disinterested and unsupportive the public has become of the freedoms both it and the press have formerly enjoyed.

The Corpus Christi *Caller-Times* (2/17/70) called on four reporters to carry the Bill of Rights in the form of a petition to the streets. Of 199 persons contacted, only 19 identified the document; 56 signed it—a third of which did not bother to read it: 143 declined to sign, 54 percent of which read it and refused to sign it. The remainder would not even read it.

In Florida, 887 students in 12 high schools did not understand press freedom under the First Amendment to the extent that they approved controls incompatible with that amendment and were in general poorly informed on guarantees of press freedom.

In Miami reporters (St. Louis Post-Dispatch) asked 50 middle-aged people on the street to sign the Declaration of Independence. Only one agreed. The same reporters asked 300 youths attending a Youth for Christ convention to sign it. Twenty-eight percent thought it had been written by Lenin. Others said it was a hippie document.

In Omaha (St. Louis Post-Dispatch) 80 percent of persons questioned refused to sign the declaration. In Madison, Wis., only one person in 112 said he would sign the Bill of Rights. Again in Illinois, two-thirds of those interviewed refused to sign the preamble to the Constitution. A CBS poll found that more than half the population favored peacetime censorship if the Government found news stories to be harmful to the national interest.

In Seattle 68 percent of the readers of the *Seattle Post-Intelligencer* wanted some form of censorship for motion pictures, television, and literature.

Growing consumerism in all areas seems to show that the people want Government to restrict big business in order to make it more responsible to the public's needs. As members of the business community, the print and broadcast media fall into the same reference despite the first amendment.

A case can be made for the statement that the executive branch today is not better or worse than previous administrations so far as respect for the First Amendment is concerned. But a public that does not understand or condone freedom of the press may respond to emotional appeals by political figures in ways contrary to the public allegiance of other times. It may not be that we have more authoritative government today than in the past. The great danger lies in the fact that readers, listeners, and viewers, may be willing to condone authoritatian actions, seemingly oblivious to the important lessons of our country's history.

The First Amendment's hard-earned rights to utter unpopular statements is no longer held in high esteem, it appears. An ambitious study of 90,000 persons under age 35 by the Educational Commission of the States asked if such statements as "Russia is better than the United States" and "It is not necessary to believe in God" should be allowed to go on the air. Sixty-eight percent of the 26–35 age group said no; 94 percent of those age 13 said no, and 78 percent of those age 17 would not permit these statements to be broadcast.

While we may applaud the direction of their sentiment, their willingness to forego their own rights to free speech to suppress unpopular statements should be of grave concern. Thomas Jefferson's guidance again seems much to the point:

> I know of no safe depository of the ultimate powers of society but the people themselves; and if we think them not enlightened enough to exercise their control with wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education.

Senator Ervin pointed out in his opening statements in these hearings the increased subpenaing of newsmen by grand juries and congressional committees. The subject will produce an argument in most newsrooms on a moment's notice. Newsmen have been required to reveal sources and details of information, thus reducing their effectiveness to carry out their duties, while at the same time making them virtual representatives of law enforcement. With the recent addition of Rhode Island, Illinois, Nevada, and New York, 19 States now have some form of newsman's privilege law. Most of the recent State legislation, however, recognizes a need for balance between the demands of securing information for publication and the compelling needs of the legal system for justice.

The Attorney General's issuance of guidelines in August 1970, governing the use of subpenas to newsmen at the Federal level seems to have reduced the number of cases. Perhaps the information being sought by this method is now regarded as less vital to justice than was earlier believed.

In any event, three cases pleading privilege to withhold information in order to protect reporter sources are presently high on the Supreme Court's calendar. Until a clarification by the Court is given on these problems, the question of granting immunity is probably academic.

The freedom of information (FOI) law has helped the news gathering information, but some weak spots remain, particularly in the time it takes to get information through judicial order. Information under the FOI law may be expensive, also. One newspaper reported having to pay more than $100 for inspecting postal route lists in its area. The Postal Service maintains an $8 an hour searching fee, the largest of any Government agency. Names of farm subsidy receivers requested by a Pennsylvania newspaer—that is local subsidy—prompted a bill for $117.36. A protest to the Agriculture Department's Office of Information brought forth the conclusion that fees would not be required and that the public has the right to this type of information.

The Associated Press managing editors know the problems facing newspapers today. Their recent freedom of information committee report says the press is under increasing attack from all quarters as evidenced by (1) roadblocks in obtaining information on the military, (2) increasing difficulty in securing information from computer files, (3) police harassment exemplified by the invasion of the *Stanford University Daily*, and (4) attempted prior restraint in the Pentagon Papers case. The committee is optimistic about gains in education. New courses are designed in Texas and Washington Universities on journalism and the law. The Committee also points out with apparent tongue in cheek that in Virginia the first amendment is being taught in public schools.

The equal time provision of the Federal Communication Act of 1934 requiring broadcasters to provide political candidates with time to reply has been expanded into the more general FCC fairness doctrine. Under the provisions of this policy, radio and television stations are required to provide some reasonable chance for rebuttal of attacks and expressed opinions. Under a personal attack section the doctrine requires that when "the honesty, character, integrity or like personal qualities" of a person or group are assailed, the station must notify the person or group attacked and supply a script or tape of the communication. The station must then provide a reasonable opportunity to respond over its facilities. The personal attack provision became law in 1967.

The expressed opinion provision has opened the floodgates for persons and groups seeking free time for the airing of themes and views contrary to their own. Even themes of television movies are included in the requests for time to reply, said to have totaled nearly 6,000 in 1 year's time. Advertising is not exempt from the fairness doctrine's expressed opinions provision and broadcasters face a possible disastrous reduction of their saleable air time through letter-of-the-law interpretation. Even the Federal Trade

Commission has cited industry commercials on the basis that they do not fairly picture ecological problems.

These developments in bradcasting are frequently cited as the reason that newspapers are now faced by growing public sentiment toward enforced access to their columns. Two States, Nevada and Florida, have right-to-access laws, the latter restricted to policical candidates. The Florida law has received national attention in a case involving the refusal of the *Daytona Beach News-Journal* to print a reply of the mayor of Daytona Beach to a column in the newspaper. Under these laws a person does not need to establish defamation or even negative context in order to invoke the right to reply, and the newspaper apparently must publish the replies regardless of libelous content or other factors.

Recently, the U.S. House of Representatives approved legislation which would have required newspapers to afford all candidates for a Federal office equal advertising space, if such space were made available to one candidate for the office Fortunately, this provision was removed from the political spending bill in conference.

There can be no doubt that many persons and groups feel strongly that what they read in newspapers is not in accord with their experience and beliefs. Among them are those who have not been afforded equal time in the offending publications. The reasons given by the newspapers for denial of access are many and varied. On occasion the material offered for publication simply libelous. Many persons ask for the publication of possibly libelous statements in the mistaken belief that they alone and not the publisher are responsible under the libel laws. But in general the access thrust is launched in the belief that first amendment guarantees imply access rights to all media.

The courts have held that the access argument is valid where the public airwaves are concerned, but that private newspapers have the right to determine what they shall publish. (*Red Lion* v. *FCC*, 395, P.S. 367, 1969).

Publishing a newspaper is a private enterprise and the owners and employees risk their capital and their jobs in their effort to provide a product the public is willing to buy. Proposed access legislation would order the courts to provide case-by-case judgment on what newspapers would be required to print.

If the day ever comes when government can order private media to print protested statements under the threat of punishment, we will have diverted a long way from the rights of individuals set forth in the First Amendment.

NNA makes no suggestion or recommendation for specific new legislation.

What is needed is revitalization of the concepts underlying the First Amendment itself. No law written by this Congress can be more clear than that amendment's prohibition against any "law . . . abridging the freedom . . . of the press."

All we ask is that those who write our laws—Federal, State and local—understand fully the reasons for this guarantee of freedom and in fact, make no law which would abridge it.

We call on educators everywhere, at all levels, to instill in their students a love and respect for this First Amendment guarantee that all aspects of the press shall remain free from any hint of Government of control or interference.

Congress should support fully such endeavors for it is only through a public, adequately informed of what Government is doing, by a completely free press, that the Government can maintain the confidence of the people.

Thank you.

Senator **Ervin**. Dr. English, I want to comment you on the excellence of your statement, both for its philosophy of the reasons which underly the First Amendment, and also for your appreciation of the problems which frequently confront the First Amendment at this time.

You have pointed out something which is rather disconcerting to me, and that is the fact that the First Amendment freedoms, especially the freedom of the press, seem to have many enemies in our country. And although strange to say, some of them are found in the press itself. I have received communications from people in the press and in the broadcast media who think there should be some kind of censorship established—not for themselves, because they do not abuse this freedom, but for other persons engaged in the media.

Is it not true that this unfortunately is the feeling of many people about freedom in general, and First Amendment freedoms in particular, because the exercise of the freedoms in the Bill of Rights by others, they think, threatens some of their sacred cows?

Dr. **English**. Yes, I think that is true. I think the big problem seems to be in the public's lack of appreciation and understanding of the amendment itself. Is it possible that we do no longer teach it in schools? I am not a very good person to ask that question, because I am involved in teaching. But several years ago, a Ph.D. thesis of teachers was being prepared in three universities—this is 20 years ago. Already, we begin to see that those teachers are not aware of the First Amendment, what it meant. Just telling about it, teaching about it, students do not really understand what is involved. I think the instruction must be in what you call extensional definition, extensional terms, what is involved, what does it mean to you? Otherwise, just reciting it does not seem to make the point.

Senator **Ervin**. My study of the First Amendment, has led to me to the conclusion that the Founding Fathers incorporated it within the Bill of Rights for a reason which was philosophical and another reason which is entirely pragmatic. I think the Founding Fathers realized that the information which people get through the exercise of the freedom of the press will teach them the truth making men free from the worst sort of tyranny—tyranny over the mind.

Also, I think they realized as pragmatists that freedom of the press is absolutely essential to make the institutions which our Constitution establishes for our Government workable. I do not know of any two things that are of more supreme importance than those two, one that is philosophical in nature and the other pragmatic in nature. Those are the reasons why I do not think that we, those of us who reverse the First Amendment freedoms, can overemphasize their importance to our country. I just do not think our system would work without it.

As I remarked awhile ago, any freedom is subject to being abused, and for a country which will not tolerate abuses of freedom, the only remedy it has is to abolish freedom, I think that would be the greatest disaster that can happen to our Nation.

Mr. Baskir?

Mr. **Baskir.** Sir, in discussing the range of access rules that apply to broadcasting in making reference to the Florida situation, you expressed your opposition to those rules with respect to the print media. What is your position with respect to those rules in broadcasting? Do you think they infringe upon the First Amendment or are a bad policy?

Dr. **English.** I think they should be as free as they could be, but I do not know how to resolve the problem of the airwaves and so on that are restricted. I do not know how we can resolve that problem.

Mr. **Baskir.** As I understand the rationale for those rules in broadcasting, it is because of technical reasons, broadcasters have a monopoly on the airwaves, and also because the Government does allocate them. They are, in a way, in a monopoly position and the law has a right to impose an obligation on them to make sure that they give access to all points of view.

Now, with respect to the print media, of course, the factual situation may be very similar. You may have a market, a town, with only one newspaper. So as a practical matter, there is a monopoly from that newspaper. Also, of course, there is legislation, the Newspaper Preservation Act, which at least to some extent gives the Government sanction to these monopolies, these single voices. It would appear to me that the same rationale could be applied to the print as applies to broadasting.

Dr. **English.** I do not see how you can apply it to the print and still respect the First Amendment, the right to publish. It is possible for competition to come into the field. No one is keeping them out while someone may be keeping out the broadcaster in a particular region—that is, the FCC.

Mr. **Baskir.** The practical arguments would seem to me to be the same in favor of these access rules. I am not necessarily in favor of them. It seems to me that the sauce there applies to the goose as well as to the gander in practical terms.

Dr. **English.** It is much easier to start a newspaper now in the towns that we represent than it was a few years ago before offset publication. Already—I believe I would call on the counsel here—already we have papers starting up in these small areas. The problem is, of course, they do not have the voice that the larger ones have. But they all started from scratch someplace.

Mr. **Baskir.** Thank you.

Senator **Ervin.** Thank you very much. You have given us a most illuminating statement.

Senator Cranston, I understand you wish to say something about our next witness. We will be glad to hear from you at this time.

STATEMENT OF HON. ALAN CRANSTON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator **Cranston.** Thank you, Mr. Chairman, this is a moment of particular significance for me, first because I wholeheartedly support the work that this committee is doing. Out of a background of having been a newspaperman both in our free country and in the dictatorships of Hitler and Mussolini, where I worked under the most stringent controls, I have developed a deep feeling about the need to maintain a free press in this country.

Second, because it is a great privilege to make an introduction to you, who have done so very much as a jurist and a legislator in leading the fight for freedom of information and freedom of the press in this country. You and I have stood shoulder to shoulder on the Senate floor in related matters, such as the effort to keep the press and media free from infringement on their freedom by wage and price controls. I have profound respect for what you have done in this field.

Third, because I am introducing to you a man, Dean Lesher, a publisher of suburban newspapers in my California, who as a publisher has been very aware of the great importance of all this and who has fought to preserve the right of the press to know and through that right, the right of the people to know what government is doing.

Dean Lesher first published newspapers in the great Central Valley of California. He still does, but also he now publishes in Contra Costa County, which is a suburban area across the Bay from San Francisco, just beyond crowded Oakland.

Many publishers of suburban papers avoid issues and simply cover local matters and even cover those in a rather bland way. That is not Dean Lesher's way. He knows what publishing is all about. He knows what freedom of the press means, and he sees to it that he uses his powers as a publisher to inform the people. He is deeply interested in preserving that right for himself and others. I think that makes him a particularly important witness for you. It is with great pleasure that I introduce Dean Lesher to this committee.

Senator **Ervin**. Thank you. I appreciate your remarks very much. The country is fortunate to have in the high office that you hold a man who understands the purpose of the First Amendment as well as you do.

Senator **Cranston**. Thank you.

STATEMENT OF DEAN S. LESHER, SUBURBAN NEWSPAPERS OF AMERICA

Mr. **Lesher**. I think I should probably say that I have a unique editorial policy in which our editors are free to express their own thoughts and if I disagree with them, I usually write a letter to the editor on an important issue. Thus far, each editor has had the good judgment to print that letter to the editor.

My name is Dean Lesher and I publish newspapers in California, after having been a trial lawyer in Kansas City, Mo.

It is a privilege to appear on behalf of the Suburban Newspapers of America. This is the dynamic group of 600 to 700 newspapers in the areas around the metropolitan core cities. This is the fastest growing segment of the American press today. Some have risen to places of dominance in their respective areas. As an aside, I can tell you that one of our daily papers is the largest daily paper in northern California outside of the metropolitan daily press.

Mr. Chairman, on behalf of this growing, vibrant, challenging segment of the American press, I come before you to respectfully challenge you and your subcommittee to move forward on two closely related legislative fronts to shore up the tottering pillars of our representative form of democracy. In order for representative democracy to survive and serve well the needs of the people, the public must know fully how the Government functions and the public must be free to express its individual and collective opinions with respect to such functioning. Both of these activities are closely related and involve freedom of speech and freedom of the press.

In the recent Pentagon Papers decision by the U.S. Supreme Court, both the public's right to know and the freedom of press were major issues. A study of the various opinions by the Supreme Court Justices in this case shows the need for legislative expression upon the two related subjects of the public's right to know and freedom of speech tied in with freedom of the press.

My extended remarks, a copy of which you have before you for your record, emphasize the need for an enactment by the Congress proclaiming that freedom of the press under the First Amendment is an absolute right, subject only to such restrictions as are deemed absolutely necessary where the security of the Nation is clearly and immediately threatened. In such event the burden of proof should be upon the Government to establish by a clear preponderance of the evidence (a burden much greater than the mere preponderance of the evidence) that such security is so clearly and imminently threatened that a restriction, even of a limited nature, should be placed upon freedom to publish in writing or orally.

Briefly, my remarks recall history, how our forefathers were fearful of a strong central government. They formed the loose Articles of Confederation which did not work. In writing a Constitution for a stronger central government, they were still fearful that such a government might preempt the rights of individuals. In order to assure that individual rights would be protected, they adopted the Bill of Rights, the first 10 amendments to the Constitution. If those amendments had not been proposed, the Constitution would not have been ratified by all of the original 13 colonies. Thus, the very birth of our Nation depended upon the enactment and ratification of the first 10 amendments.

It is the First Amendment that deals with the relationship between the individual and the Government on a broad group basis. The First Amendment thus is of primary importance to the continued success of our representative form of democracy, yes, even to the continued existence of our nation in its present form.

It is axiomatic in the interpretation of any document that an amendment to an instrument prevails when there is a conflict between the amendment and the original document. The amendment is later in time and the framers of the amendment were aware of the wording of the original document. Accordingly, they must have intended to change that meaning wherever there is a conflict.

We thus make a clear case for the enactment of a Federal statute proclaiming the absolutism of freedom of the press and freedom of speech, except where the national security is clearly and immediately threatened.

We come then to the second segment of these two closely related subjects. That second segment is the public's right to know what is taking place in the government. It is on this phase that we strongly urge you to strengthen the freedom of information statute of 1966 proclaiming the public's right to know about the operation of their government. This right should be circumscribed ordinarily only by clear and immediate threat to the security of the Nation and also with respect to matters of diplomacy where a certain degree of secrecy would necessarily be involved.

Senator ERVIN. Mr. Lesher, I'm sorry to interrupt, but I have to leave to go over to the floor to answer a live quorum call. You might proceed with your statement.

Mr. LESHER. Fine, I will rely on ESP to carry us.

Senator ERVIN. I regret that I have to do this because you have a very fine statement.

Mr. LESHER. Thank you, sir.

Aside from these limitations, the public would have a right to check, to observe, to hear, to record, and to report upon the operation of their government at its various levels and in its many phases.

Many States of the Nation have statutes known under the general heading of "The Public's Right to Know." California is probably the leader. I am proud that I was the legislative chairman of the California Newspaper Publishers Association when it sponsored the first enactment upon this subject.

That act was introduced by Assembly Speaker Ralph M. Brown, of Modesto, in 1953, was passed by both houses of the legislature and signed by Gov. Earl Warren. The scope of that act has been expanded to cover the activities of the various commissions and legislative bodies of the State at various political subdivision levels.

Mr. Chairman, I would like to insert in the record the first section of this act because of its philosophy—California Laws 1953, chapter 1588, page 3270, paragraph 1:

> In enacting this Chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this state exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.
>
> The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

This clear and unequivocal statement and the enactments since made thereunder have had a salutary effect in California upon deliberations of commissions and legislative bodies at all levels of government and upon the opening of public records to inspection by the public and the press. They are now accepted as the beacon light upon government activities keeping the public better informed of what their government is doing.

Every member of this committee is aware that our forefathers considered the people to be the government. This philosophy is expressed in every major document they drew. We cannot urge upon you too strongly the enactment of Federal statutes proclaiming this philosophy of government and asserting further the right of the public to know and of the press to keep the public informed.

What are the areas where information is not disclosed to the public or even available to the public? They are many and time permits only of a broad reference to two general categories.

The first is executive privilege, the right proclaimed by the executive department to keep secret too many documents at its own unsupervised discretion. It compounds this by refusing to permit key officials and employees to be questioned on issues either by the public or by the public's representatives, the Congress. This area needs extensive research, study, and action.

This is a sensitive area in view of the historical and constitutional separation of powers between the executive and legislative branches of the government. The issue is critical, however, in view of the growing credibility gap between the government and the public. This gap could produce an atmosphere that would seriously threaten the continuation of our form of government and the Nation itself.

Another area applies to the deliberations of Congress itself. Too many matters are heard in executive sessions, too few committee decisions and votes are recorded in detail and too many actions are not available to the press and public. This area involves the always difficult task of self-analysis and self-criticism. It is, however, an area where the public welfare calls for action.

Everyone who has enjoyed this land of opportunity yearns for a chance to make one small contribution toward the continuance of this great form of government. I hope that our small contribution will be to motivate this subcommittee to take a step in each of these directions by expanding the right of the public to know about the operations of its government and by stating that freedom of the press and freedom of speech are absolute except where the security of the Nation is clearly and immediately endangered. If you do so, your hearings will have contributed mightily toward shoring up the foundation upon which this government rests.

Our form of representative democracy is under attack at all levels from within and without. Many of these attacks are fanatical and emotional without any basis in fact whatsoever. The best defense against them and the best way to preserve what we have and enjoy is to insure that the people know the facts, that the people are well informed.

Knowledge is a necessary keystone in the functioning of a representative democracy. Without such knowledge and without full freedom of expression that the first amendment guarantees, this form of government may begin to totter and shake at its very foundation. You have a great opportunity to shore up this democracy we so dearly love by taking steps in these two proposed legislative fields that will assure to our generation and to future generations a knowledge of what is taking place and an opportunity to express themselves in the light of this knowledge.

It is hoped by the suburban press that you will place this Nation upon the pathway to a better understanding by its citizens of how government functions. It is hoped that you will take the steps suggested to eliminate the credibility gap that has grown up with respect to that functioning. Only by the elimination of this credibility gap can our representative democracy have a full and fair opportunity to succeed and to continue.

(Prepared statement follows:)

TESTIMONY OF DEAN S. LESHER, PUBLISHER OF LESHER NEWSPAPERS OF CALIFORNIA ON BEHALF OF THE U.S. NEWSPAPERS OF AMERICA, BEFORE THE SUB-COMMITTEE OF THE U.S. SENATE CONSTITUTIONAL RIGHTS, OCTOBER 13.

Senator Ervin and distinguished members of the U.S. Senate Sub-Committee on Constitutional Rights:

My name is Dean S. Lesher. I am a publisher in California of six daily newspapers and eight weekly newspapers under the trade name of Lesher Newspapers. These newspapers are in Contra Costa and Alameda Counties in the East Bay and in Merced and Madera Counties in the San Joaquin Valley.

I have the distinct honor of representing the Suburban Newspapers of America, some 500 strong, which are published in the growing suburbs around metropolitan centers throughout the nation. Many of these newspapers are the most vital, progressive and expanding newspapers in the United States. They are in the growth areas of the country, the bustling suburban areas outside the cities. These areas are growing both in population and in commercial business and the newspapers serving these areas have had the same sort of sensational growth that the census shows for population.

The average age of the publishers of these suburban newspapers is in the early 40s. That average age contrasts strongly with the average age of the publishers of metropolitan papers. Suburban publishers are younger, more dynamic, more eager to progress, more alert to the problems that beset America. In one sense they have more at stake than any other part of the press of America.

Suburban Newspapers of America sincerely support Senate Bill 1311 introduced March 23, 1971 by U.S. Senator Pearson from the State of Kansas. We agree with the purpose and intent of the bill, with the language used in the bill and with the statement made by Senator Pearson upon the introduction of the bill on March 23, 1971 in Volume 117, at page 41, of the Congressional Record.

Fifteen states now have similar bills granting to newsmen the privilege of sanctity of confidential information received or obtained in their capacities as newsmen engaged actively in the gathering or presentation of news for any newspaper, periodical, press association, newspaper syndicate, wire service or radio or television station.

Protection of this confidential relationship is vital to the gathering and dissemination of news. It is high time that the United States of America recognizes this by an act of Congress protecting said privilege.

The press in general, and newspapers in particular, are vitally interested in having the First Amendment and the rights of the press under the First Amendment clearly spelled out by a Congressional enactment. The late Pentagon Papers decision pointed out the varied philosophies expressed by the U.S. Supreme Court in connection with the First Amendment.

The position of Mr. Justice Hugo Black and Mr. Justice William Douglas was that the First Amendment gives an absolute grant to freedom to the press of America. They base it upon the simple, straight forward, uncomplicated statement of the First Amendment that Congress shall make no law abridging freedom of speech, freedom of press. . . .

These words, according to these two distinguished members of the Supreme Court, meant exactly what they said. They had in mind that the framers of the Constititution were masters of language and were quite careful in the selection of words used in the documents they prepared—from the Declaration of Independence through the Constitution of the United States.

The language used has no reservation of any kind, either expressed or implied, and therefore, must have been intended to be an absolute grant of rights and privileges to the press of America. That grant is for the benefit of the public and the welfare of the nation.

The second position taken in the opinions in the Pentagon Papers case was that there was an absence of an enactment by the Congress of the United States with respect to the situation then before the court. Attention was called to the debates in the U.S. Senate at the time the Sedition Act was originally before that body. In these debates the Senate specifically refused to grant to the government the power of injunction which the government was now seeking to use in these cases.

These Justices of the Supreme Court said that for them to grant the government such injunctive power would be to, in effect, legislate and these Justices refused to permit the court to do so.

All of the six Justices who wrote majority opinions or concurred in the majority opinions felt that the United States government had not met the burden of proof upon it of showing that the national security of the United States was endangered by the proposed publication of the articles then in process.

The burden of proof, these Justices agreed, was upon the government and the government had not sustained this burden of proof.

The Justices did not determine the degree of proof that would be required and presumably the preponderance of the evidence would have been the standard of measurement. It is the opinion of this witness that that degree of proof should be spelled out to require more than a preponderance of the evidence and something closely akin to evidence beyond a reasonable doubt. Freedom of speech and freedom of press are so vital to the preservation of our form of government and our way of life that supression thereof should take place only when the case therefor is clearly established.

The three dissenting Justices of the Supreme Court felt that the matter was being hastily handled and that there were issues of fact that should be resolved by trials in the original district courts. Their comments, therefore, did not go strictly to the question of the meaning and extent of the First Amendment with respect to freedom of the press.

It is the opinion of the Suburban Newspapers of America that the rights and privileges granted by the First Amendment are absolute, save and except in a case where the national security is clearly threatened. In such event, the government should have the right to restrict freedom of the press but only after a showing by a massive preponderance of the evidence that the security of the United States is actually threatened by the proposed publication. In the absence of the sustaining of this burden of proof, the right of the press to publish should not be abbrogated nor interfered with under any circumstances.

We base this position upon the language used in the First Amendment, upon the cardinal rule for construction of documents, and upon the historical background surrounding the enactment of this amendment. We must bear in mind that our forefathers were fearful of a strong central government. They were mindful of the aggressive conduct of the government during the colonial times. They had before them the case of Peter Zenger, the small weekly publisher in New York who dared to criticize the Crown Governor. Andrew Hamilton, a Philadelphia lawyer, won this case by first espousing freedom of the press, a doctrine new to the world.

Each of our forefathers involved in the forging of the Declaration of Independence and of the Constitution had in mind that freedom was the most important right that could be set up and safegurаded in any governmental political document.

Our forefathers were willing to so limit the powers of the central government that they began this union with a loose confederation under the Articles of Confederation. These Articles established such a loose federal organization that the country began to founder. It thus became obvious that a stronger central government needed to be formed and thus the Constitutional Convention met to draft a Constitution for the new United States of America.

At this Constitutional Convention, the founding fathers specifically stated in the body of the Constitution that all powers not specifically granted to the central government were reserved to the people. This was the theme surrounding the drafting of the Constitution.

Even when the Constitution was finally prepared, the body was not satisfied that the rights of the individuals were thoroughly protected.

Dissention arose among the group and it became apparent that the original 13 colonies would not ratify the Constitution until and unless the rights of the individuals were spelled out fully and were protected by amendments to the Constitution.

It was in this atmosphere and with this in mind that the authors of the Constitution prepared the first ten amendments of the United States Constitution, known as the Bill of Rights. If these ten amendments had not been drawn, it is doubtful that the Constitution of the United States would have been ratified by the 13 colonies and that this government would have gotten off the ground.

It is with this atmosphere in mind, and the temperament of the authors of the Constitution before us, that we become aware that the intent of the framers of the Constitution was to have freedom of speech and freedom of the press to be an absolute right and privilege. These framers could conceive of no situation requiring the spelling out of any limitation upon such rights and such privileges. Therefore, they specifically did not limit them in any manner.

The only basis we have for limiting them when national security is endangered is the fact that the underlying factor in the setting up of any government is the right of the government to protect itself against enemies, both foreign and domestic. In order to insure of such protection, the central government has the right to act when its security is jeopardized. That right to act superceded such rights of individuals as freedom of speech and freedom of the press.

However, in order for the central government to so act to suppress or restrict freedom of speech or freedom of press, the duty should rest upon that central government of establishing a weight of the evidence that exceeds a mere preponderance of evidence that the national security is clearly and immediately endangered by such unlimited and unrestricted freedom of speech or fredom of the press. It is only when such a case has been made by the central government that the central government should have the power to restrict in any manner whatsoever absolute freedom of speech and absolute freedom of press.

That the First Amendment was intended to grant an absolute right evolves from the general principle of how to construe documents. Whenever an amendment or an addition is made to a document after it has originally been executed, the amendment or addition controls in the event it is in conflict with, or in derogation of, any part of the original document.

This follows from the very nature of the word amend or amendment. To amend means "to change or modify for the better; to improve". Thus, the very purpose to be served by an amendment is to change or alter the document or to explain the document in clear and understandable language.

This is a recognized principle in determining the meaning of contracts. An addition changing a portion of the original contract prevails over any language in the contract with which the addition conflicts.

The practical principle is that the parties are fully aware of what the original document provides when they draw up the amendment. Since the amendment is later in time and was drawn with this awarness, any change the amendment makes in the original document must have been thoroughly considered by the parties and such change must have been intended.

Illustrations by the hundreds can be used to show the general application of this principle and the basic reasons for doing so. There are specific amendments to the U.S. Constitution in conflict with the general provisions of the Constitution. In each instance, the amendment prevails with respect to such conflict.

The same principle applies to the First Amendment. The framers of the Constitution obviously intended it to be interpreted as written—as a full and complete guarantee of freedom of speech and freedom of press except only in the unusual situation where the national security is immediately and clearly threatened.

While this seeems clear to students of law and students of the history of the formation of our nation, it would be well for Congress to spell this out in clear and unmistakable language. This Sub-Committee has now an opportunity to do so and thus perform a worthwhile service to this nation and its people. This could be a great contribution to Constitutional dialogue and to the preservation of the freedoms we enjoy under the U.S. Constitution.

It is the hope of the Suburban Newspapers of America that this Sub-Committee will initiate legislation that will spell out specifically the nature and extent of the First Amendment with respect to freedom of press and that will delineate and define the meaning thereof. This will offer a guideline for the U.S. Supreme Court and all Federal and State courts to follow in considering matters which arise under the First Amendment. It would be a fitting memorial to the late Justice Hugo Black to do this at the current session of Congress.

We cannot emphasize too much the fact that the First Amendment to the U.S. Constitution is one of the keystones upon which this republic is founded. If that amendment is emasculated in any manner, if it is eroded by any act of the U.S. Congress, the executive or the judiciary, then the arch upon which this great form of government rests will be endangered.

We of the press, the written press, the spoken press, the broadcasting press, have a very great and substantial interest in the enactment of legislation that will define and clarify the First Amendment of the United States Constitution and of the rights and privileges which it establishes for the benefit of the public.

We urge you to enact the confidential information protection for members of the press provided for in Senate Bill Number 1311.

We further urge you to sponsor legislation to specifically state that the First Amendment's grant of freedom of speech and freedom of press is an absolute right which can be limited or restricted only when the security of the nation is immediately and clearly endangered and then only after the United Sates has established by a vast preponderance of evidence that the danger to national security by the threatened publication actually exists.

Respectfully submitted this 1st day of February, 1972.

Mr. BASKIR. Mr. Lesher, thank you very much. On behalf of the Senator, I first would like to thank you for appearing and testifying, and again to reiterate his apology for having to leave.

Because the Senate is having a vote, we are not permitted by rules to continue the hearings, so the Senator has asked me to ask the other witnesses who have not had a chance to testify if they would be kind enough to submit their statements for the record.

(The statements referred to follow:)

STATEMENT OF RICHARD W. CARDWELL, GENERAL COUNSEL, HOOSIER STATE PRESS ASSOCIATION, INC., INDIANAPOLIS, IND., PRESENTED BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, U.S. SENATE, ON FREEDOM OF THE PRESS, FEBRUARY 1, 1972, REPRESENTING NEWSPAPER ASSOCIATION MANAGERS, INC.

Mr. Chairman, my name is Richard W. Cardwell. It is a pleasure to have this opportunity to appear before you and the other distinguished members of this Committee. I have served for 10 years as General Counsel of the Hoosier State Press Association, a membership association of daily and weekly newspapers of general, paid circulation in the State of Indiana. For the past 14 years, I have been an associate in the Indianapolis law firm of Symmes, Fleming, Ober & Symmes. I have been active for several years in the Newspaper Association Managers, Inc., a voluntary society of the managers and directors of national, regional and state newspaper associations. At the present time, I am privileged to serve as President of that group.

I appreciate having this opportunity to discuss the concept of freedom of the press with you today. By way of qualifying myself to do so, I might mention that I attempt to teach about it at two universities; I have researched it in connection with considerable litigation and also to answer in my own mind some of the apparent contradictions about it—largely caused by currently-romanticized versions of history; I read every published decision every year in which freedom of speech or of the press is at issue, and I may be one of the few living Americans who has actually read 1 ANNALS OF CONGRESS, the record of the first Congress, which details the fascinating journey of the Bill of Rights toward enactment.

It is often difficult for some to grasp the full implication of freedom of the press. Implicit in its history, and as developed judicially, it embodies multiple meanings—some of which lie at its core and some of which surround the core and are protected to make those central concepts fully meaningful.

Mr. Justice Harlan, speaking for the Court in *Curtis Publ. Co. v. Butts* [18 L.Ed. 2d 1094, 1107–1108 (1967)], reviewed the meaning and role of the First Amendment guarantee of freedom of the press very succinctly—and correctly, in my opinion—by stating:

"The modern history of the guarantee of freedom of speech and press mainly has been one of a search for the outer limits of that right. . . . That concern has perhaps omitted from searching consideration the 'real problem' of defining or delimiting the right itself.

"It is significant that the guarantee of freedom of speech and press falls between the religious guarantees and the guarantee of the right to petition for redress of grievances in the text of the First Amendment, the principles of which are carried to the States by the Fourteenth Amendment. It partakes of the nature of both, for it is as much a guarantee to individuals of their *personal right* to make their thoughts public and put them before the community as it is a social necessity required for the 'maintenance of our political system and an open society.'" [our emphasis]

The *personal right* of individuals to make their thoughts public, embodied within the core concept of freedom of the press, has been broadly developed. It includes absence of prior restraint on publication [*Near v. Minnesota*, 283 U.S. 697 (1931)]. To make the right more fully meaningful, courts have extended it to include a right to make lawful distribution [*Lovell v. City of Griffin*, 303 U.S. 444, 58 S. Ct. 666, 82 L Ed. 949] and a qualified right to publish anonymously [*Talley v. California*, 362 U.S. 60, 80 S. Ct. 536, 4 L. Ed.2d. 559]. That personal right also includes the right *not* to publish that which one does not wish to publish. This concept was summed up perfectly by Judge Marovitz of the United States District Court in Chicago, Illinois, when he said:

"The right to free speech was never intended to include the right to use the other fellow's presses . . ." [*Chicago Joint Bd., etc. v. Chicago Tribune Co.*, 307 F. Supp. 422, 429]

My major concern for the future of freedom of the press is that this basic personal-right concept is getting lost in, or could be swallowed up by the social-necessity concept.

I have the feeling that if freedom of the press is undermined in this nation judicially or legislatively, it will not occur so much from malice as from confusion.

The social-necessity concept—that freedom of the press is required for the 'maintenance of our political system and an open society' is what all the flap about "right to access" is about—a desire in some to subordinate the personal right of those using the press to exercise it freely, to the "social necessity" as they see it of furthering some desirable public policy in the dissemination of ideas.

Licensed broadcasters have already been adjudged to have sacrificed a measure of their personal right in the interest of the social necessity of "fairness." That is what *Red Lion Broadcasting Co. v. F.C.C.*, [89 S. Ct. 1794 (1969)] means. There, the Court through Mr. Justice White declared:

"It is the right of the *public* to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the F.C.C." (p. 1806)

Declaring that the purpose of the First Amendment is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail" (p. 1806), it maintained that ". . . the people as a whole retain their interest in free speech by radio and their *collective* right to have the medium function consistently with the ends and purposes of the First Amendment. *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.*" (p.1806). [our emphasis]

Similarly, the slogan, "The People's Right to Know", falls within the "social necessity" concept.

This shift toward collective public rights in the guarantees of freedom of speech and of the press, which may have been rather implicit historically, is relatively recent judicially.

It was not until 1965 in *Lamont v. Postmaster General* [85 S. Ct. 1493] that the United States Supreme Court found a specific First Amendment right in the people to *receive* information. In striking down a Congressional "communist political propaganda' mail statute, the Court stated:

"We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights." (p. 1496)

In a concurring opinion, Mr. Justice Brennan (joined by Mr. Justice Goldberg), stated:

"It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful . . . I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." (p. 1497)

I believe there is a public "right to know" implicit in the historic concept of the First Amendment. Yet, *what* there is a "right to know" and its scope are relatively undeveloped judicially.

Moreover, insofar as the privately-owned printed press is concerned, undeveloped is the question how a public "right to know" and its scope are relatively undeveloped judicially.

Moreover, insofar as the privately-owned printed press is concerned, undeveloped is the question how a public "right to know" under the First Amendment would be, or should be, accommodated to the personal right of those utilizing presses for the dissemination of information under the First Amendment if the two concepts come into conflict.

The Supreme Court has certainly indicated before that a public "right to know" is subject to qualification. In *Zemel v. Rusk* [85 S. Ct. 1271 (1965)], Chief Justice Warren shrugged off a contention that the Secretary of State's refusal to validate passports for travel to Cuba violated a newsman's First Amendment right to "acquaint (himself) at first hand with the effects abroad of our Government's policies, foreign and domestic, and with conditions abroad which might affect such policies." He replied that no First Amendment right was involved because the inhibition was on action.

"There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information." (p. 1281)

The Court obviously felt that the public's "right to know", if any, should be circumscribed in particular criminal cases when it instructed courts to order non-release of information about them in the *Sheppard* case. [*Sheppard v. Maxwell*, 384 U.S. 333]

Chief Justice Burger, dissenting in last summer's celebrated "Pentagon Papers" cases (*New York Times Co. v. United States*), jabbed at the *Times* contention that a First Amendment "right to know" was involved in publication of the secret documents and hinted at the possible conflict between that asserted principle and the action of the press in fulfilling it. He said:

"It is not disputed that the *Times* has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the *Times*, presumably in its capacity as trustee of the public's 'right to know' has held up publication for purposes it considered proper and thus public knowledge was delayed . . . After these months of deferral, the alleged right-to-know has somehow and suddenly become a right that must be vindicated instanter."

It is my opinion that the development of any such "social necessity" meaning of the First Amendment must be accommodated with, and if necessary, subordinated to, the central personal-right concept of the guarantee.

The core meaning of freedom of the press *must* include the personal right to exercise it. The concept was that from the free exercise of this personal right —from the multiplicity of views—the political system and an open society would be maintained *ipso facto*.

Contrary to the views of some, I have the firm belief that this concept is still operating in a very vibrant way today. The saving grace of the press in this nation has been its diversity. There have always been so many tongues that—absent cutting them out—government could not still them all even if it had the desire to do so. Goodness knows, the press in all its facets is still "cantankerous, obstinate and ubiquitous" enough. It couldn't even reach any uniformity of agreement about the merits of one of the most serious attacks against it in history last summer in the "Pentagon Papers" cases. And certainly this committee has gotten a hint of the press' diversity in various testimonies about the desirability of the "newsman's shield" bill [S. 1311] which is before it.

Any one with any sense knows—or should know—that the quickest and most effective way to unleash a torrent of discussion by the press is by trying to silence it. I always recall the plight of the judge in New Mexico who cited a columnist for contempt for something he had written the judge felt reflected on him, only to be immediately barraged by press comment from hundreds of newspapers, all infinitely more contemptuous than the original statements.

In my view, the press itself is partly to blame for subliminating its personal rights. Too often accused of "wrapping itself in the First Amendment," too sensitive to allegations of personal advantage, its public-relations consciousness has responded by reminding others that freedom of speech and of the press is a right "of all the people and not an exclusive perogative of those who are engaged in the business of news dissemination," and that "it is a right of the people and not of the press."

It *is* correct that freedom of speech and of the press is a right of all the people. It is *not* correct that it is not a right of those engaged in the business of news dissemination. They obviously exercise it every day on the assumption that it is.

Freedom of speech and of the press includes the personal right of anyone, including the press, to freely communicate with others who will listen. I see no necessity for any apologies.

That kind of self-induced confusion confuses others too, such as the Supreme Court of Pennsylvania. To the contention that a trial court anti-photography order violated the newspaper's freedom of the press, it replied:

"However, as pointed out by Erwin D. Calnam, Editor of the *Christian Science Monitor*, 'freedom of the press is not a right of the press. It is a right of the people!'"

Therefore, it intimated, the press has no right to assert its right to freedom of the press. [*In re. Mack*, 126 A. 2d 678, 681 (1956)]

Similarly, the Florida Supreme Court, answering a contention that an unrestricted rule of venue could result in a multiplicity of suits which would seriously injure constitutional freedom of the press, stated:

"Freedom of the press was never intended to be a special privilege extended to its publishers. On the contrary, it was conceived by the writers of the Constitution and of the Bill of Rights to be a right of the people in a democracy to unrestricted information and presentation of views on government for which the press was a tailor-made medium of dissemination. Freedom of the press, therefore, is a people's personal right rather than a property right." [*Firstamerica Development Corp. v. Daytona Beach News-Journal Corp.*, 196 So. 2d 97, 99 (1966)]

That's the type of preposterous confusion which bothers me, but it is bound to happen when one understands the guarantees of freedom of the press only in the narrowly restricted "social necessity" sense.

A tentative example occurred in Congress last year in connection with the "Federal Election Campaign Act" [H.R. 11060]. A section of that bill would have provided that if the privately-owned printed press made space available to one candidate for federal elective office in connection with his campaign, it than *had* to make equivalent space available on the same basis to all legally qualified candidates for the same office. [Sec. 103 (b) (2) of H.R. 11060]

It was defended on the House floor by a Representative who stated:

"Now, then some would attempt to stretch in some peculiar way the first amendment to some kind of protection to the newspapers to do precisely what they want to do with respect to using space. What the First Amendment protects is the people's right not to have their right of free speech abridged. It is in plain terms. It says that Congress shall make no law abridging the right of free speech." [*Congressional Record*, House, H. 11430, November 29, 1971]

That section was nothing more than a legislative attempt to socially engineer the dissemination of ideas at the expense of the personal right of the press to decide what it does, and does not, wish to publish. I believe that the First Amendment does give the privately-owned printed press the precise right to do what it wants with respect to using space.

We have a good mutual deal going in this nation. The press can tell legislators what they should do and criticize them for what they have done, but the press can not vote on the floor. Legislators can tell the press how they think it should operate and criticize it when they think it is not operating properly, but the First Amendment tells legislators they can not operate it.

But, if the press is simply some tool to further the maintenance of a political system and open society as a "social necessity", then government can operate it to an extent.

Licensed broadcasters certainly know this. The Federal Communications Commission is statutorily proscribed from censoring program content, but it can engineer "fairness" as it sees the social necessity for it.

There is, of course, no licensing mechanism for the privately-owned printed press, nor could there be constitutionally. But if the personal right of the press to decide what it will, or will not, publish can be circumscribed in some manner in the interest of "social necessity," then the question necessarily arises: if the press alone can not make such personal decisions, who else can?

The answer, inevitably, is government, since only it has the structure and power to promote the general welfare. The personal right of the press can only be substituted to some undefined degree by the power of government to decide what is socially desirable in the dissemination of ideas.

If that day comes, then a free press will be a mockery.

STATEMENT BY CHARLES A. PERLICK, JR., PRESIDENT, THE NEWSPAPER GUILD, AFL-CIO, CLC, BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE SENATE, COMMITTEE ON THE JUDICIARY, TUESDAY, FEBRUARY 1, 1971

I am Charles A. Perlik, Jr., President of The Newspaper Guild. The Newspaper Guild is the union which represents some 40,000 news and commercial department employes of newspapers, new services, magazines and related enterprises in the United States, Canada and Puerto Rico.

As the only national organization of working newspapermen in the United States (we use the term newspapermen generically), The Newspaper Guild since its founding in 1933 has had a deep and abiding concern and has worked to assure that the press be truly free of any influence that would subvert its right to gather and disseminate news and opinion—whether that influence be public or private, and whether that influence be brought to bear directly or indirectly.

The Newspaper Guild's concern is practical, to be sure. Working newspapermen, it almost goes without saying, have a most immediate and direct interest in the maintenance and application of the First Amendment's guarantee of press freedom. Working newspapermen are the foot soldiers of the press. They most immediately and directly feel the effects of actions which threaten, slow or stop the free flow of information and opinion. Newsmen are threatened with jail—sometimes they are jailed—if they refuse to disclose their information and/or its sources to public authorities or private persons. They feel the displeasure and wrath—sometimes administered physically on their persons—of those who see them as agents of vested interests—public or private in nature —right, left, or somewhere between, in posture. They bear the frustration of restrictions imposed on the gathering and publication of news by press managements unable or unwilling to risk the financial burden that might be incurred through retaliatory action by those who might be offended or annoyed by that news.

The Newspaper Guild's concern for press freedom reflects more than our members' self interest, however. We share those convictions expressed so eloquently at the opening of these hearings in October by this subcommittee's chairman. We have long held that ours becomes less the free society we profess it to be—less a representative democracy—to the extent that there is abridgement of press freedom: freedom to gather as well as publish news and opinion.

The Guild is dedicated to the maintenance and extension of the right of the press to gather and to publish, and to protect its information and its sources of information, without government interference or hindrance.

Internally this is reflected in Article II, Section 1, of The Newspaper Guild's Constitution, which reads:

"Guild membership shall be open to every eligible person without discrimination or penalty, nor shall any member be barred from membership or penalized by reason of age, sex, race, national origin, religious or political conviction or *anything he writes for publication.*"

(We have applied the emphasis to the latter qualification.)

Externally, since the Guild's founding, this dedication has been advanced by The Newspaper Guild and its local unions in a continuing series of actions at the national, regional and local levels and in repeated policy expressions by our annual Conventions.

While the Guild is aware that conflicts periodically and inevitably arise under the First Amendment, our most recent Convention, held in Boston last July, addressed itself to many of the events and issues which gave rise to these hearings and concluded that "the principle of freedom of the press * * * is under grave and unprecedented attack in the United States and Canada."

Among the occurrences cited by our 1971 Convention in arriving at this conclusion were subpenas for used and unused notes, films, tapes, photographs and files; attempts to compel disclosure of the sources of information and materials gathered; what the Convention described as the "incredible actions of the government in attempting to muzzle newspapers in the Pentagon Papers cases," abuses of press credentials by military and law enforcement agencies, and the physical abuse of newsmen by agents of the public and private citizens alike. (The complete texts of the pertinent '71 Convention's resolutions, titled "Freedom of the Press and Police Press Relations," are appended to this text. I offer them for the hearing record.)

This committee is expert on the constitutional and sociological arguments favoring the full and free flow of news and opinion in a free society such as ours.

At the risk of belaboring the obvious, however, I would like to emphasize a point that all too often, I'm afraid, is forgotten by the very public whose freedoms the First Amendment is designed to ensure and protect:

The purpose of the First Amendment's free press guarantee is not to create a special privilege for newspapers and newspapermen. Its purpose is to ensure that the public may be informed of events which may affect it and of what its government is doing in its name and be free to express itself thereon, for good or for ill. Flowing from that, to the extent necessary to ensure that the public may be informed, we believe that the First Amendment does create unique rights for newspapers and newspapermen in our society.

One of these rights, championed by the Guild for the past 37 years, is the right of newsmen to protect their information and materials as well as their sources from forced disclosure—a right presently being challenged by the government before the Supreme Court, as you are aware. (The Guild has filed an amicus brief with the Court.)

It is the Newspaper Guild's position that this right is absolute and unqualified, and that it applies to any information or source, confidential or not.

Demands for disclosure of newsmen's notes, tapes, films, photographs or files, or for disclosure of their sources whether made by the government or by private persons, endanger the trust between newsman and news source. And that trust is essential both to the ability of the press to provide the public the information to which it has a right under the First Amendment and to the newsman's ability to carry out his function under the First Amendment.

The basis for our position was laid down by the Guild's first annual convention in 1934 when it adopted a Code of Ethics affirming the newsman's obligation to "refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies." That position was reaffirmed by our 1959 Convention, which noted that a anewsman who discloses confidences and/or sources can expect to "soon be unable to collect the information necessary to give meaning to a free press * * *."

The 1969 Guild Convention, reacting to the first signs of what became a trend, cited its belief that the Bill of Rights "should permit a newsgatherer to protect both the ethics of his craft and his own future ability to practice it" and condemned "any attempt by the courts or law enforcement agencies to use newsgatherers as arms of the court."

By the time the 1970 Guild Convention met we were in the middle of a virtual flood of demands that newsmen disclose their information, materials and sources not only to law enforcement bodies but to defendants as well. And some newspaper managements had been turning over files, containing published and unpublished photographs, verified and unverified information, the names of soures, etc., to governmental agencies—sometimes without any subpena being involved—without so much as the courtesy of informing the newsmen involved. (This subcommittee has heard from at least one publisher who apparently sees no possible problem in this type of activity.) Some subpenaed newsmen had also been refused support by their publishers in resisting subpenas.

These events resulted in a pair of actions by the 1970 Convention.

In one we committed the Guild to negotiating specific contractual provisions to forbid a publisher to disclose file materials without permission of the newsgatherers involved and to require a publisher to support a newsman refusing to honor a demand for disclosure and to guarantee that the newsman will not loose his income and employment as a result of that refusal.

At the same time the 1970 Convention, while calling for enactment of legislation to protect a newsman's rights against forced disclosure "when careful study indicates conditions to be favorable to its passage," cautioned that legislation crippled by qualifications "may be worse than no law at all."

Senate Bill 1311 in its present form, in our opinion, falls into that category I just mentioned: legislation that may be worse than no law at all.

S.B. 1131, like bills introduced in the last Congress, is in our opinion so full of exceptions and qualifications that we fear it would invite prosecution against newsmen rather than protect their rights—that it would contribute to the destruction of the purpose it purports to serve. S.B. 1311 in fact appears to us to be more restrictive than rulings by some courts in recent years.

In any event, it is our opinion that enactment of any "privilege" legislation while the Supreme Court is considering the matter, is premature. We do not believe in legislation for legislation's sake.

Briefly, some of the difficulties we see in S.B. 1311:

It would restrict the privilege against compulsory disclosure of information to information which is "confidential." We are at a loss to see how in a great many instances a newsman or anyone else can properly sort out that which is "confidential" from that which is not. Not much information gathered by a newsman in the course of his daily activity comes neatly labelled.

Had this bill been law last summer, it seems to me, its explicit denial of privilege for information "which has at anytime been published . . ." might well have enabled the government to "inspect and copy" the Pentagon Papers in the *New York Times*'s possession as it sought to do. Once the first story on the Papers had been published U.S. District Court Judge Murray I. Gurfein might well have been precluded from refusing as he did to allow a government "fishing expedition" (his words) into the *Times*'s files.

The bill's explicit exemption from protection of the source of information required by law to be kept secret would seem to invite prosecution in many instances, such as those involving grand jury investigations, while hampering the press's ability to continue to carry out its traditional role of exposing the subversion of the public good to private interest, as has been known to occur behind legally closed doors.

And the bill's provisions for total disvestiture of privilege for both source and information in cases involving "threat to human life, espionage or foreign aggression" are much broader than recent court rulings. In the *Caldwell* case, for instance, the 9th U.S. Circuit Court of Appeals ruled that there must be a clear showing of a compelling and overriding public need that cannot be served by any alternative means before disclosure can be required.

The bill seems to us to invite investigators to seek to let newsmen gather their evidence, turning reporters and photographers into unwilling agents of the government or other interested third parties.

If at some time, soon or not so soon, legislation to protect newsmen's rights against forced disclosure seems necessary, this bill might accomplish what it sets out to do if the word "confidential" were strickened from its statement of purpose and from line 9 and at the same time all of Section 4 and references to it in Sections 2 and 3 were deleted.

We fail to see how anything less than absolute privilege can be justified under the First Amendment. I am not aware of any foreign aggression against the U.S., espionage against our nation, miscarriages of justice or lives lost because the press refused to disclose information it had gathered or its sources and which might demonstrate otherwise.

The point I emphasized earlier on the purpose of the Constitution's press freedom guarantee applies equally to the issue of prior restraint on publication raised by last summer's Pentagon Papers cases as it does to newsmen's rights against forced disclosure.

In analyzing the actions surrounding publication of the Pentagon Papers there is a corallary that seems especially appropriate: that just as the public has the right to know about the operations of its government, so do its elected representatives in the Congress.

Once government censorship of the press and denial of information to the public's elected representatives abridges the public's right to know, two equally disastrous consequences are inevitable.

First, as I pointed out earlier, we become, to the extent of that abridgement, less a representative democracy than we profess to be.

And not only the credibility of the press, but also, more importantly, the credibility of the government itself, is destroyed.

We do not contend, of course, that the government does not sometimes need to act in confidence and even classify some of its papers against disclosure, particularly in matters involving the national defense.

But any system for the clasification of such documents: (1) must be narrowly defined and responsibly applied, (2) must ensure periodic review and declassification, and (3) must provide for effective challenge of, and relief from, the decisions of those officials who have the initial responsibility for administering it.

We think the system's declassification process would operate best under an independent review unit with the power to make public any document classified for two years unless the necessity for maintenance of the classification is demonstrated by the classifying agency. Any document for which such proof is not made or offered should be automatically declassified.

The government's present classification system, though improved and reformed in recent years, does not meet the above criteria. Classification is imposed on some information unnecessarily, and on other information mistakenly, and the government has not been above utilizing it to attempt to manage the news. In fact, as pointed out in the press at the time of the Pentagon Papers incident, the substance and some of the precise details of nearly everything printed from the Pentagon Papers was published while it was happening, apparently deliberately leaked by persons in the administration.

While it may once more be belaboring the obvious, we must never forget that our system of government is based on a delicate system of checks and balances between legitimately contending interests. And under our system classification and publication are and must remain separate questions; the first regulated by law, the second protected by the First Amendment.

It would be foolhardy, of course, to deny the hypothetical possibility that there might be occasions justifying prior restraint on publication. The courts, including the Supreme Court, have suggested and the defendants in the Pentagon Papers cases have conceded that prior restraint might conceivably be justified in cases involving such matters as current information on wartime battle plans, troop movements and the like.

However, it would be equally irresponsible to forget that voluntary press censorship has served our nation well during wartime, without the necessity of prior restraints on publication, and can be expected to continue to do so if the occasion arises in the future. Like the government, newspapers have their own systems of internal checks and balances that serve to restrain them from precipitate action.

As the chairman noted in opening the first round of these hearings last fall, tensions of yet another kind have arisen between newsmen and public officials in recent years in some parts of the country—tensions over abuses of press credentials, involving both their issuance and use.

A press credential—or press card—is, or at least is supposed to be, simply a document which a working newsman can use to readily identify himself as such in a situation where it is necessary to establish that identification.

Press cards differ in form and format from locale to locale and the method by which they are issued or obtained, as well as their source, also differs from one city or part of the country to another.

Tension surrounding the issuance of press cards is most prevelant in places where law enforcement officials have a hand in their issuance, and seems, where it exists, usually to vary in intensity in direct proportion to the degree of those officials' involvement.

Press cards generally are issued in one of three ways.

Some papers design and issue their own.

The chairman noted in his remarks last fall that members of the Newspaper Guild in Madison, Wisconsin, last summer voted unanimously to destroy their press cards that had been issued by the Madison police department.

The paper for which those Guild members work, *The Capital Times*, is now one of those which issues its own press cards. These new cards, like those similarly issued, carry the designation "Press Card" at the top of one side, state the newsman's name and the fact that he is a newsgatherer in the employe of the *Capital Times*. There is a place for the newsman's photo on that side, too, and at the bottom, the signature of the executive editor. On the reverse side is space for the newsman's signature along with vital statistics: height, weight, color of hair, eyes, etc.

When we checked with Madison members last week they reported no more problem establishing their identity with their new press cards than they had had with the old.

Under a second method, a newsman receives from his employer a press card, carrying both his and his employer's identity, but bearing the signature of a public official, most often a police chief or commissioner, attesting to those items of information. In these instances the public official, who issues the card, sends a number of signed cards to someone in a newspaper's management ranks—like a managing editor—and he has a newsman's name, etc., put on the card before the newsman receives it.

Under a third method of issuing press cards, the issuing public agency, again most often a law enforcement body, is requested to issue a card to a newsman identified in the application and the card comes to the newsman minus perhaps only his signature and/or photo. In some instances managements request and receive the card on the newsman's behalf and give it to him. In other instances the newsman himself requests and receives the card directly from the issuing official or agency.

The California Highway Patrol issues a press card under the third method. We understand it is used widely in the state. On the front of the card it issued in 1971 the legend "1971/Press/California/Highway Patrol" is superimposed on a reproduction of a police badge and appears more prominently than the name of the newsman and the paper which employs him.

The reverse side of cards issued under both the second and third methods usually contains a statement to the effect that it has been issued for identification purposes only, a pledge that the holder will abide by orders or directions given him by police in carrying out their duties and perhaps a second pledge that the newsman will return the card if he leaves his present employer. Below all this is a place for the newsman to indicate his acquiescence to those conditions with his signature.

Press cards falling into the third category have produced most of the tension that has risen among newsmen over press cards in recent years.

When newsman must depend on government agents or agencies to obtain press cards—the basic document of their identity—it is in fact a form of licensing and as such is subject to the same sort of abuses as any other kind of licensing.

When The Newspaper Guild, in a resolution by its 1968 Convention, first took official notice of problems involving the issuance of press cards we called for them to be "issued without discrimination to persons employed in gathering news" and condemned their being "withheld (as reportedly occurring in Los Angeles) simply because a law enforcement officer does not like what the reporter writes."

A veteran newspaperman who recently joined the Guild's staff reports that several years ago when he worked in Las Vegas, Nevada, two reporters were denied press cards issued there, at least then, by the police because a "routine" police check revealed that they had police records. They lost their jobs because they couldn't get a police press card, he reports. (There was and is no Guild contract in Las Vegas to protect newsmen from such treatment, by the way.)

Tension also has arisen over press cards issued by law enforcement agencies when in several instances the agencies apparently have not been averse to issuing some to their own agents, enabling them to masquerade as working newsmen.

In several instances law enforcement officials have admitted employing this sort of ruse. In one of the most brazen of their admissions, just about a year ago, the California Justice Department's chief of law enforcement, backed by the state's attorney general, stated that he would not hesitate to have one of his agents pose as a newsman in order to gather information.

Our 1968 Convention voiced the Guild's condemnation of this practice, too, "not only because of its doubtful ethics but because it believes such conduct could destroy news sources and the willingness of the public to be interviewed by authentic members of the press * * * as well as the trust of newsmen in general."

Our 1969, 1970 and 1971 Conventions, repeated the call for an end to the practice, with our 1971 Convention noting that under this practice "the public cannot be sure * * * who is a reporter and who is a secret agent" with "the result, in some cases * * * that the physical safety and the very lives of working newsmen have been placed in jeopardy."

Even if dependence on government agents and agencies for the issuance of press cards had not in any instance had a chilling effect on the press and its practicioners' ability to function freely, the practice is a form of licensing and as such contrary to the First Amendment. The practice should stop. The press should issue its own basic credentials of identification.

Despite the alarms raised by some in recent years over the press's real and imagined shortcomings, the First Amendment's guarantee of press freedom has served and continues to serve this nation well.

I would ask those who seem to favor making the press less free:

Do you really believe that the U.S. citizenry ought to have to depend on the willingness of newsmen to serve jail terms in order to continue to obtain information necessary to fulfill their function of governmental watchdogs?

Do you really believe that news which may be embarrassing to some in public positions ought be cleared with those same officials before it can be published?

Do you really believe that the government ought to have the power to decide who is qualified to gather news?

If anything is called for today, it seems to me, it is an even broader application of the free press protections under the First Amendment, such as has occurred in Supreme Court decisions in libel in recent years.

RESOLUTION BY THE 38TH ANNUAL CONVENTION, THE NEWSPAPER GUILD, AFL-CIO, CLC, ADOPTED JULY 15, 1971

FREEDOM OF THE PRESS

The principle of freedom of the press—which involves the inalienable right of the people to be informed and to make their own judgments on the policies and actions of their government—is under grave and unprecedented attack in the United States and Canada.

In the United Sates, this attack includes the incredible actions of the government in attempting to muzzle newspapers in the Pentagon Papers cases, the recently defeated move to cite Dr. Frank Stanton, President of CBS, for contempt of Congress for his refusal to turn over TV film outtakes prepared in connection with the program "The Selling of the Pentagon," and the various pronouncements of members of the Nixon Administration attempting to justify the administration's apparent policy that the best press is a kept press.

In Canada, even more gross violations of the principle of the free press occurred during the Quebec terrorist crisis of late 1970. One such violation was the prohibition of publication without police authority of photographs or statements issued by the terrorists, or even references thereto. In some instances, Canadian journalists and others were arrested and detained without charges and without bail. The homes of journalists were searched and news material in them seized.

That these events occurred in two countries which have long venerated and respected the principle of a free press has alarmed and dismayed free people throughout the world.

Even more dismaying to people in the United States was the fact that the attacks on the Constitutional guarantees of free press and free speech were carried out by the Attorney General of the United States. John Mitchell, a cabinet officer whose duty it is to preserve, protect and defend the Constitution —not to weaken its guarantees and destroy it.

The 38th Annual Convention of the American newspaper Guild condemns Mitchell's attempts to subvert the Constitution of the United States and demands his resignation or dismissal.

The 38th Annual Convention of the American Newspaper Guild declares that it is self-evident that guarantees of free speech and free press extend not only to print media, but to all media, including, but not limited to, radio and television.

The 38th Annual Convention of the American Newspaper Guild declares that it is its belief that freedom of the press and of speech is inviolable in all countries, and that it is opposed to attempts to censor, muzzle, intimidate or otherwise violate the integrity of the pess or of newsmen in any country—and particularly when such attempts occur in free countries such as Canada and the United States.

POLICE PRESS RELATIONS

For many years, the American Newspaper Guild has been concerned about abuses by some public agencies in their dealings with working newsmen and women.

While many editors, publishers and managers have been concerned with lofty principles, and while Guild Conventions have considered sweeping resolutions, to those men and women who are the foot soldiers in the battle to report the truth, freedom of the press becomes something less than an academic principle when it is abridged by a policeman's club or a rioter's fist.

It may be futile to demand that rioters stop rioting, bombers stop bombing and criminals stop committing crimes.

However, the 38th convention of the American Newspaper Guild demand that responsible authorities bring a halt to abuses against newsmen which include police, military and government agents who harass, intimidate and impersonate newsmen, and who seek to block reporters and photographers from reaching sources of news.

Abuses are legion: the Chicago police often impersonate newsmen—as documented by the *Chicago Sun-Times;* the Illinois Bureau of Investigation admits it has investigators pose as television news camera crews; Federal Bureau of Investigation agents have posed as reporters with phony credentials; military intelligence agents working on domestic assignments have impersonated television news crews; in San Jose, police have attempted to seize notes and material from reporters covering news activities; and some publishers have failed to resist these practices, and have condoned and encouraged them.

These odious practices undermine public confidence in persons engaged in collecting and reporting news. The public cannot be sure, if these practices continue, who is a newsman and who is a spy, who is a reporter and who is a secret agent. The result, in some cases, have been that the physical safety and the very lives of working newsmen have been placed in jeopardy.

The 38th Annual Convention of the American Newspaper Guild urges all working newsmen to expose such imposters, whenever and wherever they are found.

The 38th Annual Convention also strongly condemns interference by the military and law enforcement officials with newsmen by blocking their free access to areas and activities which are matters of public interest, and therefore, news. In cases where police lines have been established, newsmen must be allowed to determine for themselves that they wish to assume the risk of entering such areas if that is necessary to gather the news.

We congratulate managements and publishers who aggressively resist efforts to obtain information through unconstitutional use of search warrants, subpoenas, and requests to turn over photos and newsmen's notes to the police or to other bodies. But we condemn these other managements and publishers who are undermining the very principles they espouse when they speak of a free press by ordering their employes to turn over unpublished material to agencies outside the news industry.

The 38th Annual Convention reminds all persons in the news industry that the freedom and independence of the press is lost the moment the press becomes an arm of the police, the military or the government.

Mr. Baskir. The Senator has also asked me to say that the subcommittee will reconvene tomorrow at 10 a.m. in room 1318.

Thank you.

(Whereupon, at 12:45 p.m., the subcommittee was adjourned, to reconvene Wednesday, February 2, 1972, at 10 a.m.)

FREEDOM OF THE PRESS

WEDNESDAY, FEBRUARY 2, 1972

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY.
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 1318, New Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the subcommittee) presiding.

Present: Senators Ervin and Hruska.

Also present. Lawrence M. Baskir, chief counsel, and Bill Pursley, counsel; and Stanley Ebner, minority counsel.

Senator **ERVIN**. The subcommittee will come to order.

Yesterday during the hearings I made certain oral statements. There is always a hazard in making oral statements which is twofold. The person who makes an oral statement may not express himself correctly or he may not be correctly understood by some of his audience.

I refer to certain statements attributed to me, and if I made any remarks justifying those statements, they certainly were inadvertently made. I did not blame the FBI in any way for its investigation of CBS commentator Daniel Schorr. I don't think Mr. Schorr criticized the FBI in any way in respect to that investigation.

Under the laws and the Executive Office, the FBI is an agency of the executive branch of the Federal Government and it is required to make an investigation whenever ordered to do so either by the President as the head of the executive branch of the Government or any person whom it believes is authorized to speak for the President, and likewise when requested by the Department of Justice.

The FBI merely performed its duty in this case. I accept at face value the statement of Mr. J. Edgar Hoover that the FBI was requested by a properly authorized person in the White House to make the investigation of Mr. Schorr with a view to determining his fitness from the standpoint of character and loyalty to fill some Federal office which was not designated to the FBI or to anybody else.

I do agree with Mr. Schorr's observations that before any official, who is authorized by the executive department to request the FBI to make an investigation to determine fitness for the appointment to Federal office, acts, that official should inform the person being investigated of the investigation, of the objective of the investigation, and the office for which he is being considered.

With due respect to everybody concerned, I think there is a certain amount of stupidity demonstrated by investigating a man's fitness for appointment to Federal office without first consulting that individual and ascertaining whether he would accept the office if it is offered to him, but the FBI was not responsible in any way for that stupidity.

The FBI performs a most important function in our country. In the first place, it is necessary for those having appointive powers in the Federal Government to ascertain the loyalty and fitness of an American being considered for an appointment to a public office. Therefore, the FBI has that duty when requested to do so by a proper official.

Furthermore, the FBI is authorized to make investigations at the request of the Department of Justice. The Department of Justice is justified in making those requests whenever they have information which seems to indicate to them that some individual or some group has violated the law or is about to violate the law.

Now, if you had a law that said that the FBI or any other law enforcement agency of the government, Federal or State, couldn't investigate a person or group to ascertain whether circumstances reasonably indicated they were about to violate the law or had violated the law, unless that violation was first established, then in effect, you couldn't have any investigations at all. If the the FBI, or any other agency of government that has law enforcement powers. undertakes to investigate a charge that perhaps I have violated the law or am about to violate the law, they may wind up with a finding after an investigation that I hadn't violated the law and wasn't about to violate the law.

So I just wanted to make these remarks to clarify this situation and to defuse any emotions which might have resulted from anything I inadvertently said or inadvertently was suspected of having said.

Do you have any comments?

Senator HRUSKA. No, I haven't, Mr. Chairman, except to say I regret my inability to have been here yesterday. Other official duties of at least equal importance kept me away. Official duties.

Senator ERVIN. Your absence is fully understandable to the chairman of the subcommittee because the chairman of the subcommittee doesn't know of a single member of the Senate that works any harder than the Senator from Nebraska, and I might add that I know very few in the Congress who work any where near as hard.

Senator HRUSKA. You are very charitable. I hope that is not inadvertent.

(Laughter)

And I know it isn't.

(Laughter)

Senator ERVIN. No that was deliberately made.

Counsel will call the first witness.

Mr. BASKIR. Mr Chairman, our first witness this morning is Mr. Clay T. Whitehead, Director of the Office of Telecommunications Policy of the Executive Office of the President.

Senator ERVIN. Mr. Whitehead became the first Director of the Office of Telecommunications Policy in September 1970. A native of Kansas, Mr. Whitehead received his Ph. D. in management, from Massachusetts Institute of Technology, with concentration on policy analysis and economics.

He joined the White House staff in January 1969. As Special Assistant to the President, his responsibilities included the space program, atomic energy, maritime affairs, communications, liaison with regulatory agencies, and several specific economic and organizational matters.

I want to welcome you to the subcommittee and express our deep appreciation for your willingness to come and give us the benefit of your observations on what I consider one of the most important aspects of our national life.

STATEMENT OF CLAY T. WHITEHEAD, DIRECTOR OF THE OFFICE OF TELECOMMUNICATIONS POLICY; ACCOMPANIED BY ANTONIN SCALIA, GENERAL COUNSEL

Mr. **Whitehead.** Thank you very much, Mr. Chairman. I am very pleased to be here with you today and to have this opportunity to discuss with the subcommittee some of the aspects of the first amendment which I consider to be an important concern of my office to protect.

I would like first of all to introduce to the subcommittee Mr. Antonin Scalia, sitting at my right, general counsel of the Office of Telecommunications Policy.

Senator **Ervin.** We are delighted to have him with us also.

Mr. **Whitehead.** I wish to address my remarks today specifically to the first amendment implications of the two most significant innovations in our mass communications system during the past decade.

The first of these is cable television. Coaxial cable and related technologies enable large numbers of electronic signals—television signals included—to be carried directly into the home by wire rather than being broadcast over the air. There is no particular limitation on the number of signals which can be provided; systems now being constructed typically have the capacity to carry about 20 television channels, and can be readily expanded to 40.

The original use for this technology was "CATV," or community antenna television. As its name implies, that involved no more than the use of cable to carry broadcast signals picked up by a high master antenna into homes in areas where reception was difficult. In recent years, however, use of the technology has progressed far beyond that. Many cable systems now use microwave relay systems to import television signals from far distant cities. Some originate programing of their own, and make unused channels available to private individuals, organizations, schools, and municipal agencies. Looking into the future, cable technology has the potential to bring into the home communications services other than television—for example, accounting and library services, remote medical diagnoses, access to computers, and perhaps even instantaneous facsimile reproduction of news and other printed material. But I wish to focus today upon the immediate consequences of cable, and in particular its impact upon mass communications.

I do not have to belabor the point that the provision of 20 to 40 television channels where once there were only four or five will drastically alter the character of the medium. It converts a medium of scarcity into a medium of abundance. As this subcommittee is aware from earlier testimony, one of the most severe problems which must be faced by broadcasters today is the allocation of limited broadcasting time—allocation among various types of programing, and allocation among many groups and individuals who demand time for their point of view. Cable, if it becomes widespread, may well change that by making the capacity of television, like that of the print media, indefinitely expandable, subject only to the economics of supply and demand.

Of course the new medium also brings its own problems, several of which are immediately related to first amendment concerns. Economic realities make it very unlikely that any particular community will have more than a single cable system. Unless some structural safeguard or regulatory prohibition is established, we could find a single individual or corporation sitting astride the major means of mass communication in many areas.

The second aspect of this new technology which bears on the first amendment is, to my mind, the more profound and fundamental, because it forces us to question not only where we are going in the future, but also where we have been in the past. That aspect consists of this: The basic premises which we have traditionally used to reconcile broadcasting regulation with the first amendment do not apply to cable.

In earlier sessions of these hearings, this subcommittee has heard three principal justifications for Government intrusion into the programing of broadcast communications: The first is the fact of Government licensing, justified by the need to prevent interference between broadcast signals. But with cable, there is nothing broadcast over the air, no possibility of interference, and hence no unavoidable need for Federal licensing. The second is "the public's ownership of the airwaves" which the broadcaster uses. But cable does not use the airwaves. The third is the physical limitation upon the number of channels which can be broadcast in any given area—meaning that there is oligopoly control over the electronic mass media, in effect conferred by Federal license. But the number of feasible cable channels far exceeds the anticipated demand for use, and there are various ways of dispersing any monopoly control over what is programed on cable channels short of controlling content.

In other words, cable television is now confronting our society with the embarrassing question: Are the reasons we have given in the past 40-odd years for denying to the broadcast media the same first amendment freedom enjoyed by the print media really reasons —or only rationalizations? Why is it that we now require (as we in effect do) that each radio and television station must present certain types of programing—news, religion, minority interest, agriculture, public affairs? Why is it that our courts repeatedly intervene to decide, or require the FCC to decide, what issues are controversial, how many sides of those controversies exist, and what "balance" should be required in their presentation? Is it really because the detailed governmental imposition of such requirements is made unavoidable by oligopoly control of media content or by the need to decide who is a responsible licensee? Or is it rather that we have, as a society, made the determination that such requirements are good and therefore should be imposed by the Government whenever it has a pretext to do so? And if it is the latter, is this remotely in accord with the principle of the first amendment, which (within the limitation of laws against obscenity, libel, deception, and criminal incitement) forbids the Government from determining what it is "good" and "not good" to say?

This stark question is inescapably posed by cable technology. The manner in which we choose to regulate cable systems and the content of cable programing will place us squarely on one side or the other of this issue. Perhaps the First Amendment was ill conceived. Or perhaps it was designed for a simpler society in which the power of mass media was not as immense as it is today. Or perhaps the First Amendment remains sound and means the same thing now as it did then. The answer to how we as a nation feel on these points will be framed as we establish the structure within which cable television will grow.

Because the President realizes that such fundamental issues are involved, he has determined that the desirable regulatory structure for the new technology deserves the closest and most conscientious consideration of the public and the executive and legislative branches of Government. For this reason, he established last June a Cabinet-level committee to examine the entire question and to develop various options for his consideration. Not surprisingly in view of the magnitude and importance of the subject, the work of the committee is not yet completed. I assure you, however, that the first amendment concerns such as those I have been discussing are prominent in our deliberations in the committee—as I hope they will be prominent in yours when the Congress ultimately considers this issue.

I now wish to turn to what I consider the second major innovation in our mass communications system during the past decade—the establishment of a corporation for public broadcasting, supported by Federal funds. The ideals sought by this enterprise are best expressed in an excerpt from the report of the Carnegie Commission on educational television:

> If we were to sum up our proposal with all the brevity at our command, we would say that what we recommend is freedom. We seek freedom from the constraints, however necessary in their context, of commercial television. We seek for eduational television freedom from the pressures of inadequate funds. We seek for the artist, the technician, the journalist, the scholar, and the public servant freedom to create, freedom to innovate, freedom to be heard in this most far-reaching medium. We seek for the citizen freedom to view, to see programs that the present system, by its incompleteness, denies him.

In addition to this promise, public television also holds some dangers, as was well recognized when it was established. I think most Americans would agree that it would be dangerous for the government itself to get into the business of running a broadcasting network. One might almost say that the free-speech clause of the first amendment has an implicit nonestablishment provision similar to the express nonestablishment restriction in the free-exercise-of-religion clause. Just as free exercise of religion is rendered more difficult when there is a state church, so also the full fruits of free speech cannot be harvested when the government establishes its own mass communications network. Obvious considerations such as these caused Federal support of public broadcasting to be fashioned in such a way as to insulate the system as far as possible from government interference.

The concern went, however, even further than this. Not only was there an intent to prevent the establishment of a Federal broadcasting system, but there was also a desire to avoid the creation of a large, centralized broadcasting system financed by Federal funds—that is, the Federal establishment of a particular network. The Public Broadcasting Act of 1967, like the Carnegie Commission Report which gave it birth, envisioned a system founded upon the bedrock of localism, the purpose of the national organization being to serve the needs of the individual local units. Thus it was that the national instrumentality created by the act—the Corporation for Public Broadcasting—was specifically excluded from producing any programs or owning any interconnection (or network) facilities.

Noncommercial radio has been with us for over 50 years and noncommercial television for 20. They have made an important contribution to the broader use of communications technology for the benefit of all. The new Corporation for Public Broadcasting has, for the most part, made a good start in expanding the quantity and quality of programming available to local noncommercial broadcasting stations. There remain important questions about the most desirable allocation of the corporation's funds among educational, instructional, artistic, entertainment, and public affairs programing. But most importantly, from the first amendment standpoint, there remains a question as to how successful the corporation has been in avoiding the pitfalls of centralization and thereby of government establishment. Now that we have a few years' experience under this new system, we see a strong tendency—understandable but nonetheless regrettable—towards a centralization of practical power and authority over all the programing developed and distributed with Federal funds. Although the Corporation for Public Broadcasting owns no interconnection facilities, which the act forbids, it funds entirely another organization which does so. Although it produces no programs itself, which the act forbids, the vast majority of the funds it receives are disbursed in grants to a relatively few production centers for such programs as the corporation itself deems desirable—which are then distributed over the corporation's wholly funded network. We have in fact witnessed the development of precisely that which the Congress sought to avoid—a fourth network so-called, patterned after the BBC.

There is, moreover, an increasing tendency on the part of the corporation to concentrate on precisely those areas of programing in which the objection to establishment is strongest, and in which the danger of provoking control through the political process is most clear. No citizen who feels strongly about one or another side of a matter of current public controversy enjoys watching the other side presented; but he enjoys it a good deal less when it is presented at his expense. His outrage—quite properly—is expressed to, and then through, his elected representatives who have voted his money for that purpose. And the result is an unfortunate, but nonetheless inevitable, politicization and distortion of an enterprise which should be above faction and controversy.

Many argue that centralization is necessary to achieve efficiency, but I think it is demonstrable that it does not make for efficiency in the attainment of the objectives for which public broadcasting was established. For those objectives are variety and diversity—almost inherently antithetical to unified control. To choose for public broadcasting the goal of becoming the fourth network is to choose for it the means which have brought success to the first three—notably, shownmanship and appeal to mass tastes. This is decidedly not to say that there should be no nationally produced programing for public television. Some types of programing not offered on commercial television require special talent, unique facilities, or extensive funds that can only be provided at the national level; it is indeed the proper role of the corporation to coordinate and help fund such programing. But both for reasons of efficiency and for the policy reasons I have discussed above, the focus of the system must remain upon the local stations, and its object must be to meet their needs and desires.

The First Amendment is not an isolated phenomenon within our social framework, but rather one facet of a more general concern which runs throughout. For want of a more descriptive term we might describe it as an openness to diversity. Another manifestation of the same fundamental principle within the Constitution itself is the very structure of the Nation which it established—not a monolithic whole, but a federation of separate States, each with the ability to adopt divergent laws governing the vast majority of its citizens' daily activities. This same ideal of variety and diversity has been apparent in some of the most enduring legislation enacted under the Federal Constitution. Among the most notable was the Communications Act of 1934. Unlike the centralized broadcasting systems of other nations, such as France and England, the heart of the American system was to be the local station, serving the needs and interests of its local community—and managed, not according to the uniform dictates of a central bureaucracy, but according to the diverse judgments of separate individuals and companies.

In 1967, when Congress enacted the Public Broadcasting Act, it did not abandon the ideal and discard the noble experiment of a broadcasting system based upon the local stations and oriented towards diversity. That would indeed have been a contradictory course, for the whole purpose of public broadcasting was to increase, rather than diminish, variety. It is the hope and objective of this administration to recall us to the original purposes of the act. I think it no exaggeration to say that in doing so we are following the spirit of the Constitution itself.

Mr. Chairman, that concludes my prepared statement. Thank you very much.

Senator **Ervin**. I want to commend you on your statement, which raises some of the most serious problems I think we have in understanding the first amendment. You have effectively pointed out that the justifications which we have employed for regulating the broadcasting medium is founded upon factors which do not apply in the case of cable television. I sometimes think we have only touched the outer fringes of what will be possible through cable television. I happen to live in the foothills of the Blue Ridge Mountains and owing to the configuration of the mountains or some other natural conditions that I don't fully understand, I was unable to get some very close TV stations. But by means of cable television, my capacity to hear and see has been vastly expanded. I get many stations that I couldn't get at all in time past. Certainly since cable television does not use the airwaves and since limited frequencies is not a problem for the cable television, I think you make an excitingly fine case for the propositions that whatever justifications there may be for regulations of the broadcasting media, which uses the airwaves, does not apply to cable television.

I think we all recognize that the main purpose of the First Amendment was to afford rights which would make Americans politically and intellectually and spiritually free. We can't escape the fact that the Federal Government regulation of the broadcasting media which used the airwaves results in two things which are somewhat dangerous to liberty. One is that it keeps the broadcasting media at all times under a Damocletian sword, and the other is that it tends to make the government succumb to the temptations to try to brainwash the American people.

The first amendment was designed to allow people to present both sides of a question. I have one illustration drawn from my own experience representing my State of North Carolina which, as you know, manufactures a great deal of tobacco. First we have a political doctor over in HEW who wants to dictate what the Americans should smoke, and I suspect, eat, drink, and wear, though he hasn't gotten to the last three things, and for some reason the FCC has succumbed to his blandishments. They now have a regulation which says in effect that while people can broadcast derogatory statements about tobacco, people who think that tobacco is pretty good can't say anything in favor of it over the air.

Nevertheless, the policy of the FCC is that it has the complete possession of all the truth on this subject and those who disagree with them have none.

I think if the Federal Government adopts such a policy that generally it destroys freedom of the mind. I think the First Amendment was written to implement the concept expressed by Thomas Jefferson when he said, "I have sworn upon the altar of God eternal hostility to all forms of tyranny over the minds of man."

So I certainly agree with you that we need reconsideration of some of these things and we don't want government domination.

Also I share your views about the centralization and control of the public broadcasting system. I am a sort of a lone voice crying in the very confused governmental wilderness at the present time. I don't believe in centralization of power. I am a disciple of Woodrow Wilson who said that liberty has never come from government. Liberty has always come from the subjects of it. The history of liberty is the history of the limitation of government not the increase of it. When we resist, therefore, the concentration of power we resist the processes of death because concentration of power always precedes the destruction of human liberties.

I think many of the liberties of American people have been destroyed by centralization of power.

The public broadcasting presents a real problem. We have some public broadcasting stations, I think we have one here in Washington, WETA, which does a marvelous job with the programs it presents. And, of course, public broadcasting also sits under a Damoclean sword if it is going to be dependent upon Federal appropriations. While many of us profess, as did Voltaire, the sentiment, "I don't agree with a thing you say but I will defend to the death your right to say it," as you pointed out so well in your statement, people don't want views that they don't like disseminated at public expense.

I think it is essential that we keep public broadcasting.

It has a real function to perform and we have got to find some way to make it secure in its financing and also to make it secure against Government control of the contents of what it broadcasts.

I will certainly await with interest your report of your study of these subjects because I think you have put your finger squarely on some of the most serious problems that we have in this field, and which are so closely intertwined with the First Amendment. I like your expression that the First Amendment, whatever you may say about it, it is designed to secure diversity of opinion.

Senator HRUSKA. Thank you, Mr. Whitehead, for your very fine statement. You put many questions very clearly, quite pertinently. I am especially interested in the impact of some of the activities of your office in the light of the First Amendment. In a little while I shall ask you some specific questions on that subject.

Before I do, however, I would like to ask you about this statement that you made during the course of your testimony this morning. It is at the bottom of page 2 of the statement. You say, "Unless some structural safeguard or regulatory prohibition is established, we could find a single individual or corporation sitting astride the major means of man's communication in many areas." Considering modern technology as having broadened the range of CATV, do you see any comparability or do you see any similarity between a corporation that would gather—all the programs that are available and have them for sale, or for distribution to local broadcasting systems or telecasting systems? Do you see any similarity between that kind of a mechanism and the structure that has been created through the years by the Associated Press and by the United Press International and other press services?

Mr. WHITEHEAD. I think there is certainly the potential, Senator, for that kind of similarity to arise. Local cable television systems are going to have to obtain their programming from certain sources, their news from certain sources, and I think it is likely that some kind of centralized nationwide organization could spring up similar to what has happened with the Associated Press. This is a distant possibility.

Senator HRUSKA. Well, now, there was a time when the Associated Press and United Press International fell into the displeasure of those in Government who under our laws didn't like monopoly and the things that go with monopoly. That has been pretty well resolved now, hasn't it?

Mr. WHITEHEAD. I think it has been in that case. I think there will have to be similar kinds of things considered with respect to cable television to avoid just the problem that I think you are referring to.

Senator HRUSKA. So that if there is a gathering, whether it is by one corporation or by two or by three, perhaps they will not be able to say we will give these programs only to certain stations and we will not give them to others. Perhaps they have gone into the public domain to the extent that AP and UPI have gone and they are not able to discriminate, are they, under the present system?

Mr. WHITEHEAD. That is certainly one very effective way of going about it and it avoids the dangers of direct regulation that we would be very sensitive to in that kind of area.

This is what I was referring to when I said certain kind of structural changes should be made or should be adopted. It is to avoid the very detailed regulatory programs and still avoid the dangers that are implicit in the monopoly kind of situations to which you refer.

Senator HRUSKA. In the quotation that you included from the report of Carnegie Commission on Educational Television, they say, "We seek for educational television freedom from the pressures of inadequate funds."

By what means can that be achieved? After all, we have two sources of funds, I presume. One is from private sources, an organization or a corporate entity of some kind that provides the services that television for education would like to have. There is another source and that is from the public funds over which under our Constitution, thank goodness, the committees and Members of the Congress and the two Houses of the Congress have control.

How can we achieve a freedom from pressures of inadequate funds?

Do you know?

Mr. WHITEHEAD. I am afraid I don't know the full answer to that, Senator. The ideal, of course, would be unlimited funds with no restrictions. That is simply incompatible with the traditions of our society. People either have to use their own money or they have to convince other people to give them the money.

Public television today is obtaining funds through donations from corporations, from the listener and the viewer, and from foundations. They are also beginning to receive funds from the Federal Government. However, I think all of those people have a responsibility to ask what that money is being used for. There has to be an answerability, nevertheless. The answerability in the form of private donations is quite simple. If you do not like what you are listening to, you don't contribute any money.

In the case of Federal funds, however, there is a much more ticklish problem which I am referring to. I think we would all have to agree there simply cannot be unlimited funds, that we should provide adequate funds, that Federal Government should be a supplementary source but not the principal source of those funds, and that the Congress does have a responsibility to ask in broad form how those funds are being used and whether those uses serve the purposes the public would like to see served.

In short, I think their desire for unlimited funds has to be just a desire and goal rather than something that can be actually attained.

Senator. Hruska. Well, of course, your reference to the ideal situation being one where there would be unlimited funds provided, that wouldn't fit very well, would it? First of all, there isn't that much money. Secondly, in this country we don't like discrimination. The 14th amendment says everybody should be treated equally and a free press and even an educational television system is but one of our national goals. There have many other national goals, and if we are going to treat everybody equally and give them all unlimited funds, the dollars wouldn't be worth very much, would they?

Mr. Whitehead. We have to make the judgment.

Senator Hruska. You say the Government would want to know what the funds it provides are being spent for.

Sometimes there are prohibitions and restrictions put upon the expenditure of those funds and you say one of those prohibitions specifically excludes the Corporation for Public Broadcasting from producing any programs or owning any interconnection or network facilities.

How meaningful is that prohibition, Mr. Whitehead?

Mr. Whitehead. I think it is somewhat less meaningful than originally intended. Through the devise of wholly funding these activities, the corporation has discovered, not suprisingly, that it has rather great control over what programs are produced and which ones are distributed over the public broadcasting network.

I don't mean to imply that they use that control, for improper purposes, but I simply do refer to the point that one organization is in effect exercising the power that I believe the Congress did not want it to have, and this raises a problem with respect to how we proceed in providing Federal guidance and funding.

Senator Hruska. Do you feel that a system of grants and, of course, the use of the programs from organizations that receive those grants, constitutes an evasion or violation of the statutory prohibition excluding the corporation from producing any programs or owning any interconnection with network facilities?

Mr. Whitehead. No, sir. I don't consider it a violation nor would I consider it a purposeful evasion. I do think, though, that it reflects a rather different spirit than what I understand was intended by the 1967 act.

Senator Hruska. Well, what are your views on creating and implementing a national public TV news show anchored by former NBA newscaster Sander Vanocur for the robust salary of $85,000, presumably per year? I noted this item in the *Newsweek* of February 7th. What are your ideas on that in the light of the prohibition to which you alluded in your statement?

Mr. Whitehead. Senator, I would prefer not to comment on any particular individual or employee or even any particular show that is put on by public broadcasting.

Senator HRUSKA. Well, then, for the purposes of my question, I eliminate the name of Sander Vanocur.

Mr. WHITEHEAD. Thank you, sir.

I think that that type of thing is illustrative of the general problem which I was referring to, to wit when public funds are being used, there has to be some concern about the uses to which the funds are being put. As to the level of salaries, for instance, I think the public generally feels that public services has its own rewards and the use of public funds for paying very large salaries is not compatible with that general feeling.

It raises other problems. Public television has traditionally made use of talents of artists, writers, directors, actors, and so forth, who could command rather great salaries in the commercial sector but who donate or make available their time at a very low level to participate in the very worthwhile activities of educational and public broadcasting. Obtaining large salaries through public funds is going to inevitably discourage that kind of thing and in the process it is going to change the spirit of public television.

Furthermore, I think that to the extent public television wants to be involved in the discussion of controversial political affairs, which is inevitably going to be provided, they simply have to take into account the fact that this is going to make public television itself controversial. They have to weigh the benefits of that and the costs of that.

Along with that is the question of whether Federal funds should be used for this kind of purpose and that raises simply the broad question of principle that I raised in my statement.

So I think there are a number of problems.

Senator HRUSKA. This is a direct attempt. When a grant is made to another entity at least it is not that direct, but when a man is hired as a newscaster, without references to personality, without reference to salaries, when there is created a national public TV news show, wouldn't that seem to be specifically within the prohibitions that say the corporation is excluded from producing any programs?

I don't know much about your telecommunications industry but to a layman it seems where there is a prohibition from producing any programs and then there is, according to this news article, the creation of a national public TV news show, I think they are talking about the same thing, don't you?

Mr. WHITEHEAD. Sir, as I said, it is certainly not a violation of the act. It obviously is counter to the spirit of the act.

Senator HRUSKA. It is obviously what?

Mr. WHITEHEAD. Counter to the spirit of the act. Technically they are not producing that program. They have given a grant to another entity that is producing the show.

Senator HRUSKA. Well, it wouldn't be my purpose to go into that further because I understand that other committees of this Congress are inqquiring into the matter. Perhaps they have a more specific oversight of the activities of the corporation. And I will entrust that part of the subject to their tender mercies. I think they will give it a good working over. They should.

Now, directing some questions to your statement proper, recently the Federal Trade Commission recommended that the Federal Communications Commission require "counter-advertising" under the Fairness Doctrine. Do you think there are any First Amendment problems with this proposal?

Mr. **Whitehead**. Yes, sir. I think there are. There are two important First Amendment considerations. One is the growing tendency to discriminate against the broadcasting media simply because of the fact of a Federal license. That raises broad First Amendment problems.

Perhaps more directly there is the question of who is going to oversee this process? How are we going to decide who gets to counter what and whether the person who is doing the counter-advertising is in fact not being deceptive?

Now, product advertising is not considered, I believe, to come under the free speech provisions of the First Amendment. It is not considered to be protected speech.

On the other hand, counter-advertising presumably would be. So there do arise very sensitive First Amendment problems of who is going to oversee the process, who gets to say what about advertising, who gets to do the counter-advertising? It merely moves the FTC's problem back one step and tries to pass over to the FCC what should really be the responsibility of the Federal Trade Commission.

We find this a very disturbing proposal and disagree with it.

Senator **Hruska**. In the example given by Senator Ervin about the evils of tobacco being considered in a sacrosanct position, no controversy about it at all. It was the FCC who said that, wasn't it?

Mr. **Whitehead**. That is correct.

Senator **Hruska**. So they have moved in and have answered the question you raised when you ask who will take charge of monitoring this. They have stepped into that void, haven't they?

Mr. **Whitehead**. They have.

Senator **Hruska**. Do you think that is where it should reside?

Mr. **Whitehead**. We think the decisions on advertising practices should properly reside with the Federal Trade Commission. If you want to regulate advertising, you should do it through your control of advertising, not through the device of Federal licensing and regulation.

Senator **Hruska**. Where it is a hybrid creature, and the advertising may be a viewpoint and the answer to it an opinion, then we get half and half, don't we?

Mr. **Whitehead**. That is right.

Senator **Hruska**. And we don't know whether we should be in one area or the other.

Mr. **Whitehead**. That is right.

Senator **Hruska**. Now, on the subject of CATV, I understand that your office had negotiated with interested parties and received various viewpoints on it, and recently a compromise was achieved which would retard CATV growth subsequently and especially in the top 50 markets. How does this square with what seems to be the bright future that is seen for the technology developed by CATV?

Mr. **Whitehead**. Well, the bright future of any new technology or any new industry always presents a bit of a chicken and egg problem. How do you get the thing geared up to be big enough so that the advantages can in fact come about. The way that the Federal Communications Commission wanted to adopt, is to give cable television some favored treatment on its ability to import distant signals.

Now, as soon as they do that, there are profound copyright questions that arise and the Federal Communications Commission approach is to authorize those distant signals to be imported and to allow special copyright provisions—a compulsory license as it is called.

The compromise that was later reached among the parties, the copyright owners, the cable television people, and the broadcasters, placed some restrictions on the terms and conditions under which this special treatment would be afforded in the top 50 markets. So that viewed in its proper perspective, it is not retarding of cable television in the top 50 markets but simply not giving it such favored treatment in the top 50 markets. The reason for that, in the economics of television production, is that the top 50 markets are essential to the continued profitability of the program production organizations. They have to be assured of making an appropriate profit in those markets if they are going to be able to produce programing at all. The agreement was intended to provide much more freedom and much more latitude for cable television in the markets below the top 50 and to keep the necessary copyright exclusivity provisions in the top 50 markets to assure the program suppliers' economic base would not seriously be damaged.

Senator HRUSKA. Of course, when there has been a negotiation with reference to an interpretation of the copyright laws we get into the field of legislation, the statutes, and then normally when there is a difference of opinion upon that, we refer it to the courts. We go into the courtroom and ask the judge, what do you think this really means? So I presume that this arrangement and compromise which was worked out would be subject to court interpretation?

It would also be subject would it not, to express legislation on the subject where a law enacted by Congress would say this is what shall be. Do I state the case fairly?

Mr. WHITEHEAD. Absolutely.

Senator HRUSKA. Now, your office has a responsibility to develop policy for direct to home broadcast satellites. Are there any First Amendment implications of this for the U.S. broadcasters and if so, what are they?

Mr. WHITEHEAD. Yes, there are First Amendment implications. On the one hand, we would generally view the expansion of any new outlet of communication as an expansion or opportunity to extend the workings of the First Amendment. However, in this case there is the possibility, because of the economic realities, that direct broadcasting from satellite to home would result in the establishment of a new centralized national television system. It would involve programing to the entire Nation and the economics of this would drive out local broacasting.

Now, this would work counter to the principle of the First Amendment where we want as many local and diverse voices as possible. You have those two competing kinds of First Amendment considerations that need to be weighed.

There is also the international problem which we have to keep in mind. Use of the radio spectrum in space is inherently an international of activity and the United States I am afraid is in the minority around the world in believing the world should be an open society—open to the freedom of information across national boundaries.

There is some movement abroad in international communications circles to try to limit or to forbid the use of satellites for this kind of purpose. We are very diligent in trying to avoid that taking place.

Fortunately this is a problem that is not going to be with us in the immediate future because the technology and the economics of the technology are such that it simply is too expensive for practical use in the foreseeable future.

Senator HRUSKA. Well, it is gratifying that the substances of your answer indicates that future decisions or considerations will be given within the framework of the first amendment. That is encouraging.

What is the administrative financing plan for the CPR? Is personal financing the goal as far as you know? What policy or what thought has your office on that subject?

Mr. WHITEHEAD. We along with most people feel very strongly that long-range financing is essential to setting up the kind of corporation, and kind of public broadcasting system that we want and need in this country. Unfortunately in setting up that kind of long range financing we have to resolve some of these very vexing questions that I discussed in my statement. We have concluded that it is simply not an appropriate time to try to push through a long range financing plan in this session of Congress. We have therefore submitted a one-year extention of the authority for funding of the Corporation for Public Broadcasting at an increased level of funds, up to $45 million from the previous year of $35 million to assure the corporation can continue to grow and continue the healthy development of public broadcasting.

In our bill, which I believe will be introduced today, we have provided that a certain amount of the funds, namely, $15 million, would go directly to the local stations as a matter of right.

Senator HRUSKA. Mr. Chairman, I have a series of additional questions that are along this line. I don't want to burden the record at this point nor to encroach on the time of other witnesses and staff and the Chairman. May I ask unanimous consent that these questions be propounded to Mr. Whitehead for his answers and insertion into the record?

Senator ERVIN. That will be fine. So ordered.

They will be directed to Mr. Whitehead and he can answer them in writing.

Mr. WHITEHEAD. I will be pleased to do so.

Senator HRUSKA. I would prefer to do it that way and, if there is no objection, I would appreciate it.

(The material referred to follows:)

SENATOR HRUSKA'S QUESTIONS FOR MR. WHITEHEAD

1. The Corporation for Public Broadcasting seems to put a lot of emphasis on British Broadcasting Corporation entertainment shows, cultural uplift and public affairs discussions and documentaries. What does this have to do with

educational TV? Do you think the Corporation for Public Broadcasting is simply programing for an economic or cultural elite? Is it responsive to the needs of "middle Americans" of all races?

2. What do you consider to be the influence of foundations, such as the Ford Foundation, on public broadcasting programs, operations and policy making? Do you see any "free press" dangers in this? Should foundations be precluded from these activities?

3. How much money has the Ford Foundation directed to public broadcasting activities?

4. How could the Congress best keep tabs on the Corporation for Public Broadcasting's use of federal funds, just to see that there's fiscal responsibility and with no intent to exert improper influence?

5. You mentioned today that the Cabinet Committee on cable TV is studying this or the other fundamental issue and will soon make recommendations. What's holding the report up?

6. Do you know what the cable TV Cabinet Committee is considering to assure that cable development will enhance the opportunities for free expression which you described for us today?

7. What is the Office of Telecommunications Policy's role in advising the Federal Communications Commission on the First Amendment implications of its proposed rules regarding cable program content, access channels and the like?

RESPONSES OF CLAY T. WHITEHEAD TO QUESTIONS RAISED BY SENATOR ROMAN L. HRUSKA REGARDING FIRST AMENDMENT IMPLICATIONS OF PUBLIC BROADCASTING AND CABLE TELEVISION

Question No. 1.—The goals to be achieved for public broadcasting were initially derived from early educational radio and televsion services which developed in response to the educational needs of local communities and the instructional programs of state and local educational entities. The Carnegie Commission on Educational Television built on these educational broadcasting goals and created the concept of public broadcasting, which was intended to include more than classroom instructional services and other strictly educational broadcast services for use outside of the classroom. The intent was to have the Corporation fund programing in a wide variety of fields, including drama, culture, and art. The Congress followed this intent in the Public Broadcasting Act of 1967, although there was some uneasiness expressed about the Corporation's funding of entertainment programing.

In its programing operations, CPB has provided entertainment, "cultural uplift," public affairs and other types of programing. These do tend to appeal to a cultural and economic elite. I think, however, that there is no doubt that the more emphasis CPB gives to instructional services, adult education broadcasts, and programing for the learning needs of children, the more CPB is appealing to a broader, more diverse audience. Both types of programing are desirable; it is a question of emphasis. We believe that CPB should work more closely with the local educational stations to see where the balance should be struck between both types of program services to achieve the greatest benefit to the public.

Questions Nos. 2 and 3.—Foundations, in general, and the Ford Foundation, in particular, have contributed much of the financial support for the development of public broadcasting. No single private or public entity has contributed as much as the Ford Foundation—nearly $200,000,000 in all. Obviously, when any entity—including the Government—spends large sums of money upon an enterprise it looks to see that the enterprise is developing along the lines that it desires. There is nothing wrong about this; indeed, it would be irresponsible for any private or public donor to dispense money willy-nilly, without regard to success in achieving the desired goals.

On the other hand, it is certainly legitimate to question whether it is appropriate for a social institution as important as public broadcasting to be substantially directed along the lines desired by any single entity that is not accountable to the public. The Ford Foundation, for example, is well known to be particularly interested in public affairs programing. Naturally, this interest underlies the Foundation's funding decisions and affects the balance among various types of programs that are made available to the public.

The inappropriateness of dominant influence by a single private source—however benevolent that source may be—is one of the reasons the Administration believes that public financing for public broadcasting should be established on a sound, fiscally responsible and stable basis.

Question No. 4.—In 1967, when the Congress enacted the Public Broadcasting Act, a question was raised as to how the Congress could maintain responsibility for CPB's use of Federal funds. The matter was resolved by including a provision in the Act allowing for an audit of CPB by the General Accounting Office. To my knowledge, Congress has not used that provision.

Question No. 5.—The President's Cabinet committee on broadband cable television was formed in June 1971, and has spent a considerable amount of time analyzng the fundamental and difficult policy matters which it must resolve in order to make its recommendations to the President. There has been steady progress in the committee's work, and there is nothing "holding up" its recommendations except the complexity of the task.

Question No. 6.—The Cabinet committee has considered a number of different approaches for cable development which will enhance opportunities for free expression. While it would be inappropriate for me to discuss the details of the committee's current deliberations, I can highlight some of the First Amendment objectives that public policy should set for cable television. One of the most important objectives is to facilitate access to cable channels for both program production and program reception. Another objective is to guard against the dangers posed by the fact that, in most instances, provision of cable transmission services will be a natural monopoly. Furthermore, as cable develops over-the-air broadcasting must be allowed to continue to provide essential public services that will contribute to the total diversity of programing and program sources.

There are various ways to achieve these First Amendment objectives for broadband cable development. There could be broadcast-type regulation for cable, with use of the Fairness Doctrine, paid access requirements, program "anti-siphoning" rules, etc. A strict common carrier approach could also be chosen, which would require complete separation of program supply and distribution functions. Another approach may be to require vertical disintegration of the program production and program distribution functions, in order to avoid excessive concentration of control over the access to cable channels. Other approaches and variations on the above are also possible.

Whatever the approach ultimately chosen, the Cabinet committee will be guided by the fundamental goal of fostering the opportunities for free expression which broadband cable promises for the future.

Question No. 7.—OTP has not advised the Federal Communications Commission on the First Amendment implications of the FCC's new rules regarding access channels, cable program content, and other cable services not related to the retransmission of television broadcast signals. The Administration's views on these aspects of cable television will be based on the Cabinet committee report. As I noted earlier, free speech considerations are prominent in the committee's deliberations.

While we take no position at this time regarding those aspects of the FCC's proposed rules not related to retransmission of broadcast signals, we nevertheless support prompt implementation of the entire package, with broad industry support. We think this is essential to enable the development of this promising new technology to proceed.

The framework and national policy for cable regulation is a matter of crucial importance to our society, and it requires the most careful congressional consideration as a matter of mass media structure. The FCC rules will serve to permit cable growth while that deliberation is proceeding and yet not foreclose the opportunity for congressional review and readjustment of the long-run policy. Indeed we would not urge final implementation of the FCC's new cable rules if we thought that this would have the effect of foreclosing any practical evaluation of a broad, long-range policy for broadband cable technology. We believe, however, that implementation of the rules will not have this effect, and that the FCC rules could serve as a transitionary approach to the ultimate public policy treatment of cable technology.

Senator ERVIN. Mr. Whitehead, I will have to admit you have confused me a little by making the distinction between freedom of speech generally and freedom of advertising. I think you and I would both agree that the First Amendment gives every American the right to make a political speech in which he says my religious views are good for my country. Don't we?

Mr. WHITEHEAD. Yes, sir.

Senator ERVIN. What provision of the Constitution says to an manufacturer, you are to be forbidden by a Federal agency to say that the goods you produce are good for the country?

Mr. WHITEHEAD. I don't think there is any problem with that, sir, and my general counsel, has just flagged the same problem for me. Not being a lawyer I am a little bit at a loss in grasping all the technicalities.

Senator ERVIN. I will have to confess I can't see a valid distinction between a man saying, my political views are good for the country, and a man saying my product is good for the country.

Mr. WHITEHEAD. I certainly have no problem with that in principle.

Senator ERVIN. You don't have a problem with it?

Mr. WHITEHEAD. No, sir.

Senator ERVIN. Nevertheless, you say the Federal Government can determine the truth of the latter but not of the former?

Mr. WHITEHEAD. No, sir, that is not what I am saying. I think the advertiser certainly has the right to say to the public what he wants to say. I just was under the impression that there were certain restrictions that were placed on that right and I may have been wrong.

Senator ERVIN. Well, the FCC has required certain people producing certain gasolines who advertise that their gasoline is good for the motor, to present as a part of their advertisement information indicating that their gasolines pollute the atmosphere.

Now, I don't know what your views are on that but my view is that action is polluting—that is, FCC requirements of that kind are polluting freedom. In my opinion, polluting freedom is worse than polluting the atmosphere, if we have to make a choice between those two very disagreeable things. If you allow the FCC, or any other governmental agency, to say this product is good and that product is bad, and an advertiser cannot speak up for the goodness of his own product in public broadcasts, I think you are very close to getting to the point of allowing the government to say to the American people, it would be good for you to read this book but it would be very bad for you to read that book because that book might give you some thoughts that the government thinks are improper.

Mr. WHITEHEAD. Yes, sir; I agree completely with you in spirit.

Senator ERVIN. Thank you.

Mr. WHITEHEAD. And that was my reason for being so upset and opposing the FTC's proposal which I think carried this use of government regulation and licensing in broadcasting far beyond what was ever intended and far beyond what was sound.

Senator ERVIN. The trouble with governmental power is that those who have it have an insatiable appetite for more power and they abuse power. I think there is less danger in having people abuse freedom of speech than there is in having despotic governmental power because one perceives freedom even though the freedom is exercised and abused, and the other stifles freedom.

Thank you very much.

Do you have any questions?

Mr. **Baskir**. I would like to followup on some of those points which Senator Hruska and the chairman mentioned. In a speech in October, you had some very very critical things to say about Fairness Doctrine and other legal mechanisms to open up accesses to broadcasters; stronger, I might add, than any of the other witnesses we have heard. You said it was of government control, that the courts, and I guess the FCC, are making broadcasters government agents that to take away the licensee's First Amendment rights and giving the public an abridgable right of access, in essential is, I guess, the First Amendment then becomes what the FCC and the courts say it is.

You also had three proposals which were designed to change the situation. One was with respect to access. If I recall, you wanted to have a statutory right of access, with whoever paying for the time accommodated on a first come first served basis. I think when you made that speech and made those proposals, they were your personal views. I would like to ask you first, are they still your personal views and only your personal views, or do they represent something more from the administration?

Mr. **Whitehead**. Those are reflective of the broad concern of those in the administration and elsewhere that there are fundamental problems involved in the direction we are taking to regulate broadcasting. Those specific proposals you refer to were my personal proposals and remain my personal proposals. They were put forward because we felt very strongly that this was needed to stimulate public discussion of these very broad questions of how we are regulating broadcasting. Public discussions I think, had become rather bogged down and we felt a concrete proposal, presenting a rather different alternative, would be useful in stimulating public discussion. We thought they were responsible proposals and we continue to think so. However, we are not yet prepared to take action on them because I don't think we have had sufficient public discussion to justify pushing those specific proposals forward and trying to get them adopted at this time.

But we do think that these proposals and like proposals should receive very serious public consideration.

Mr. **Baskir**. On the right of access, your proposed statutory right of access in place of the Fairness Doctrine and various other things, as I recall, was based upon requiring the broadcasters to sell time to whoever asked for it and had the money to pay for it.

Now, the Federal Trade Commission has proposed to the FCC a similar proposal but they added another item, that some of this time should be offered free of charge. I wonder what your views are on that?

Mr. **Whitehead**. The problem of requiring a broadcaster to provide time free of charge is that the only place that can be done is the government. Therefore you get right back into the problem of government power over the content of speech that I was referring to earlier and the chairman alluded to.

This is just a very serious and very sensitive problem. The spirit of the proposal that you are talking about was to limit the Fairness

Doctrine in its application to program time and not to use the Fairness Doctrine as a way of obtaining the right of access for an individual to have time to express his point of view. The Fairness Doctrine is intended to assure various points of view are expressed. It was never intended to be a mechanism whereby a person could claim the right of access to a television screen. The proposal I made was an attempt to illustrate that and provide a different access mechanism that would avoid the Federal Government getting involved in the very detailed determination of who gets that right of access. The proposal would also avoid undermining the economic structure of broadcasting by requiring all sorts of free time to counterbalance people who have paid for time or simply claimed right of access.

Mr. BASKIR. How would you handle the problem, which I gather the Trade Commission's proposal is aimed at, of getting points of view across from people who do not have enough money to buy time? There are very important points of view, I expect which cannot command funds in the public marketplace because——

Mr. WHITEHEAD. Well, first of all——

Mr. BASKIR. They are not attractive from the commercial points of view, so the people who hold them can't find the money to buy the time.

Mr. WHITEHEAD. I think most points of view if they are sufficiently important do attract funds. But recognizing that that may not always be the case, that is precisely why we have the fairness obligation placed on the broadcaster as license.

As long as we have the current system of broadcasting with the limited number of channels, the FCC is going to have to decide who is the qualified licensee. I think in making that determination, a very important aspect of it is the question "has that licensee been fair?" Has he covered the controversial issues and has he made sure that all sides are fairly presented? We would like to have the licensee cover points of view and assure that they are covered if the money is not forthcoming to buy time for that purpose.

Mr. BASKIR. This is the second part of your proposal? The straight statutory purchase of time would not be the complete test.

Mr. WHITEHEAD. Oh, no, of course not. When I made those proposals I made it very clear that they were interrelated. These are very complex matters and as you start discussing issues and proposals, you find that they begin to overlap and interlink so you can't always ascribe one issue to one particular proposal.

Mr. BASKIR. Your third proposal was that we start deregulation by taking some parts of broadcasting—I think you were suggesting certain major broadcasting markets perhaps certain portions of the FM band—and deregulate those. It seems to me that the logic of your speech and your statement today would suggest that you want to propose deregulating all of the broadcasting rather than just portions of it.

Mr. WHITEHEAD. There is unfortunately rarely a clear line that you can draw between something that has to be regulated and something that does not need to be regulated. In broadcasting it is more a matter of degree. I think that television, for many reasons is unique and probably is going to continue to have to have a significant amount of Federal regulation.

My proposal was on radio broadcasting. I pointed out that it is quite different from television. It is a case of the tail wagging the dog. We are now regulating radio as a kind of secondhand television. We don't think that is appropriate. But most appropriately of interest to this committee, we gave great weight to first amendment considerations in developing the proposals.

In radio we have a multiplicity of outlets. In almost every community there are more radio voices available than there are, say, newspaper voices. We have a strong belief in this country that the viewer, the listener, the consumer has a certain amount of good sense and can decide what he wants to listen to and what he doesn't want to listen to and discriminate between what he is hearing and what doesn't want to hear.

We simply felt from a First Amendment standpoint and from an economic standpoint, in view of the opportunity for competition in radio, that there was much less need to regulate radio in the great amount of detail that there is in television and probably much less need for all that red tape than you might think from having it there.

Unfortunately that is the kind of thing that is impossible to prove. We could study it for 10 years and never develop, I think, a convincing case one way or the other. We therefore propose to try an experiment in several areas of the country to move as far as we thought prudent within the law, of course, to remove as many of the regulations as seemed prudent and to follow the program, to see what happened. Does the service to the public improve? Or, does the Federal Government need to look over the public's shoulder and tell the public what they will have.

We simply think that kind of thing ought to be tried so that we will know which direction we ought to be going in.

Senator **Ervin**. Thank you very much for a very illuminating and very penetrating analysis of the many complex problems that arise in this field under the First Amendment.

Mr. **Whitehead**. Thank you, sir.

Senator **Ervin**. You may call the next witness.

Mr. **Baskir**. Mr. Chairman, our next witness this morning is Miss Edith Efron.

Senator **Ervin**. We are delighted to welcome you to the subcommittee and appreciate your willingness to express views which were very entertainingly set forth in your book, *The News Twisters*, You may proceed in your own way, Miss Efron.

STATEMENT OF MISS EDITH EFRON

Miss **Efron**. Just one prefatory comment. I speak here as a private citizen, not as a representative of my publication.

Mr. Chairman, members of the committee: A view has crystallized in this country that the bias controversy is a relatively new phenonmenon, spawned by a repressive Nixon administration, and bred in the dark shadows of right-wing conspiracies.

This view is a symptom of our antihistorical age, where memories are increasingly confined to the parameters of the daily press.

The bias controversy was actually born in the 1930's with the collectivist concept of public ownership of the airwaves. Until that time, if people did not like the bias of a publication or a news service, they solved the problem by refusing, individually, to buy it—a simple and rational system that still prevails in all media save broadcast news. It is when the people were informed by the U.S. Government that they collectively "owned" the airwaves, and were quasi-proprietors of the broadcast press, that they began to haggle collectively over the political orientation of that press.

The Government took its first drastic action to control bias in 1941, when the FCC, with its *Mayflower* decision, deprived all American broadcasters of their First Amendment rights by forbidding them to express their own views on controversial issues. This solved the bias problem satisfactorily: there were no longer any controversial views on the air to get excited about. Unfortunately, the solution was more deadly than the problem: it constituted a frontal lobotomy of the entire broadcast medium. America had to endure eight years of Government-induced vacancy in a major communications system—and the marks of the lobotomy have never disappeared—before the error was acknowledged and corrected.

The correction did not take the form of restoring unbreached First Amendment rights to the individual broadcaster: he remained a second-class citizen. It took the form, in 1949, of the fairness doctrine —which allowed the broadcaster to express his own opinions on major controversies, provided that he gave "equal," "equally forceful," and "nonpartisan" coverage to other points of view as well.

And from 1949 to this present day, there has been constant dissension in this country over the problem of fairness in broadcast news. It has been most acute with respect to network news which, by virtue of Government permission and protection, has acquired a monopoly over the nationwide dissemination of the facts and interpretations of American political life.

As a staff writer on *TV Guide*, I have been covering this constantly simmering antagonism to the political attitudes in network news for ten years. It was a serious problem in 1960. By 1964, under the Kennedy administration, the anger had become so intense that it inspired a congressional investigation. And by 1968, under the Johnson administration, this anger exploded like a bombshell—with nationwide protests being registered over network coverage of the race riots, the Republican convention, the Democratic convention, the antiwar riots in Chicago. The number of Americans by then who felt that network news was biased ranged between 57 and 70 percent, according to polls of the period.

Throughout this remarkable decade of mounting protest, network management has militantly refused to grant that there is the slightest basis in reality for these public reactions. It has attributed them to a variety of neurotic responses ranging from selective perception, through escapist intolerance of bad news, to a hostile desire to kill the messenger who brought the bad news. Apart from this parlor psychoanalysis of the majority of the population, the networks have had nothing to say save to attest with regularity to their own impeccably objective perceptions.

It was in 1968, at the height of the nationwide protests against network bias that I undertook to do a study of my own—a study of how the networks covered the critical two-thirds of the presidential campaign of 1968, the last 7 weeks until Election Day. I was given a small grant to cover taping, typing and research expenses by the New York Historical Research Foundation, and I set to work.

Time does not permit an extensive presentation of my theory and method, but I will mention three points:

First, I concentrated on prime-time news alone, because all studies indicate that these early-evening news programs are the most important source of political information for the majority of the country.

Second, I used an intrinsically journalistic observation as my key test for bias. There is one slanting device known to every editor and reporter in the land. It is this: if a reporter wishes to load coverage of a controversy in favor of a certain position, he will simply stuff his coverage with opinions from those who take the desired position, while giving little or no room to opinions from the other side. There are other far more subtle editorial slanting techniques—in *The News Twisters*, I name and illustrate 33 of them—but this is the central one on which my entire analysis is based: I did a systematic check on the equity of pro and con opinion on a group of controversial subjects. This test simultaneously served to check on the network's adherence to the fairness doctrine.

Third and last: I selected the major controversial subjects of the period: The presidential race, the war, black militancy, left-wing protest movements, and several sub-aspects of these broad subjects. In classifying opinion on these matters as pro and con, my basic rule was always to conform to the reporters' own classifications where they existed. If, for example, a reporter described an opinion as "heckling" or "opposition" or as "booing," I classified it as antagonistic opinion; if he described it as "endorsement" or "support" or as "cheering," I classified it as favorable or pro-opinion. The great bulk of opinion in the study turned out to be of this variety which already came pre-categorized in one way or another by the reporter. The opinion which I classified independently was usually covert or implicit opinion by reporters.

This, in essence, was my method. I applied it systematically to 7 weeks of network coverage—300,000 words. And the results appeared in *The News Twisters*. I will not report on all my findings here. Instead, I will give you a close-up view of the results of my investigations into two of the most important controversies of the 1968 period—The Nixon-Humphrey race and the war.

The results on Mr. Nixon alone have caused the greatest consternation. Speaking quantitatively, in terms of simple word-count, the pro and con opinion on the Republican candidate for the Presidency ran as follows: 16 to 1 against Nixon on CBS; 10 to 1 against Nixon on NBC; 8.5 to 1 against Nixon on ABC.

The anti-Nixon opinion is so voluminous in contrast to the pro-Nixon opinion that it verges on the ludicrous. The content of most of this criticism itself cannot be challenged. Most of the attacks on Nixon were journalistically legitimate. They came from Democratic Party and independent party challengers, from assorted Democratic Party politicians, from Democratic union chiefs, and, as such, were a valid part of the campaign.

What was bizarre was primarily the quantity and repetitiousness of the criticism, often in purely optional matters. To illustrate: on CBS, Nixon was charged with telling untruths seven times by political opponents—twice by Hubert Humphrey, twice by Wallace, once by Ramsey Clark, once by Clark Clifford, and once by Lawrence O'Brien. But NBC and ABC deemed such charges newsworthy only three times each. Thus, CBS viewers heard politicians charge Nixon with dishonesty more often than did the viewers on the other two networks put together. All one can conclude is that CBS particularly liked to air this charge.

Similarly, the degree of hostile editorialization about Nixon, his personality, his morality, his campaign techniques, and so on, was quite voluminous. ABC viewers were privileged to hear Mr. Nixon described as a man who went for his enemies' jugular and who would like to assault them with a meat-axe.

Startling as was the vast body of anti-Nixon opinion, even more startling were the pro-Nixon findings. In their way, these are the most deadly.

Here, for example, is a summary of all pro-Nixon opinion from the public and from Republican political figures, carried by CBS TV news during the 7 weeks of the campaign period studied: on only 6 days during the entire 7-week period did CBS news stories include opinion favorable to Mr. Nixon from members of the public.

On only 1 day during the 7-week period—on October 28, towards the very end of the campaign—did CBS news stories include any Republican political opinion which praised Richard Nixon. It came, specifically, from Dwight and Mamie Eisenhower, and from Nixon assistants Patrick Buchanan and Raymond Price.

The picture is even bleaker for Mr. Nixon on ABC–TV. ABC news stories also reported only six times in 7 weeks on opinions favoring Nixon from the public. And as for Republican political figures: once, on October 8, ABC news informed its viewers that Senator Javits supported Nixon. Unless one wants to count Bud Wilkinson as a Republican political figure—there was no more.

Of the three networks, NBC was the most generous. NBC viewers actually heard opinions favorable to Nixon from the public 12 times in 7 weeks. And NBC cited four Republican politicians, on 4 different days, as having favorable attitudes to Nixon. They were: Senator Dirksen, Representative Gerald Ford, vice presidential candidate Spiro Agnew, and State Senator David Stanley.

Given facts like these, one need hardly look at the anti-Nixon opinion at all to know that this was politically biased coverage. The opinions of American citizens who supported Nixon, and the opinions of the Republican Party representatives who were working to elect him President, were simply not on the air.

By contrast, the coverage of Humphrey was fair. Most network newsmen were not enamored of Humphrey—at least not until he had come out for a unilateral bombing halt and won the support of the antiwar groups; but by the end of the campaign period, pro and anti-Humphrey opinion was fairly equitable on all three networks —with ABC and CBS being a touch more friendly, and NBC a touch less. In general, the early sources of political antagonism to

Mr. Humphrey were thoroughly explored by the reporters; and the later sources of support were given a full airing.

My statistical findings on the presidential race have aroused something of an uproar in the country. And inevitably, a great many people are frantically denying their reality and are charging me with writing fiction, most particularly in the area of the Nixon findings. You will be interested, therefore, in the comments made in the winter issue of The Public Interest by Prof. Paul H. Weaver of the Harvard University Department of Government. He writes as follows:

> . . . there are three points to be made about this problem. First, my own inspection of two different samples of Miss Efron's file of anti-Nixon opinion convinces me that, by any reasonable standard, the large majority of such items are in fact quite clearly anti-Nixon opinion; no more than 20 or 30 percent of the anti-Nixon items might be questioned. Nobody has shown that the proportion of questionable items is larger; indeed, so far critics have merely adduced a few extreme examples, as if these were enough to invalidate the entire study. And this brings me to the second point. What is significant about Miss Efron's findings is not the absolute numbers of words pro and con; it is the relative size of the two bodies of opinion. In order to invalidate the finding of a huge disparity between pro-Nixon and anti-Nixon opinion, it is not enough to show that *some* anti-Nixon opinion has been incorrectly classified —one must show that most of it has been incorrectly classified. Even if one were to find that she had overestimated the amount of anti-Nixon opinion by 100 percent and underestimated the amount of pro-Nixon opinion by 50 percent, there would still be 2.5 times more anti-Nixon opinion than pro-Nixon opinion, a clearly unfair pattern. Needless to say, nobody has yet established errors of this magnitude, and it seems unlikely that anyone will.

You will also be interested in a briefer statement issued to the press on October 27 of last year by Dr. George Weinberg. Dr. Weinberg is a psychologist, a research consultant, a statistician, and author of one of the leading statistics texts in use in American colleges and universities for the past decade. Dr. Weinberg said:

> I saw Miss Efron's research before reading her book and before knowing her conclusions. I found that my judgments coincided with hers well over 90 percent of the time. The great majority of the statements she classifies as pro or con opinion could hardly be classified otherwise. Miss Efron is far more objective, systematic and explicit in her method than anyone known to me who has ever written a book about TV. After examining her data, I believe that any systematic tabulation by any method would result in essentially the same findings.

In brief, I have not been writing fiction.

Given these findings on Nixon the question inevitably comes up: Was this bias deliberate? The answer to this question is complex and I cannot do justice to it in a few words. But briefly my own answer is this: It was not deliberate in the sense of an organized plot or of a conscious cabel. But it was inevitable given the virtually all-liberal composition of network staffs.

During the campaign, Eric Sevareid acknowledged on the air that most newsmen were for Hubert Humphrey—leaving to implication the fact that most were against Richard Nixon. On February 8, 1970, Howard K. Smith brought this implication out into the open. He generally confirmed Vice President Agnew's charges of bias and said this about the newsmen's prejudices: Johnson was politically assassinated and some are trying to assassinate Nixon politically. They hate Richard Nixon irrationally.

I believe that my findings are evidence of such antagonism, that it was so deep and widespread that it contaminated professional decisions—and that network managements must be held responsible for the result.

Now, to examine another subject, briefly—the war.

In *The News Twisters*, opinion on the Vietnam war is classified under different headings, just as it appeared in network news stories. There is opinion on the U.S. war policy in general; and opinion on the U.S. bombing halt policy in particular.

And once again, we see precisely the same pattern of heavy loading of opinion on one side—and a virtual void of opinion on the other.

In the 7 weeks studied, the three networks carried 72 different stories in which opinion was heard condemning the U.S. policy on the war, and demanding a unilateral bombing halt in opposition to the Johnson policy of reciprocity. Seventy-two stories means that about 10 times every week, the networks were pounding America—and the Johnson administration—with opinion opposed to government policies on the war. This editorially selected outcry, subtly interlaced with editorial opinion, came from the following sources: Senators Fulbright, Javits, Morse, and McGovern; Paul O'Dwyer, John Gilligan; Eldridge Cleaver, Dick Gregory, the president of Yale, SDS leader Tom Hayden, actress Vanessa Redgrave; The Socialist Workers' Party, The Peace and Freedom Party, The Freedom and Peace Party, The Socialist Labor Party, The Communist Party; Arthur Goldberg, George Ball, Averill Harriman, Cyrus Vance; U Thant; Indira Gandhi; Xuan Thuy, the North Vietnamese negotiator; Soviet Premier Kosygin; British and Tokyo demonstrators—and assorted domestic students, demonstrators, black militants, soldiers, pacifists, artists, and so on.

Many of these sources were frequently repeated in successive newscasts. It is quite clear that the networks concentrated on the views of an assortment of Doves and Leftists, foreign and domestic, who were opposed to U.S. war policies.

And what did we hear on the other side? I'll summarize it for you precisely. It was to be found in only 13 stories—13 as opposed to 72, meaning: A 6 to 1 ratio against the Government: ABC aired only four opinions opposed to a unilateral bombing halt in 7 weeks—three from President Johnson, alone or in combination with Walt Rostow and Dean Rusk; and one from President Thieu of South Vietnam.

CBS aired only two such opinions—one from Ohio Republican William Saxbe, and a paraphrased opinion citing the generals in Vietnam and the Secretary of State.

And NBC also presented two opinions—one from President Thieu, and one from Iowa State Senator David Stanley.

That is: Eight opinions in 7 weeks opposing a unilateral bombing halt, on all three networks combined.

On the subject of the general war policy:

ABC aired four favorable opinions—those of President Johnson and/or Ambassador James Wiggins—twice each.

CBS aired only one such opinion—from President Johnson.

And NBC aired none.

That is: Five opinions in 7 weeks favoring the Johnson policies, on all three networks combined.

This is remarkable coverage indeed of the biggest controversy in the Nation. It totally failed to reflect the attitudes in the Nation, which at the time was giving President Johnson majority support. The administration's allies, both domestic and foreign, were simply not on the air.

On February 27, 1968, about 6 months before the period of my study, Walter Cronkite presented a special report from Vietnam. In it he said: "It seems now more certain than ever that the bloody experience of Vietnam is to end in a stalemate," and he predicted that the United States would not be victorious in this war. And on March 10, 1968, a few days later, Frank McGee presented a Sunday report in which he said that the enemy now has the initiative and that the war as the administration has defined it is being lost. Two days later the *New York Times* headlines read on March 12: "U.S. is losing war in Vietnam, NBC declares."

Apparently having decided that the war was being lost, these two networks, and ABC as well, resolved to give little or no air time to any view which supported President Johnson's policies.

Whatever one may think about the war, this is not balanced reporting of diverse opinions on a crucial controversy. It is disguised political advocacy.

Very much the same situation prevails in the other controversial areas which I investigated. Over and over again on all three networks—whether the subject was black militants, or the white middle class, or the left, or the right—this lopsided opinion can be found. It favored black power, it opposed the white middle class; it favored the left, it opposed the right. Almost always the opinion was loaded on the left-liberal side of the controversies. Almost always there was a vacuum, or a dramatic shortage, where strong opposition views could and should have been present.

Because of this acute shortage of opinion on one side of almost every controversy, one can state with extraordinary precision which groups in this country were deprived of representation on network news programs during the 1968 period of study. These groups were: The broad white middle class majority, Republican and Democrat—conservative and Republican leaders—the broad black majority—moderate black civil rights leaders—and the ideological pro-violence new left.

And these happen to be the very groups which in 1968 and 1969 charged the network repeatedly with bias. They, in fact, are exactly what remains when you subtract the left liberals from the American political spectrum. It is no great surprise that when Vice President Agnew delivered his speech on network bias a year after the period of this study, there was a volcanic eruption in the Nation—with some 57 percent of the public, including 60 percent of all college graduates, supporting him. This public explosion appears to have been a direct and cumulative response to the opinion loading, to the one-sided advocacy that passed for balanced reporting on controversies.

The Americans who protested are obviously the Americans whose views were chronically left out.

Omission—the crudest slanting technique in the journalistic repertoire—is the principal technique in network slanting. It is perhaps inevitable, therefore, that when CBS chose to attack *The News Twisters*, its attack was a monument to this very slanting technique.

In September, before *The News Twisters* was published, a 10-page document was distributed to the Nation's media by CBS. The mailing literally blanketed the country. It was a study of *The News Twisters* conducted by the CBS news department itself. It claimed to present hard, documentary evidence of the degree to which I had grossly distorted CBS transcripts. This evidence, said CBS, was based on a spot check of those transcripts.

This document is a fraud. Its fraudulence consists in a systematic omission of every conceivable piece of information either from CBS transcripts or from *The News Twisters* text which would make my classifications intelligible and would reveal the reasoning behind them. The effect of these omissions was to make my work seem arbitrary, irrational, and dishonest.

Seventeen charges were listed by CBS—a number that is statistically insignificant for my study; although CBS did not mention this fact to its readers—and of these 17 charges, 15 contained active misrepresentations of either CBS transcripts, *The News Twisters* text, or both. I have prepared a detailed report in which I identify every misrepresentation; restore every violated context; present the stories that CBS sought to conceal; and I have identified the precise principles by which CBS conducted its so-called random spot check. My analysis reveals that it was not a spot check at all but a carefully calculated smear planned to discredit my book before publication. I call this report "How CBS Tried To Kill A Book." I cannot cite from it here, textual analysis must be read. I have given a copy of this report to every member of the committee and I hope each member will read it. Incidentally, I have arranged for copies to be kept on file with this committee for inspection by the public.

I believe that this report will assist the committee in its examination on the conflicts that have arisen nationally over the network news.

Now, I respectfully submit that the very existence of an ideological oligopoly that controls the airwaves—let alone one which acts t destroy both criticism and critics—is an immense danger to thi country. A considerable awareness already exists in Congress of thi danger and some substantial proportion of Congressmen are a angered by the bias as are members of the public. But Congress i nonetheless afflicted by a characteristic paralysis when it comes t action in this area. Even an explosion of nationwide protest—a pro test that included three out of every five college graduates accordin to the Harris and Gallup polls—could not move Congress int action.

It is quite apparent why the Congress—and the FCC—are paralyzed. The misadventure of Congressman Staggers reveals the bitte truth: That their hands are permanently tied; that they cannot ac against this monolithic bias on the Nation airwaves; that the Fair ness Doctrine is an impotent ideal which cannot be enforced without violation of the First Amendment; that the First Amendment does not deny the right of a news service to be biased, it only states that the news service is free; that even the Supreme Court cannot talk the discrepancy between the Fairness Doctrine and the first amendment out of existence; and that the Nation, in fact, has no protection whatever from this ideological oligopoly.

The day must come when Congress acknowledges this truth—and more: When it acknowledges that it alone has created this situation, that it is by congressional permission alone that this oligopoly exists and has so long been sheltered from any challenge to its power. On that day, Congress will recognize that this artificial tyranny must be destroyed—by the Congress which brought it into being.

There is only one way to destroy it without violating the First Amendment. That way is not by the petty chivvying and nibbling and the proliferation of regulations that has gone on for years. It is for the government to acknowledge the sacred status of the first amendment in this country; to acknowledge that it has no business regulating an intellectual and artistic medium—that it never had any business doing so—that it never should have violated the first amendment rights of individual broadcasters and allowed 3 nationwide monopolies to form on this intellectually stagnant base—and that it should not, year after year, have blocked economic and technological competition in this area to protect the profits of these 3 giant monopolies.

The government must acknowledge all this however painful it may be. It must get out of broadcasting lock, stock, and barrel and let CATV, pay TV, and cassette technology rip, uncontrolled, unlicensed, unregulated uncensored, and uninhibited—dominated exclusively by the desire to win voluntary customers, and regulated by the law of supply and demand alone. Only this hurricane of fresh air will bring about in broadcasting the intellectual freedom and diversity that is now lacking.

What is desperately needed in broadcasting is the classical American system that prevails in all the other free media in this land—a free enterprise, pay system, in which each producer of intellectual and artistic commodities is absolutely sheltered by the first amendment; in which each individual consumer purchases only the products that please him and leaves those who have tastes and views alien to his strictly alone. It is the competitive system—free of the twin plagues of government intervention and nationwide monopolistic concentrations of power—which alone have given us the huge spectrum of intellectual and artistic alternatives in this country. It is this proved and honorable system which must be introduced into broadcasting.

Only one thing is needed to accomplish this and that is for government to withdraw from this media. Poetry does not need the government; plays do not need the government; movies do not need the government; documentaries, newspapers, magazines, novels, photographs, and sports events do not need the government. All this country has gotten from government intervention into this realm is the stupidest, most restricted, and most venal medium of communications in the country.

There may be chaos for a while if the government gets out. This chaos would be temporary and supportable. And when it settles, and when the long pent-up creative and competitive energies flow into this government-created vacuum—health will be restored to this medium.

In the process, those arrogant parasitical growths known as the networks will shrink down to the size of normal syndicated operations—selling their wares in an open market and feeling the bite of direct competition for the consumer dollar. This is, of course, precisely as it should be.

The irrational power of the networks today is purely a function of the freedom which has so long been denied to others. It is the government which must take that power back.

Senator Ervin. I found your statement, and I might add your book, very interesting and very intriguing. As a Member of Congress, I have observed for a long time that there are styles in legislatures just as there are styles in mini-skirts and maxi-coats. Politically powerful forces develop certain programs and unfortunately oftentimes they get a consensus from the most powerful media of communication both those who print the words, and those who broadcast that these programs are 100 percent good. Therefore, they will not do anything to militate against these "good" programs by giving people who disagree with them an opportunity to be heard.

I say this because I happen to be a southerner who has opposed civil rights bills. Most of the powerful media of communications in this country reached the conclusion that civil rights bills were the highest form of rightousness and they would not present opposing arguments. I have stood on the floor of the Senate, as have many other Senators, in opposition to these bills and the greatest newspapers of this country just mentioned the fact that some Senators from the South occupied the floor for so many hours, never giving any information about what was said.

Now, I happen to be a man who believes that all people of all races and all religions and all national origins should stand equal before the law. But, those who advocated the civil rights bills were so solicitous about the welfare of the minorities they reached the conclusion that the way to give equality was to subordinate the basic rights of the majority.

I don't think you can promote equality by making the legal rights of some people inferior to those of another.

Furthermore, many of these civil rights bills were of a character which tended to destroy the system of government we have had in this country for a long time. They attempted to transfer from the jurisdiction of local communities and the States to the jurisdiction of the Federal Government matters which can only be handled intelligently at the local level and which our Constitution clearly contemplates should be handled there.

They also took away basic legal rights from everybody, such as the right to make contracts with people you wanted to make contracts with, and the right to use your property in a way that you wanted to use it.

Well, I am honest in these beliefs. There is a bill over on the Senate floor now which would rob every employee in the United

States in private industry, employing eight or more people, of the right to determine who he employs. Simply stated it denies every employer of eight or more employees who has invested his resources or talents in a business, the right to determine whom he should employ to make his business a success or a failure.

We have a bill over here that would place churches, educational institutions, and State and local officials under the domination of a Federal agency, the EEOC, on the grounds that we must convert the American dream into a nightmare in order to make it effective.

Now, I spoke out against these things, being a legislative fool who rushes in where legislative angels fear to tread, and I have found, from my own experience, that when these powerful media of communication arrive at a consensus, they exclude from their broadcasts and from their printed page opinions of those who don't think their views are 100 percent sacrosanct.

However, on one occasion they did decide they wanted somebody to express opposition to the civil rights bill advocated by President Kennedy on a morning television show. I went out there and was interviewed by Martin Agronsky who was very fair in his moderating of the program. I expressed the opinion, which any rational being in the United States would not dispute, I thought, that this particular bill was in large part politically inspired.

I have been around Washington a long time and I think when politicians advocate something they are politically inspired. But not so with Mr. Hugh Downs who had some communication from New York, on this program. He rudely interrupted my statement, denied me the right to present the views that I was invited there to present, in fact he insinuated that I was some kind of loathsome creature for even suggesting that a President who was the most adroit of politicians would advocate a measure partly inspired for political reasons. If I were running the network or had control over a program, since I believe in freedom of speech for everybody, including those who disagree with me, I would think that I would have had the common courtesy to have allowed my invited guest to present his viewpoint.

So, I realize that those human beings who have control of the networks and newspapers are not perfect. They are subject to some of the same infirmities that people like myself are. And I think there is some kind of obligation—I am not talking about legal obligations—some kind of a moral obligation that requires the news media to be fair.

But when I get into this problem of who is going to establish fairness, I am reminded of an old lawyer down in North Carolina who went into see a new judge in action one day. He came out of the courthouse and somebody asked the lawyer, "What do you think of the new judge?" The lawyer said, "Well, the Constitution of the United States gives everybody the right to make a damn fool of himself but I think this man is abusing his constitutional privilege."

Now, one thing has always troubled me about freedoms, especially about freedom of speech. It is that I don't know any way to grant people freedom and not have that freedom abused. I am a great believer in freedom of speech and freedom of the press and freedom of the broadcast media.

I am so devoted to this freedom that I have almost reached the same position as Isaiah when he said about Jehovah, "Though he smite me, yet will I praise him."

I have given a lot of thought to this question and no one knows better than I that many people abuse freedom of speech, freedom of the press and freedom of broadcast. I tend to agree with your observation that there are "news twisters" in the communications media, but the question which occurs to me is how are we going to keep the "news twisters" from twisting the news, and who is going to twist the "news twisters" into righteousness? That is very significant.

I would infer from your statement that one of your possible solutions, as far as the great network system is concerned, would be to remove Federal regulations.

Miss Efron. Yes. I suggested that it be removed from the whole broadcasting operations. I think that there is no rational way to tell men how to run their news services and the First Amendment actually forbids such a thing. The Fairness Doctrine is actually an amoral document. It is a debate concept. And to interfere in any way with the selectivity of newsmen in moral areas is actually to forbid them to make their own best, their most righteous judgment of what the truth is.

For example, if a newspaperman deems that the war is, by his best understanding, an error and that this information should be brought to the country, no government should step into that area of his moral judgment.

My concern is not so much with the phenomenon of liberal bias as such. It is the fact that you have three networks with one and the same political philosophy blanketing the country, that it is an oligopoly, and that Congress has frozen them into that power. We are in the grip of an ideological tyranny and there is no way to intervene without violating the first amendment.

Now, a great many people spend their time thinking of little corrections and little legislations and little regulations that serve merely to torture these men. My answer is, leave them alone. But the Government must get out so that it does not hold up any further competition in this area. Ultimately, I am for pay TV. Until this medium is run exactly like every other medium of artistic, intellectual and political communication in this country, the bias controversy can only grow more accute.

Senator Ervin. Of course, these laws and acts of Congress were passed with respect to the broadcast media, because of the very great shortage of channels at that time. Congress enacted the laws on the theory that the airwaves could be used to have a discussion of public problems as well as the dissemination of information, and if everybody who wanted to go into the broadcasting business would go into if you have something in the nature of a Tower of Babel—so much confusion in the airwaves that nobody could hear anything. That was the origin of the allocation of channels.

Then later they developed this fairness doctrine and even it can be very much abused. I think it has been abused in more than two instances by the FCC, but I would like to say I think on the whole they have administered it fairly well.

Well, then, the question occurs to me, if you establish somebody as a censor of the communications media to make it fair, you would have to have somebody else to make certain that the censors were fair.

So what we have to leave here in this field is a certain amount of legal chaos and see if we can't give acceptance to Thomas Jefferson's theory that a country has nothing to fear from freedom of speech as long as truth is free to combat error. And I say that despite some of the observations I made about the media and their characterization of those of us who opposed the civil rights bill as being the very negation of equality instead of the promotion of equality.

I really don't know how we can regulate the industry except by leaving them free to disseminate what they have to disseminate, and trust that in the longrun people will judge them correctly and that they will respond to the wishes of the people, at least, insofar as the people have truth on their side.

Senator **Hruska**. Mr. Chairman, during the course of her remarks, the witness requested that her report entitled, "How the CBS Tried to Kill a Book," be kept readily available by the subcommittee for members of the public to examine.

My suggestion is that that request be broadened so that it will include the CBS report itself, in order that the contents of both documents will be available to all interested parties.

Senator **Ervin**. The Senator from Nebraska like the Senator from North Carolina believes everybody is entitled to their say on both sides of the question.

Senator **Hruska**. That is the only way we can get the whole story and the only fair way in my judgment.

Now, your solutions to the network monopoly as contained in the concluding pages of testimony suggests that the whole field should be open to the forum of the market place, that is, full and free competition without Government interference.

Miss **Efron**. Yes.

Senator **Hruska**. That situation now applies to the printed news, to the printed media. Do we have any of the same problems with newspapers that you describe in your book? Is competition among newspapers creating more or fewer problems? What are your thoughts on that?

Miss **Efron**. The best way I know to answer this, and I say this with all due respect, is that the content of the newspapers isn't our business. It is the business of the newspapers and of those who wish to buy the newspapers. What one can say about the press is that it is possible to get publications with political viewpoints of every conceivable coloration, that the free market allows for the creation of everything from the far right press to the far left press and every shade in between, and that it is precisely by having a free press, that one ends up with this diversity and this choice.

Now, if in fact dominant publications have, let us say, a liberal philosophy, that is historically the development in this country, and unless one comes up with some brilliant new philosophical trend that will displace it, it will go right on being the dominant trend. Therefore, probably your media in freedom would be dominantly liberal, liberal-centrist, anyway, but under freedom, those who are not necessarily swimming in the main stream tide and who criticize it from many points of view have been able to have their publications.

And that is all that you can ask for in the broadcast medium.

Senator HRUSKA. Of course, in the free market of the newspapers world we have witnessed a constantly constricting number of competitors. There are fewer and fewer newspapers.

Why would no regulation of the networks not result in that same state?

Miss EFRON. Well, part of the restriction in one sense would be economic problems, not specifically journalistic problems.

Another thing is that there has been a tremendous proliferation of other kinds of press that didn't used to exist before.

This phenomenon is the underground press. There are all sorts of new publications coming into existence all the time. So that it isn't a static situation which is the case in broadcasting with networks-entrenched dominance of nationwide political coverage. It is just simply a rigid institution. NBC isn't going to wither away and some new type of press flower in its place. It is just frozen. And the Government has frozen it.

Senator HRUSKA. Now, during these hearings and elsewhere, even before these hearings, there have in some areas been frequent allusions to a conspiracy by the Nixon administration to silence criticism or to "twist the news," as you would put it.

Your statement and book indicate to the contrary in many respects. There are some people——

Miss EFRON. I don't believe I——

Senator HRUSKA. People who subscribe to the idea that the criticism that was voiced by Vice President Agnew was both valid and useful. There are others who contest that point of view.

Would you care to give your point of view in this regard.

Miss EFRON. Yes. I am sorry to have interrupted you.

There are two issues, I believe. One is the issue which is repeatedly being raised about which I have no information on it other than what I read in the papers, that this administration is increasingly intervening in the freedom of newsmen. I have no special knowledge in that realm. My book was not about that. My book would indicate that there is enough reason to have exacerbated the administration so that it might perhaps unwisely be retaliating, but that is purely speculative on my part.

I do not think that Vice President Agnew was wrong to speak. I think that he was factually correct. And nobody else was speaking for the public. But my own observations are that Congress makes—well, it can make a racket sometimes but it doesn't actually do anything, and I do not observe that anyone at the networks has been particularly silenced by congressional or executive action.

But I repeat, this is not my area of research and I do not know specifically what the government has or has not been doing.

Senator HRUSKA. Well, Mr. Agnew went out to Des Moines, Iowa, and delivered of himself some very emphatic and some very pronounced views——

Miss **Efron**. If you are speaking about that——

Senator **Hruska**. On the press.

Miss **Efron**. Yes.

Senator **Hruska**. And I would like to ask you if in your judgment you would consider that as evidence or as part of a conspiracy against the press—a statement of view on his part, a practice that the press and many commentators and all media have on their part, but somehow he was criticized for exercising that right.

Miss **Efron**. I thought I had made my view on that clear. I think he had the right and I think he was right and I think my study substantiates his charges very strongly. I do not consider any political leader in the country expressing his views about anything to be wrong. Why should that be wrong? I thought that your question was directed more at the FBI investigations and seeking to take people's notes and things of that kind. But as far as Mr. Agnew's statement, he was telling the truth. So I do not see that as any intervention in anybody's freedom.

Senator **Hruska**. Your book would indicate, and you have concluded, that there was a clear bias established in the areas in which you made inquiry in your survey——

Miss **Efron**. Yes.

Senator **Hruska**. During the election of 1968. Would you like to venture an opinion on how this type of loaded coverage affected the American vote and voters in that campaign?

Miss **Efron**. That would be speculative. We know that the American voters did not obey the bias. They did not follow it. The problem of how to evaluate people's responses to material is not one I deal with in my book. I think one can state in a kind of common sense way that wherever the views of a publication or a news service vary very, very sharply on basic moral issues from those of the public, the public will repudiate those views. But if there are technical matters or matters of great complexity where the individual citizen has no real means of using his life experience to check what he is hearing, then I think that biased coverage could influence people.

But in 1968, the issues were really very raw and primitive and they mainly involved violence as a means of expressing ones political disagreement with things. That was a very important theme, subliminally, in much of the coverage. Here the people had their own opinions and would not be influenced. That is all there is to it. But they certainly did vote for Mr. Nixon and the bias was against Mr. Nixon. So one can conclude that they were not brainwashed.

Senator **Hruska**. I want to thank you for your answers and also for your appearance here.

Senator **Ervin**. I thought at first that you and the TV broadcast system had reached a common solution, but I believe there is a fundamental distinction between your remedy and what media thinks should be done.

Miss **Efron**. And what?

Senator **Ervin**. As I construe testimony on behalf of the broadcast media, they think that the Government should retain the power to allocate channels but that the Government should not exercise any other control over the media. Their position is that that is necessary to give them complete freedom of speech as the Constitution contemplates. Now, your position is, I think, of significant difference.

Miss EFRON. Yes.

Senator ERVIN. You think the Government should to take its hand out of the regulating business entirely?

Miss EFRON. Yes, that is correct.

Senator ERVIN. And allow anybody who wanted to go into the business of the broadcast media to do so?

Miss EFRON. Yes.

Senator ERVIN. And grant them total immunity from Government control of any kind?

Miss EFRON. That is correct. My reason for disagreeing with the networks's position is simply that when they say that they want First Amendment protection, they are merely talking about freezing the status quo as it is, so that they don't really mean First Amendment protection for everybody who is in the business or wants to get in it. What they really mean is: Leave us alone with our oligopoly. And that I cannot grant.

If the government does protect this oligopoly, does maintain it, does not break it up, then some extraordinary kind of pressure short of blue-penciling copy would have to be undertaken to bully them into being fair. But I don't see the point of becoming authoritarian as a solution to an authoritarian situation.

Senator ERVIN. I think you would agree with me that there is no practical way by which we can give freedom of press or freedom of speech to unbiased persons and deny it to biased persons.

Miss EFRON. That is correct. You cannot.

Senator ERVIN. And I think you suggested one of the forces that operates to keep us somewhere within the field of what is reasonable —for example, in situations where the news media makes an unfair attack upon any individual or any program—is a certain sense of fairness held by the people which generally causes them to react adversely to these unfair situations. That is one thing that makes it possible for freedom of the press and freedom of the broadcast to accomplish good objectives. That is the same idea which Thomas Jefferson expressed when he said you don't have anything to fear from freedom of speech if you just leave truth free to combat error; sometimes the public reaction destroys the effect of the unfair treatment.

Miss EFRON. In principle that is true, but in a situation where you have an entrenched oligopoly, that will not necessarily work.

For example, the networks say, and I believe that many of them generally believe this, that regardless of their own political attitudes, cultural attitude, they try desperately to be professional and fair and that they are able to maintain this impartiality as professionally trained men.

Well, I wonder whether these same men would tolerate three networks full of conservatives who all argued that they were merely being professional, and after 57 percent of the people blew up over their conservative bias and charged them with being conservative on the air, with not letting liberals have a voice, rationalized this as selective perception on the public's part.

Given the situation as it presently stands Congress has frozen an oligopoly into place which has uniform political sympathies. At this point you cannot count on the normal give and take which does exist in the free market to rectify it.

If I may cite one example, in 1968, at one point 70 percent of the American people were indignant at the networks for the way they were covering certain situations. Had that been a free market operation, do you know what would have happened? They would have lost their customers and their stocks would have crashed and we wouldn't be talking about this today.

The problem is there is no public control at all in the form of the law of supply and demand and constantly, pressure is building up for a vicious type of control, namely censorship. It is because I am enormously afraid that if this basic discontent over the philosophical slant in network news department is not alleviated, that one of these days there will be a fantastic explosion and the first amendment really will be torn to shreds. Right now it is a rather peaceful time, but the latest pulse pole count indicates that there is a good 40 percent of Americans that are chronically antagonized by network bias. Well, that quantity can rise—you can't leave it that way.

Senator ERVIN. None of us likes to hear or read expressions of views we dislike. I will have to confess I don't like people to express opinions not in accord with my sound views, but I am perfectly willing to do so. Your recommendation is this: You think that the present Federal regulations which bar from the airwaves every person except those licensed by the FCC creates a monopoly, and you would institute the right of every person who desires to go into broadcasting to do so, if he had the financial ability.

Miss EFRON. Yes.

Senator ERVIN. And let the people by their reaction to what is broadcast, instead of the government, in effect regulate the broadcasters from economic standpoints?

Miss EFRON. That is right. Yes.

Senator ERVIN. Now, I would say that I think the great majority of news people I know are fair people; at least, they all try to be with rare exceptions. And I wasn't altogether displeased by some of the reactions in the news media against the speeches of Vice President Agnew. I wasn't displeased because it showed that they didn't like things adverse to their activities spoken any more than I do. As I indicated, it is quite human. I am a person who believes in freedom of speech, even for Vice President Agnew. I had the privilege of making a talk to the National Newspapers Association some time ago and I was asked what I thought about Vice President Agnew's news speeches. I said that I gave him freedom of speech and pointed out that any public official's, including the Vice President's right to criticize the news media was co-equal with the right of the news media to criticize him. When a public official criticizes the news media, I don't necessarily think it is an attack on the First Amendment, but merely an expression of opinion by a public official that the news media was not exercising its rights under the First Amendment in a way that the official thought they should be exercised. That is still my position.

I want to thank you. You have given us a most enlightening, interesting, thought-provoking, and I might add controversy provoking presentation of one of the most serious problems in the first amendment area. Thank you very much.

I regret the necessity of being on the Senate floor will prevent the chairman from hearing anymore witnesses today. We have two other witness scheduled but we will make arrangements to hear them just as quickly as possible.

The subcommittee will stand in recess until the 8th of February.

(Whereupon, at 12:40 p.m., the subcommittee was adjourned, to reconvene Tuesday, February 8, at 10 a.m.)

FREEDOM OF THE PRESS

TUESDAY, FEBRUARY 8, 1972

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:05 a.m., in room 1318, New Senate Office Building, Senator Sam J. Ervin, Jr. (chairman), presiding.

Present: Senator Ervin.

Also present: Lawrence M. Baskir, Chief Counsel and Staff Director, and William Pursley, Counsel.

Senator ERVIN. The subcommittee will come to order, and the counsel will call the first witness.

Mr. BASKIR. Mr. Chairman, our first witness this morning is Mr. Andrew Heiskell, chairman of the board of Time-Life, Inc.

Senator ERVIN. Mr. Heiskell, I wish to welcome you to the committee and to express to you the committee's thanks for your willingness to come and report and give us the benefit of your views and vast experience in the field we have been investigating.

STATEMENT OF MR. ANDREW HEISKELL, CHAIRMAN OF THE BOARD, TIME-LIFE, INC.

Mr. HEISKELL. Thank you. Mr. Chairman, my name is Andrew Heiskell. I am chairman of the board of Time, Inc., publishers of *Life*, *Time*, *Fortune*, and *Sports Illustrated* magazines.

Let me first say that this subcommittee and its chairman are performing an important service to all Americans in examining the present state of the freedom of the press. One frequently hears that a free press is "guaranteed" by the First Amendment to our Constitution.

However, the framers of the Constitution and of the Bill of Rights were more realistic, for they recognized that no generation can guarantee freedom of the press for those which follow.

The Constitution had empowered Congress to levy and collect taxes, to regulate commerce, to establish post offices, and post roads, and to promote the progress of science and useful arts. Congress was further empowered to make all laws which should be necessary and proper for carrying out these and other powers.

The First Amendment restricted the exercise of these powers by providing that "Congress shall make no law . . . abridging the freedom . . . of the press . . ."

The framers of the Constitution and of the Bill of Rights knew, as this subcommittee is freshly reminding us, that a free press requires an environment of free inquiry and the encouragement of dissent; and this requires the affirmative commitment of our people and their government to an open society.

Thus, your chairman properly identifies as the "more general and more serious issue" what he characterized as "the growing deterioration of the relationship between press and Government."

Given the complex society in which we live, an effective free press requires much more than the absence of Government interference. It must have the active and continuing cooperation of government to function effectively. Similarly, a free government cannot endure without a strong and independent press.

One clear example of dependence of a free press upon Government is illustrated today by the broadcast media—radio and television. Networks, news services, individual stations, may collect news, analyze it, form opinion about it—but all of this is futile unless they can transmit it to the public.

This cannot occur without a license from Government, but it also cannot occur without an extensive system of governmental regulation to allocate frequencies, prevent interference, control monopoly, and thus ultimately to insure access and diversity.

My purpose in coming here is to remind the committee of the role of magazines in a free press and to underline the extent to which they too are dependent upon wise public policy and constructive Government support.

Of course, the American press today consists of four major elements—newspapers, magazines, radio, and television. An effective national press must be a composite of these media, for each performs a distinct service and no one of them could substitute for any other.

Magazines and network broadcasting, particularly television, speak to a national audience, while both newspapers and radio tend to be more local in their coverage. Although television journalism is national in scope, it cannot offer the detail, the depth of analysis, or the precision of reporting which are furnished by a good magazine.

Only magazines and good newspapers offer an opportunity for their reader to study at his leisure, to compare, to review, and to retain information, analysis, and opinion. Moreover, the national magazines of general circulation provide continuing public education in areas as diverse as art, religion, geography, economics and politics. Magazines also offer the best national outlet for investigative journalism, for photographic essays, for new arts and letters, for analysis of public issues, and for statements by public figures.

If magazines as we know them today were to disappear, the variety and depth of reporting which are critical to a free society would be lost, and I know of no way to replace them. Our political and social structure would be seriously weakened, and our national objective of enlarging educational opportunity significantly more difficult to attain.

Like every other element of a free press, magazines must enjoy certain rights and protections to go about their job. They must be permitted to collect news, information, and opinion, and this is often dependent on the attitude of Government. They must be free to develop and present news, information, and opinion free from harrassment or retribution by Government.

Magazines must be free to publish, then, but they also must be able to marshal the financial resources which permit them to publish and maintain the enormous manpower and facilities which are required to collect, to edit and to print. Finally, they must have the ability to distribute their product.

Everyone would recognize that a free press could be destroyed if conditions are created or allowed to develop in which a free press cannot function—cannot collect, cannot edit, cannot publish, or cannot distribute its output.

All would quickly condemn, as contrary to our Constitution and contrary to our national interest, the exercise of licensing power to prohibit broadcasting, to limit the scope or content of its news coverage, or to force broadcasters to espouse a particular political phiosophy.

All of us would recognize the unconstitutionality of confiscatory taxation which levied prohibitive fees on publication. However, we have not yet recognized that magazines can be killed by Government just as surely by denying them the revenues which they require to exist or by making it impossible for them to distribute their product.

For magazines the only feasible means of distribution is the postal system. Congress has traditionally set special rates for newspapers and magazines because it has recognized the importance of the post office in binding the Nation together. The philosophy which underlies that historic tradition was perhaps best expressed by a special commission appointed by the Congress in 1844 to study the purpose and value of the post office.

The commission reported:

> The United States Postal Service was created to render the citizen worthy, by proper knowledge and enlightenment, of his important privileges, as a sovereign constituent of his government; to diffuse enlightenment and social improvement and national fellowship; elevating our people in the scale of civilization and bringing them together in patriotic affection.

Magazines depend on Government for the provision of their means of distribution as surely and as completely as the broadcast media depend on Government to provide a clear frequency or channel for their use. If the cost of this distribution system becomes prohibitive, then magazines will disappear.

The U.S. postal Service has proposed a 142 percent increase in second class mail rates for magazines over the next 5 years. At Time Inc., the proposed increase would raise our mailing costs by $27 million over the 5-year period, based on 1970 circulation levels.

The profits of all our magazines before taxes in 1970, the last year for which figures are presently available, totaled $11 million—less than one-half the proposed increase in postal rates.

Our 1970 pretax earnings of $11 million, it should be added, were on revenues of $300 million, a profit margin of less than 4 percent. The financial situation of the magazine industry as a whole is even worse. Pretax earnings of the whole industry last year were only about $50 million. Under the present proposal magazines would pay $130 million more for mail service by 1976.

One of the great national magazines, Look, has suspended publication, in large part because they saw no hope of economic survival in the face of such an enormous increase in postal rates.

Newspapers which depend on the mails would also be hard hit by the proposed increases. Those papers—mostly smaller weeklies—distributed within the county of publication and, therefore, eligible for the so-called in-county rates face increases that could amount to as much as 500 percent over the next 10 years.

For most, the increase is likely to be somewhere between 100 percent and 200 percent—a substantial burden for any business, large or small. Other papers, of course, are subject to the same rates and would be subject to the same increases as magazines.

The amounts which the Government proposes to charge us to distribute the output of a free press—charges over which we have no control—will soon prevent the distribution of some national magazines.

We face these rising costs at a time when advertising revenues are seriously imperiled. Not only does television command an increasing share of advertising expenditures, but advertising itself is under persistent and pervasive assault by Government.

The city of New York has proposed to tax it. The Federal Trade Commission is increasingly attempting to restrict it. Many have proposed that advertising of a wide variety of products be banned entirely. Regardless of the purpose of the Government action, if it has the effect of reducing the amount of money spent on advertising it then has the further effect of worsening the financial plight of the Nation's magazines.

I do not suggest and I do not believe that any of this is the result of a great conspiracy by Government to destroy an essential element of the free press. I do suggest that no one has faced the basic questions of public policy: How much is a free press worth in a free society?

Is a free press not one of the most important assets to the survival and growth of free institutions? What is more urgent than the creation of an environment in which a free and independent press is economically viable?

Some of our critics have suggested that national magazines have an easy out as costs rise. They say that as costs rise, as postal rates triple, as advertising revenues decline, we can simply raise our price per copy or per subscription.

They argue that the people who want magazines should pay for them—whatever the cost. The newsstands today are full of specialized magazines, appealing to a limited audience, and priced at $1 or $1.25 or $1.50 or $2 per copy.

We publish one of the oldest and one of the most expensive, *Fortune* magazine, devoted to in-depth reporting on business, and it sells for $2 a copy and a subscription costs $16 per year.

But *Fortune*, like other specialized magazines, reaches a limited audience—600,000 buyers—obviously of very high income.

Even if some subscribers would pay this kind of price for every magazine of general interest and national circulation—and experience shows that few will—the nature of a free press would be radically altered. At a time when it is critical that all of our people share more equally in the benefits of our society, nothing would be more tragic than to have our national journals speak to and be available to only the well-to-do.

On what political or social theory does such a suggestion rest? Is it assumed that only the well-to-do desire or deserve to know what is happening in science, religion, art, literature, and politics in America and in the world?

Is it assumed that only the well-off and the comfortable need to be involved in the political and social dialogues of our time?

Surely there is a compelling argument that magazines contributing richness and diversity to the life of the average citizens are essential to the good health of our system. It would be tragic if what survived of the industry were specialized magazines for small audiences plus a few bigger magazines concerned with sex, scandal, and the sale of gadgets.

I would make one final observation as to the public stake in the survival of magazines and newspapers, as opposed to the regulated broadcast media. In their political role the printed media are largely proof against the manipulations of the demagogue. The magazine in particular is a vehicle for political sense, for the thoughtful discussion of public issues.

This is because it neither depends on the whims of various governmental decisions or the support of a few advertisers. The broader the range of advertising support the more likely the press is to remain free. Of all of the times in the Nation's history, we can now least afford to lose this quality of independence.

The Congress has effectively demonstrated its concern about the attrition rate among daily newspapers and the growth in the number of "one-newspaper cities." Through partial suspension of the antitrust laws, under the "Failing Newspaper Act", competing newspapers have been permitted to use joint printing facilities and to combine certain of their commercial operations.

But despite this unprecedented aid, more and more communities are becoming dependent upon the views of a single newspaper for editorial comment and the selection and analysis of newsworthy events. For a large segment of the American public, national magazines provide again the only other source of editorial views and analysis of national and international developments.

Without competition in the news field, the quality of the product will inevitably suffer as it does in any other field or enterprise. Giving the daily newspaper a virtual news monoply can promote neither a free press nor an informed public. Yet this is the inevitable result if access to the U.S. mails, the sole means of distribution available to the national magazine, is priced beyond reach.

Clearly, freedom of the press is not a private right. On the contrary, it is a public right. In the final analysis, what is at stake is the public's right to know, which depends in turn on a free press. As the Supreme Court put it in *Time Inc.* v. *Hill*:

> Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our policial system and an open society.

My plea, sir, is that this committee go beyond condemnation of Government interference with a free press, and commit itself to the creation of an environment in which a free press can grow and flourish and expand. It is time that a major objective of public policy be to promote affirmatively the financial health, the multiplicity, the vigor, and the independence of every organ of opinion, of news, of analysis, and of continuing education which our people are capable of creating.

The intent of the First Amendment that "Congress shall make no law * * * abriding the freedom * * * of the press * * *" needs once again to be forecefully brought to the attention of the many governmental entities of this great Nation.

Benjamin Franklin no longer sits in the councils which guide our country's destiny; but his spirit needs to be revived. Government needs to return to that spirit. In its prosecution of crime, its regulation of commerce, its provision of a postal service, its every function —it should simultaneously weigh the consequences of its actions in terms of their impact on the viability of the press.

Thank you, sir.

Senator ERVIN. I think your statement clearly discloses that you agree with me that the First Amendment taken as a whole was designed to make Americans politically, intellectually, and spiritually free.

Mr. HEISKELL. Yes, sir.

Senator ERVIN. And I also interpret your statement to be an expression of the view that the freedom of the press, as well as freedom of speech, was established for a two-fold purpose:

First, to express the philosophy of the drafters of the amendment that the fullest possible information and dissemination of ideas is necessary to keep the minds and spirits of men free; and secondly that the proper functioning of our institutions of government demand the fullest dissemination and information and ideas.

Mr. HEISKELL. Yes, sir, and I think the problem which I bring to your attention is that we face a new, active and different situation. In our history, until last year, the consideration concerning the costs to be borne by publishers in distributing magazines was determined in fact by the Congress and the Congress weighed all factors in making that determination; that, the public benefit, their right to know, the ability to pay, and so on and so on.

Now, we have set up an independent Postal Service, and to it has been delegated the power to set rates. As I read the phrases concerning that delegation, that power, it was clear to me, at least, that the Congress intended the Postal Service to also take into account all those factors, but in fact, in setting the rates, the Postal Service has simply taken its cost of doing business into account. I might say that the final proof of this is their having in a rather summary way, a year ago, suggested the increase of 142 percent for magazines—it would be 175 percent for ours, by the way.

This was recommended, after a meeting of the Board, the newly appointed Board, which surely didn't know very much, and then after 13,000 pages of testimony, the examiner last week managed to come to the brilliant conclusion that 142 percent was exactly the right figure.

I find this quite amazing, and I suggest to you, sir, that this has something to do with, perhaps, delegating too much power to executive agencies, and that the Congress might consider whether more careful phrasing is not needed since the Postal Service does not seem to understand general phrasing.

Senator **Ervin**. The concern of the First Amendment was for a free press rather than for a press. The first amendment recognized that if the Government established a press, it would not be free, did it not? It entrusted this great task of disseminating the information and the ideas necessary to keep the minds and spirits of our people free and to make our Government institutions work in what we call the free enterprise system, did it not?

Mr. **Heiskell**. That is correct, sir. It seems to me that the First Amendment clearly said that the press must be responsible for what it is doing, because no one else can be responsible for it. If you give that responsibility to any part of Government, you thereby automatically annul the First Amendment. The purpose is for the benefit of the people of the country, and so far it has worked pretty well.

Senator **Ervin**. I want to commend your pointing out so forcibly that newspapers and magazines and the broadcast media are quite different in their methods of operation, and that they compliment each other in the sense that they furnish us with a diversity of ways of disseminating information and ideas.

I think that the people who drew the First Amendment felt that out of a diversity of services, and also out of a diversity of information and ideas, the people would ultimately be able to tell what the truth is, and that the best test of truth was its ability to get itself accepted in the marketplace where different notions compete with each other for the minds of men.

To paraphrase Jefferson, we have nothing to fear from freedom of speech as long as we leave truth free to combat error.

I think you have rendered a great service to the country and to the subcommittee in pointing out that the First Amendment in and of itself is just words on a piece of paper which are not self-executing, and that it is impossible for one generation to give an absolute title to freedom to the next generation.

It can only be retained on the condition that the next generation loves freedom enough to see that there exists a climate which allows it to operate effectively.

One of the greatest expressions of the First Amendment I have ever read was by Judge Learned Hand, when in emphasizing this same idea, he said that as long as a love of freedom lives in the hearts of the people, that freedom is secure, but that if it ever dies there, that freedom cannot be saved by any constitution or by any law.

There are many people today responsible for governmental policies who undoubtedly believe in their hearts that they love freedom of speech and freedom of the press, but they adopt governmental policies which tend to defeat those freedoms. As you emphasized, the framers of the First Amendment committed the future of the First Amendment to the free enterprise system. It is necessary for this freedom, which is really for the public's benefit rather than those who exercise it, to exist. It is essential that those who are to perform this great public functions of enlightening the people, to be able to make enough to discharge this function. I certainly share your concern about the great increase in the postal rates.

I share the concern about the increased costs in the publication of newspapers. In most cities—at least in the smaller cities in the country, and I think in every city—in my State of North Carolina the same people own all the papers. This is really an undesirable result because of the need of diversity of opinions to keep this country free.

Mr. HEISKELL. Senator, it seems to me that the point that is often forgotten is that there is no one truth, that it is up to the individual to seek out the truth by the diversity of his viewing and reading. In some countries, like Russia, there is one truth, and it so happened that Pravda translated into English means just that, "the truth".

We want to have that diversity. My second point is that I don't think the people realize the cumulative impact of various acts of Government, when you combine the impact of subpena and the impact of the FTC and the impact of the postal costs and the special taxes on advertising.

When you combine all those, you are then really endangering the diversity, the multiplicity of views that the country really needs if it is to continue along its present path.

Senator ERVIN. I think that the report of the committee that studied this problem in 1844 emphasized that the Post Office Department is not intended to be a commercial organization, merely to be self-sustaining. It recognized that the Post Office Department, as you point out, just like the airwaves in the case of the broadcast media, is a great means of disseminating information and ideas which the framers of the first amendment recognized as essential to freedom of mind in this country and also the proper functioning of our governmental institutions.

The Supreme Court decided a case from Louisiana, in which it held that you can, by confiscatory taxation, destroy the freedom of the press, and you can do likewise just as effectively and perhaps more so, by a much more insidious approach of curtailing advertising revenues.

To some extent, I think some of the policies of the FCC and the FTC and others do that. By establishing exorbitant postal charges one can drive the free press out of existence.

Mr. HEISKELL. Yes, sir. As I look back over the years, the Congress in its wisdom did increase postal costs, but I think the average was 6 to 7 percent over the last 15 or 20 years.

As of the day that Congress turned over this power to an independent agency, it proposed increasing it by 35 percent a year. That is an impossible situation. That is the same as the power of taxation to destroy, and something must be done about that.

Senator ERVIN. Those who control policies of the Government, while professing to love the concept embodied in the expression "freedom of the press," can destroy the freedom of the press by exorbitant charges on distribution of materials.

I think you made that valid point.

Even if you could conceive that magazines could continue to exist merely on the subscription rates of people who had the money to purchase them regardless of the price, that would defeat the purpose of the first amendment.

The objective of freedom of the press is to disseminate ideas and information to all people, of all gradations of wealth, to the poorest as well as those who are affluent. It is essential that we do this if a country founded on the principles of freedom of thought and expression is to endure.

That is my judgment.

Mr. **Heiskell.** I agree with you.

Senator **Ervin.** I want to commend you on what has been a most helpful statement. I wish everybody in Congress would have access to it, and I will put it in the *Congressional Record* with your permission, and hope they might read it.

Mr. **Heiskell.** Thank you.

Senator **Ervin.** It will occupy a very fine place among the facts, which are so often surrounded by much fiction.

Mr. **Heiskell.** I appreciate the opportunity, Senator.

Thank you.

Senator **Ervin.** Counsel will call the next witness.

Mr. **Baskir.** Mr. Chairman, our next witnesses this morning are Mr. David Rintels and Mr. Norman Lear and Mr. Liam O'Brien representing the Writers Guild of America.

Senator **Ervin.** Yes, I want to welcome you to the committee and to express the committee's deep appreciation for your willingness to come forth and give us the benefit of your experience and observations with respect to what I consider perhaps the most important public question we have in America today.

STATEMENT ON BEHALF OF THE WRITERS GUILD OF AMERICA BY MR. DAVID RINTELS, MR. NORMAN LEAR AND MR. LIAM O'BRIEN

Mr. **Rintels.** We are happy to come and present evidence before you. My name is David Rintels. I am a writer, a member of the governing council of the Writers Guild of America, West, and the chairman of The Guild's Committee on Censorship. With me are Laim O'Brien and Norman Lear, both distinguished writers and longstanding members of the Guild.

The president of the WGAW, Ranald MacDougall, has written to you that "Insofar as the Writers Guild of America is traditionally, historically, and unalterably opposed to censorship in any form, the members appearing before you have our complete support in their presentation."

We deeply appreciate their support and confidence. Today however, we speak as individual writers about our personal experiences and working knowledge.

This subcommittee has heard testimony in these hearings directed to keeping the broadcast press, and specifically the news and public affairs departments of the television networks, free from Government censorship and intimidation. We fully support you in your wish to keep the news free from this censorship.

You have also heard testimony saying that the networks have a responsibility to present a free flow of ideas to the American people. That in their news and documentaries they must present a wide spectrum of thought and not merely reflect one narrow point of view. We fully support you in this pursuit as well.

As members of the Writers Guild of America, whose 3,000 members write every network television dramatic, comedy, and variety program produced in this country, we have a third concern. In our world of entertainment, which is a vast source of what we know and how we think about our world, ideas and information are as vitally important and as needful of protection as any other area of the press. But within this area of entertainment programing, it is our contention that the networks have deliberately and almost totally shut off this flow of ideas, have censored and continue to censor writers who work for them.

It is therefore our hope to convey to you our belief that there are two related issues which fall within the scope of these hearings and which demand your most urgent attention: First, the right of the men and women who write for television to deal in ideas and truths and realities free from the repressive censorship and program practices under which we do, in fact, write. Second, the right of the American people to be exposed to something more than an endless cycle of programs that mislead them and distort the realities of what is happening in America today.

That these two issues are related and of grave concern to all of us should be clearly demonstrated by the following statistics taken from a recent poll of our Guild. Of all who responded:

Eighty-six percent have found, from personal experience, that censorship exists in television. Many state, further, that they have never written a script, no matter how innocent, that has not been censored.

Eighty-one percent believe that television is presenting a distorted picture of what is happening in this country today—politically, economically, and racially.

Only eight percent believe that current television programing is "in the public interest, convenience and necessity," as required by the Federal Communications Act of 1934, title 47, U.S. Code, sections 307a and 307d.

Because these figures suggest strongly our conviction that the American people are being badly served by the television industry's use of the airwaves which they, the American people, own, it is proper to inquire as to the causes of these abuses.

We approach this inquiry not, as we hasten to add, in any spirit that all television must be educational or instructive or elevating, but rather from the following basis: Even granting for the moment the questionable argument advanced by those who control television —an argument we do not grant, for reasons we will later explore— that because so many of the American people are willing to settle for nonstop lowest common denominator programing, television must be doing something right, must it then follow that virtually 100 percent of all network dramatic and comedy programing must be aimed at the lowest aspirations of this audience virtually 100 percent of the time, even to the point of disregarding any reasonable standards of balance, quality, and reality?

Must anything which does not amuse and titillate the majority be censored out, as it is in fact, as we shall shortly document? This is where we wish to join the battle to enlist your support, over the question of whether current television programing and censorship practices and the inevitable resulting product are in the public interest, as the law requires.

We believe emphatically that they are not, and that while we are the first victims of these practices, the ultimate victims are the American people.

The situation in television today—how serious is it? How well does television fulfill its legal and moral obligation to serve the public interest?

First, it must be understood how all pervasive television has become in America. More than 95 percent of all homes are equipped with television, a substantially larger number than have indoor plumbing. A quarter of all homes have more than one set. The average home has its television on an astounding 6.43 hours a day. At any given time between 8–11 p.m. not less than 75 million people are watching television with 91 percent of them tuned to one of the three networks. Television has become the newspaper, the magazine, the town meeting, the high school, and the college of the country.

We look at these figures and are horrified because we know, first hand, that 75 million people are nightly being fed programs deliberately designed to have no resemblance at all to reality, nonsense whose only purpose is to sell snake oil and laxatives and underarm deodorants.

We know this but apparently the 75 million do not. This is what is so tragic: People believe what they are being told. As Archibald McLeish has said, "(broadcasting) * * * matters more over the long run * * * than what anybody else does because (it is) more persistently shaping the minds of more people than the rest of us put together."

Dr. Bradley S. Greenberg of Michigan State University said:

> Forty percent of the poor Black children and thirty percent of the poor white children (compared with 15 percent of the middle-class white youngsters) were ardent believers of the true-to-life nature of the television content.

So people watch television by the tens of millions. Many believe it literally. All of us are influenced by it to some extent. Increasingly television has become the literature of the country.

With such enormous influence comes enormous power, and with such power should come—must come, in the public interest—responsibility. We agree wholeheartedly with industry spokesmen who say that television has a responsibility to entertain. But we also believe that television has a responsibility not to deceive. A responsibility not to present one narrow view as the whole truth. A responsibility not to shy away from reality, from issues, from controversy, from substance, from public discussion of all matters in the public interest.

Yet it is our contention that in prime time entertainment television, which most of the people watch most of the time and which has by far the largest impact of all television, these responsibilities are being shirked, willfully and totally.

The following examples are typical of everyday occurrences in television.

My collaborator and I interested a producer in doing a script about a magazine photographer in Vietnam who was shooting a picture essay on 18-year-olds going into their first combat. The photographer, a man who likes to incite action as much as to observe it, follows one especially cocky boy until he comes face to face with a guerrilla and then takes a picture showing terror in the boy's eyes.

The boy acts bravely; he just looks afraid. On the next patrol the boy, who has been shown the pictures of himself by the photographer with the result that he now begins to question his own bravery, anxiously looks around to see where the photographer is and whether he is taking more damning photos. He turns once too often and is killed.

The producer likes the story well enough, a character study that would allow us to say something about truth and bravery, he kindly called it—to forward it to the network for its required approval. The network liked the story, too. They wanted only one change, because Vietnam, you know, is controversial in television.

My collaborator, wise in the ways of television, felt his heart sink. If they wanted the story moved to Korea, or Germany during World War II, the usual gambits, we were prepared to make a fight of it.

No, not at all. Keep the story fresh and contemporary by all means. Keep it in the present. Just change the locale to Spain, make it a bullfight instead of a war, and make the soldier into a matador. That way, then the bull charges, the matador can look to see whether the photographer is taking more pictures and . . .

For another example I was asked to write another episode of the series The FBI on a subject of my choice at about the time, 5 or 6 years ago, when the four little girls were killed by the bomb in the Birmingham Church. It had been announced that the FBI was involving itself in the case and I told the producer I wanted to write a fictional account of it. He checked with the sponsor, the Ford Motor Co., and with the FBI—every proposed show is cleared sequentially through the producing company, QM; the Federal Bureau of Investigation; the network, ABC; and the sponsor, Ford; and any of the four can veto any show for any reason, which it need not disclose—and reported back that they would be delighted to have me write about a church bombing subject only to 3 stipulations. The church must be in the north, there could be no Negroes involved, and the bombing could have nothing at all to do with civil rights.

After I said I wouldn't write that program, I asked if I could do a show on police brutality, also in the news at that time. Certainly, the answer came back, as long as the charge was trumped up, the policeman vindicated, and the man who brought the specious charge prosecuted.

For another example, Robert Collins, an established writer, was asked to write for *The Senator*, deservedly called the boldest and best dramatic series on recent television. Collins writes:

> The theme of the first story I submitted was the question of possible amnesty for draft evaders. The producer refused the story on the ground that advocacy of amnesty was not the consensus of the country and was therefore unacceptable.
>
> The second show I proposed concerned itself with the question of whether a homosexual in government was, by the fact of his homosexuality, a possible security risk. The producer was willing in this case—but because the treatment of the homosexual in my story was sympathetic and he was portrayed as neither nance nor psychopath, and I refused to treat him as such, the network refused the story.

Writers by the dozens report that they have written characters who are black and have seen them changed to white; they have written Jews and seen them converted to Gentiles; they have proposed shows about South African apartheid, Vietnam, old folks, mental disease, politics, business, labor, students, and minorities; and they have been chased out of studios.

This year, 1 year after The Senator was canceled, ABC and Universal Studios did a show starring Anthony Quinn called "The Man and the City." Producer Stanley Rubin says:

> Although the format cried out for relevancy we were flatly forbidden to make a relevant show. On a series about a contemporary Mexican-American Mayor of a southwestern city, no stories about the poor, about the old, radicals, Chicanos, Blacks, the whole field of urban life was expressly and by fiat, forbidden.

The writer has no more freedom in any series in television. Take the omnipresent medical shows as a group—"Marcus Welby, M.D.," on ABC; "Medical Center" on CBS; "The Doctors" segment of the "Bold Ones" on NBC. Anybody who watches these programs must of necessity believe the following about American medicine:

No patient is ever denied a hospital bed or required to wait until one is available.

No doctor ever charges for his services; no hospital ever bills a patient; no one ever has to go on charity, or do without care.

Almost every doctor cures almost every patient—if only the patient will let him. Occasionally someone dies, more likely out of boredom or pique than of the medical profession's inability to cure him. He is usually 107 when he goes.

The American Medical Association doesn't exist, and, of course, doesn't lobby. There is no need for it, to be sure, because no one on television ever suggests that we need more and better doctors, more and better hospitals, and more and better medical schools, lower cost health care or, heaven help us, national health insurance.

At least two Senators on this subcommittee—Senator Kennedy and Senator Scott—have strong feelings about the cost and availability of health care in this country; they stand up here, in one of the two most influential forums in the country, and they say so. It is their right, not to say their obligation. Many writers agree with them. Those who do are absolutely prohibited from standing up in the other most influential forum and suggesting that American medicine could be improved, its cost reduced, its scope expanded. Their work is more difficult because our television doctors are all heroes and above mistakes or the need for help or improvement.

They're doing fine, their patients are all in splendid shape at the end of the hour, and the viewer is content—what could possibly be wrong with American health care?

The consequences of this shallow one-sidedness are tragic. No debate ensues, no national awareness of a problem which some of you and some of us believe may have reached crisis proportions. Personally I don't know whether there is a health crisis in America; I would like to know; I do know that it is a gross disservice to the country to refuse to discuss whether such a crisis exists.

It is our contention that this refusal to allow us to deal with the real world is one of the basest and most virulent forms of censorship imaginable, that there are substantial First Amendment questions here, and that there is, as a consequence, an immediate need to examine the enormous gap between what the law requires—namely, that television program in the public interest—and the television industry's own and self-serving interpretation of the law—namely, that it feels free to put on practically anything that will attract a sufficient audience.

What has happened is that the broadcasters have rewritten the definition of "the public interest" as follows:

> Robert Sarnoff, in a speech while he was still chairman of the corporate NBC (he has since become chairman of the parent RCA Corporation) once ventured a definition. He said the public interest was what the public was interested in. It was patently a definition to justify broadcasting's excesses in commercial entertainment. A young child may be interested in lighting matches and an older one in experimenting with drugs, but any parent knows that neither is in their best interest.
>
> LES BROWN,
> *In Television: the Business Behind the Box.*

The narrowness of this definition of the public interest and its essential unfairness to the real public interest is suggested by former Senator William Benton.

Mr. Benton says:

> I can only ask, if this alleged "wasteland" is indeed what the American people want, is it all they want of television? . . . Is it all they are entitled to ? . . . Are not . . . these dwellers of the wasteland . . . the same Americans who have taxed themselves to create a vast educational system . . . are they not the same who have established an admirable system of justice, created a network of churches . . . when they turn their TV knobs, do they not by the millions have interests broader than the entertainment which is so complacently theirs? . . . I think the American people should expect that the greatest single instrument of human communication ever developed must make its due contribution to human security and human advancement . . . A high common denominator distinguishes our people—as well as a low one—and both denominators apply to the same men, women and youngsters. Television was crystallized into the low road. . . .

Television does not program in the public interest; it programs in its own interest and its sponsor's interest and against the public's interest.

We are asked what differences it might make if the shackles were removed, if we were allowed to deal in issues. Aren't we all writers of fiction anyway? Aren't illusion and fantasy our stock in trade?

The difference would be that whereas now we are required to foster, without critical examination, a mythology which states that a punch in the mouth solves all problems and doesn't really hurt anyone, that bullet wounds without killing, that ours is a society hampered in its strivings to improve its acknowledged greatness only by the efforts of a few sinister malcontents who seek to undermine us for their own perverse purposes, instead of this mythology we could proceed to an honest evaluation of who we are and where we are headed.

Once we become aware that in real life the cavalry does not always arrive in time, that the good guys do not always win, that it must hurt deeply to be black and unemployed, or to be hungry in a land of abundance, once we strip away the cliches and look at the realities, then we can make that new first step toward our great and shared goals.

We want desperately to aid in this effort, not hinder it.

We will raise a great many questions here today and we do not pretend to know all the answers. But it seems to us that the problems are so grave and the consequences for America so great that a new attempt to examine the course of television, drawing on the nation's best minds, must now be made.

We therefore hope that you will recommend creation of a citizens committee to examine television which can make the necessary study and detailed recommendations that will, hopefully, start us on the high road.

We ask partly for ourselves. Dostoevski has written,

> There is 1 punishment so terrible that even hardened convicts tremble at the prospect, and that is simply this: To take a man's lifework and render it meaningless.

But much more than for ourselves as writers, we ask for the country.

Senator Ervin. The written statement is so illuminating and intriguing that I want to have the entire written statement printed in the record, because what you said was most illuminating, and there are very many illuminating things in the written statement that you did not allude to, and I think they are worthy of consideration.

(The document referred to follows:)

STATEMENT OF DAVID W. RINTELS [1], BEFORE THE SENATE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,—FEBRUARY 8, 1972

My name is David W. Rintels. I am a writer, a member of the governing Council of The Writers Guild of America, West, and the Chairman of the Guild's Committee on Censorship. With me are, Liam O'Brien, formerly Story Editor of "Hawaii 5-O", and Norman Lear, writer and producer of "All In the Family." The President of the WGAw. Ranald MacDougall, has written to you that "Insofar as the Writers Guild of America is traditionally, historically, and unalterably opposed to censorship in any form, the members appearing before you have our complete support in their presentation." We deeply appreciate their support and confidence. Today, however, we speak as individual writers about our personal experiences and working knowledge.

As members of the Writers Guild, whose 3,000 members write every network television dramatic, comedy and variety program produced in this country, we appreciate and support fully this Subcommittee's historic efforts to keep the printed and broadcast press free of the restrictions of censorship and intimidation. Your work is vital to insure an informed public, just as an informed public is vital to insure the successful working of democracy.

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[1] Member of Writers Guild of America, West and Chairman of its Committee on Censorship.

It is our hope here to convey to you our heartfelt belief that there are two related issues which fall within the scope of these hearings and which demand your most urgent attention:

First, the right of the men and women who write for television to deal in ideals and truths and realities free from the repressive censorship and program practices under which we do, in fact, write.

Second, the right of the American people to be exposed to something more than an endless cycle of programs that mislead them and distort the realities of what is happening in America today.

That these two issues are related and of grave concern to all of us should be clearly demonstrated by the following statistics taken from a recent poll of our Guild. Of all who responded:

Eighty-six (86) percent have found, from *personal* experience, that censorship exists in television. Many state, further, that they have never written a script, no matter how innocent, that has not been censored.

Eighty-one (81) percent believe that television is presenting a distorted picture of what is happening in this country today—politically, economically and racially.

Only eight (8) percent believe that current television programming is "in the public interest, convenience and necessity," as required by The Federal Communications Act of 1934, Title 47, U.S. Code, Secs. 307a, 307d.

Because these figures suggest strongly our conviction that the American people are being badly served by the television industry's use of the airwaves which they, the American people, own, it is proper to inquire as to the causes of these abuses. We approach this inquiry not, we hasten to add, in any spirit that all television must be educational or instructive or elevating, but rather from the following basis: Even granting for the moment the questionable argument advanced by those who control television—an argument we do not grant, for reasons we will later explore—that because so many of the American people are willing to settle for non-stop lowest-common-denominator programming, television must be doing something right, must it then follow that virtually one hundred percent of all network dramatic and comedy programming must be aimed at the lowest aspirations of this audience virtually one hundred percent of the time, even to the point of disregarding any reasonable standards of balance, quality and reality? Must anything which does not amuse and titillate the majority be censored out, as it is in fact, as we shall shortly document? This is where we wish to join the battle and to enlist your support, over the question of whether current television programming and censorship practices and the inevitable resulting product are in the public interest, as the law requires. We believe emphatically that they are not, and that while we are the first victims of these practices, the ultimate victims are the American people.

The situation in television today—how serious is it? How well does television fulfill its legal and moral obligation to serve the public interest?

First, it must be understood how all-pervasive television has become in America. More than 95% of all homes are equipped with television, a substantially larger number than have indoor plumbing. A quarter of all homes have more than one set. The average home has its television on an astounding 6.43 hours a day. At any given time between 8:00–11:00 p.m. not less than 75,000,000 people are watching television, with 91% of them tuned to one of the three networks.

The people who control television use these figures to demonstrate their wide audience acceptance and to document their positive contributions to American life: Such love and devotion must have been earned.

We look at these same figures and are horrified because we know, first-hand, that 75,000,000 people are nightly being fed programs deliberately designed to have no resemblance at all to reality, nonsense whose only purpose is to sell snake-oil and laxatives and underarm deodorants. We know this but apparently the 75,000,000 do not. That is what is so tragic: people believe what they are being told.

"(Broadcasting) . . . matters more over the long run . . . than what anybody else does because (it is) more persistently shaping the minds of more people than the rest of us put together."

ARCHIBALD MACLEISH.

"(Carroll) O'Connor (of ALL IN THE FAMILY) is baffled by some letters which show people take TV so seriously they evidently feel the Bunkers are a real family. Some ask why he treats his wife as he does; one man called him a big, dumb S-O-B for so doing; another wrote asking why he didn't leave his wife because she was such a dumbell!"

VARIETY.

"Forty percent of the poor black children and thirty percent of the poor white children (compared with 15 percent of the middle-class white youngsters) were ardent believers of the true-to-life nature of the television content."

Dr. BRADLEY S. GREENBERG,
Michigan State University.

So people watch television by the tens of millions. Many believe it literally. All of us are influenced by it to some extent. Increasingly television has become the literature of the Seventies. It is the newspaper, the magazine, the town meeting, the high school, the college of the country.

With such enormous influence comes enormous power, and with such power should come—must come, in the public interest—responsibility. We agree wholeheartedly with industry spokesmen who say that television has a responsibility to entertain. But we also believe that television has a responsibility not to deceive. A responsibility not to present one narrow view as the whole truth. A responsibility not to shy away from reality, from issues, from controversy, from substance, from public discussion of all matters in the public interest.

Yet it is our contention that in prime-time entertainment television, which most of the people watch most of the time and which has by far the largest impact of all television, these responsibilities are being shirked, wilfully and totally.

From thousands of examples consider the following:

My collaborator and I interested a producer in doing a script about a magazine photographer in Vietnam who was shooting a picture essay on 18-year-olds going into their first combat. The photographer, a man who likes to incite action as much as to observe it, follows one especially cocky boy until he comes face to face with a guerilla and then takes a picture showing terror in the boy's eyes. The boy acts bravely; he just looks afraid. On the next patrol the boy, who has been shown the pictures of himself by the photographer with the result that he now begins to question his own bravery, anxiously looks around to see where the photographer is and whether he is taking more damning photos. He turns once too often and is killed.

The producer liked the story well enough—a character study that would allow us to say something about truth and bravery, he kindly called it—to forward it to the network for its required approval. The network liked the story, too. They wanted only one change. Vietnam is controversial, you know.

My collaborator, wise in the ways of television, felt his heart sink. If they wanted the story moved to Korea, or Germany during World War II, the usual gambits, we were prepared to make a fight of it.

No, not at all. Keep the story fresh and contemporary by all means. Keep it in the present. Just change the locale to Spain, make it a bullfight instead of a war, and make the soldier into a matador. That way, when the bull charges, the matador can look to see whether the photographer is taking more pictures and. . . .

Last year John Bloch was Story Editor on an ABC-Paramount Studios series called "The Young Lawyers." He wrote a script in which the white male Young Lawyer was to be shown having a drink in a public place with the black female Young Lawyer. Just drinking and talking, with perfect and total innocence. Six times the producer, acting under the explicit direction of the Paramount Studios censor and network liaison-man, Henry Colman, requested that the black girl be rewritten into a white girl; six times Bloch refused. Finally he was promised that the change would not be made. His option was not picked up by the studio and, after he was let go, the film was shot—with a white girl playing the part.

Norman Felton, Executive Producer of Dr. Kildare, writes: "On one occasion, despite backing from the American Medical Association, the National Educational Association and the Surgeon General of the United States (who eventually sent a telegram to the network endorsing the project) we were not allowed to present a film concerned with venereal disease. It was developed with scrupulous attention to good taste. The advisors, as above, pointed out that people watched a program like "Dr. Kildare" more than documentaries, and it would be of great benefit to the people of America for the film to be made and shown. The network, however, was afraid of 'offending'."

Robert Collins, an established writer, was asked three times to write episodes of THE SENATOR, deservedly called the boldest and best dramatic series on recent television.

"The theme of the first story I submitted was the question of possible amnesty for draft evaders. The Producer refused the story on the ground that advocacy of amnesty was not the consensus of the country and was therefore unacceptable.

The second show I proposed concerned itself with the question of whether a homosexual in government was, by the fact of his homosexuality, a possible security risk. The Producer was willing in this case—but because the treatment of the homosexual in my story was sympathetic and he was portrayed as neither nance nor psychopath, and I refused to treat him as such, the network refused the story.

The third story I proposed, again with the Producer's approval, dealt with the Pentagon's storage of nerve gas near an urban area. A one-line memo from Jean Messerschmitt of NBC to the Producer said simply this story was unacceptable to the network. She gave no reason but the Producer told me he had heard the subject would offend sponsors who had dealings with the Pentagon. I don't know about that; I do know that NBC is RCA, and RCA is one of the biggest defense contractors."

I have been required, by NBC and also by ABC, to delete the word 'Pentagon' from scripts even in strictly factual references. I have been allowed, on occasion, to mention the word 'army'. I don't understand the logic.

But I do understand perfectly the logic of the following: On the ABC series "The Invaders," the Producers were ordered to delete the word 'integrated' from a script. The network's position, stated to the Producer, was that the word could be used on occasion but must never be spoken by the hero of a series.

Norman Felton, again concerning his experiences as Executive Producer of "Dr. Kildare":

"We once did a script on Kildare called 'Holiday Weekend'. A doctor had told us that holiday weekends were the worst time in a hospital due to auto crashes. We thought it would be a public service to make a show about this, dramatizing—painfully—the need for safer and saner driving, and put it on the air the Thursday before the Labor Day weekend. NBC fought us, long and bitterly, before finally giving in, on the grounds that we were an entertainment show and what, please was entertaining about auto crashes?"

Writers by the dozens report that they have written characters who are black and have seen them changed to white; they have written Jews and seen them converted to Gentiles; they have proposed shows about South African apartheid, Vietnam, old folks, mental disease, politics, business, labor, students, and minorities; and they have been chased out of studios.

This year, one year after "The Senator" was cancelled, ABC and Universal Studios did a show starring Anthony Quinn called "The Man and The City." Producer Stanley Rubin says: "Although the format cried out for relevancy we were flatly forbidden to make a relevant show. On a series about a contemporary Mexican-American Mayor of a southwestern city, no stories about the poor, about the old, radicals, Chicanos, Blacks—the whole field of urban life was, expressly and by fiat, forbidden."

Says Rubin, "I wanted to do one show about the refusal of a father to accept a posthumous medal for his son, killed in Vietnam. The issue of the war was background to the plot, which concerned the man and not the war. The network turned this story down. ABC does not recognize war."

There are thousands of other stories ranging from the ridiculous—as when Adrian Samish, who supervises all scripts for QM Productions, which is responsible for "The Fugitive," "The FBI," "Cannon," etc., objected to a political reference in a script of mine by slamming his fist on my desk and telling me, 'We hired you to write scripts, goddam it, not to put your ideas in them'—to the marvelously sublime, as when the Producer of the series "My Favorite Martian" required a writer to change a line on the grounds that "A Martian would never talk like that." The list is so long that it is impossible to believe for one moment that these are isolated instances, temporary abberations, foolishness on the part of a few myopic individuals. On the contrary, these instances are symptomatic of the rigorous and final institutionalization of censorship and thought control on television.

Let us now look at one whole series: ABC's "The FBI."

The FBI series, about to go into its eighth successful year under the official imprimatur of J. Edgar Hoover and the Federal Bureau of Investigation, formerly claimed that its programs were based on real FBI cases, when they frequently were not, and even now claims that its programs are 'inspired' by real FBI cases, which they frequently are not; that although the names and places are fictitious, everything you see on the air happened and they have even broadcast official-looking file numbers on the air to prove it; and, if this isn't enough, a narrator begins each program by announcing the exact date on which the crime was committed and ends each program by announcing, documentary-style, the federal prison terms meted out by federal courts to the criminals. They then show you the great seal of the FBI and thank the Bureau and Mr. Hoover for their cooperation. They strongly imply, in short, that they are telling you the truth about what the FBI does. The facts suggest something very different.

For example, I was offered a job writing on the series; when I asked them which case they wanted me to adapt, they told me to come up with a story of my own invention—no case needed. Other writers, including the President of the Television Branch of the Writers Guild of America, have had the same experience. It doesn't always work this way—sometimes the Producers invent and write out, with the cooperation of the resident FBI Agent assigned to the series, one page 'notions' which they then assign to writers; sometimes the shows are in fact based on real cases—but in many cases the story is not only not 'based on' or 'inspired' by real FBI cases, it is invented solely by the writer and/or producer, and inevitably the story details are fabricated from beginning to end. As William Randolph Hearst cabled the artist Frederic Remington in 1898 before hostilities broke out between the United States and Spain over Cuba, "You provide the pictures, I'll provide the war."

For a second example, I was asked to write another episode of THE FBI on a subject of my choice, at about the time, five or six years ago, when the four little Black girls were killed by the bomb in the Birmingham Church. It had been announced that the FBI was involving itself in the case and I told the producer I wanted to write a fictional account of it. He checked with the sponsor, the Ford Motor Company, and with the FBI—every proposed show is cleared sequentially through the producing company, QM; the Federal Bureau of Investigation; the network, ABC; and the sponsor, Ford; and any of the four can veto any show for any reason, which it need not disclose—and reported back that they would be delighted to have me write about a Church bombing subject only to these stipulations: The Church must be in the North, there could be no Negroes involved, and the bombing could have nothing at all to do with civil rights. After I said I wouldn't write that program, I asked if I could do a show on police brutality, also in the news at that time; certainly, the answer came back, as long as the charge was trumped up, the policeman vindicated, and the man who brought the specious charge prosecuted.

For a third example, and to lend credence to the second, in the seven years in which the series has been on the air, years of great change racially in this country, change in which the FBI has been centrally involved, the producers have never—not once—done a program about any aspect of the violation of the civil rights of a minority. There is dramatic material for a thousand shows in this area, and the writers would not, for a change, have to invent the details; scores of writers have asked if they could write about civil rights and each has been turned down. If you want to do a kidnaping, great; Communist espionage, wonderful; organized crime, marvelous; civil rights, never.

Fourth Example: On the series no FBI agent has ever bugged a house or tapped a phone or hired a paid informant. And no writer is ever allowed to suggest that these strategems are ever employed, or indeed that they exist. They may be invaluable to police work and the FBI certainly employs them, the argument goes, but they're bad public relations. The public can be spared these truths.

Fifth example: Should a writer want to write, say, about violations of anti-trust law, he is told to go elsewhere. In seven years not one episode of the FBI has allowed on this subject. The trouble is, of course, there is no other place for the writer to go in television—no other series will touch this subject, either—so no writer can write about it on television, and nobody who depends on television for his knowledge of the world will ever know that crime in the real world is sometimes committed by respectable white-collar types. Street crime and organized-gang crime and law-and-order crime exist because they are a staple of dramatic television. Anti-trust crime does not exist, in effect, because television says it does not exist, any more than violations of minority rights happen. The FBI in Washington of course does know that these crimes happen because it is charged with investigating them, in fact if not on television.

There are other misrepresentations made to the American people by this purportedly realistic series. Although the Director of the FBI, Mr. Hoover, has said publicly that La Cosa Nostra exists, the series chooses to call it The Organization, a criminal syndicate whose chief visible trait is that its membership is comprised of a lot of non-Italians named Smith keeping up with a lot of folks named Jones; again, although the FBI explicitly teaches its agents never to shoot except to kill, on the series nobody has been killed for years now—wounded by the carload, certainly, but never killed.

There is other, sadder evidence of the series' refusal to deal with the real world or even to acknowledge its existence—in seven years on the air, not one woman has ever been hired to write an episode, nor has any Black, despite the fact that on one occasion a white writer with four credits on the series recommended a black writer and said that he would rewrite the script for free if the black writer's script was not up to par; and, a matter which will concern the members of this Subcommittee on Constitutional Rights as much as it does us, namely that the producers acknowledge privately what has long been an open secret in the industry, that all actors and writers and directors are screened by the Federal Bureau of Investigation in Washington and only those who are "politically acceptable" to the FBI are hired—but by now the message should be clear. The American people are being force-fed a dishonest picture of the work of a Government agency and any writer who attempts to portray the real world, suggesting that white collar or business crime exists or that crimes against peoples' rights are as much a source of national concern as crimes against their persons, is simply not allowed to do so.

The writer has no more freedom to deviate from the official line in any series in television. Take the omnipesent medical shows as a group—"Marcus Welby, M.D." on ABC; "Medical Center" on CBS; "The Doctors" segment of "The Bold Ones" on NBC. Anybody who watches these programs must of necessity believe the following about American medicine:

No patient is ever denied a hospital bed or required to wait until one is available.

No doctor ever charges for his services; no hospital ever bills a patient; no one ever has to go on charity, or do without care.

Almost every doctor cures almost every patient—if only the patient lets him. Occasionally someone does die, more likely out of boredom or pique than of the medical profession's inability to cure him; he's usually 107 when he goes.

The American Medical Association doesn't exist, and of course doesn't lobby. There's no need for it, to be sure, because no one on television ever suggests that we need more and better doctors, more and better hospitals, more and better medical schools, lower-cost health care or, heaven help us, national health insurance.

The one man with more experience than any other in producing medical shows for television, Norman Felton, has been responsible for "Dr. Kildare," "The Eleventh Hour," and "The Psychiatrist." Felton says:

"Television does not reflect truth. On the DR. KILDARE series we were asked by NBC to get the approval and seal of the A.M.A. This meant that we submitted scripts for approval to the A.M.A. Although the organization gave us technical help, it goes without saying that we did not present an accurate picture of the practice of medicine, or the difficulties many people had in obtaining adequate medical care. . . . The network's censorship extended from preventing us from tackling whole subject matters to a myriad of smaller items, such as making us take out any reference to 'breast' or use of the word in a film concerned with mastectomy. Control of ideas exists down to the present in series such as 'Marcus Welby, M.D.,' and 'Medical Center.' "

At least two Senators on this Subcommittee—Senator Kennedy and Senator Scott—have strong feelings about the cost and availability of health care in this country; they stand up here, in one of the two most influential forums in the country, and they say so. It's their right, not to say their obligation. Many writers agree with them. Those who do are absolutely prohibited from standing up in the other most influential forum and suggesting that American medicine could be improved, its costs reduced, its scope expanded. Your work is more difficult because our television doctors are all heroes and above mistakes or the need for help or improvement. They're doing fine, their patients are all in splendid shape at the end of the hour, and the viewer is content—what could possibly be wrong with American health care?

The consequences of this shallow one-sidedness are tragic. No debate ensues, no national awareness of a problem which some of you and some of us believe may have reached crisis proportions. Personally, I don't know whether there is a health crisis in America; I'd like to know; I do know that it is a gross disservice to the country to refuse to discuss whether such a crisis exists.

Here, then, is the impossible situation we labor under. We want desperately to write about the subjects which interest us as writers and human beings, subjects which are not very different from those which interest you. But we cannot because the men who control television have decreed, we feel in gravest error, that these matters do not interest the public. Cops-and-robbers interest the public; large and happy families whose worst problem is whether Gramps will find his new set of teeth before the Saturday-night wingding at the Golden Age Home interest the public; dentists with chimpanzees and priests who solve crimes and lawyers who invariably defend minority-group children without fee and never lose a case—these interest the public. But life and truth do not interest the public and cannot be written about except in rare instances when we are allowed to explore controversial themses, but only under the most rigidly controlled conditions and only under the expressed condition that we still 'play it safe'.

It is our contention that this is one of the basest and most virulent forms of censorship imaginable, that there are substantial First Amendment questions here, and that there is, as a consequence, an immediate need to examine the enormous gap between what the law requires—namely, that television program in the public interest—and the television industry's own and self-serving interpretation of the law—namely, that it feels free to put on practically anything which will attract a sufficient audience.

The broadcasters have rewritten the definition of "the public interest" as follows:

"Robert Sarnoff, in a speech while he was still chairman of corporate NBC (he has since become chairman of the parent RCA Corporation), once ventured a definiton. He said the public interest was what the public was interested in. It was patently a definition to justify broadcasting's excesses in commercial entertainment. A young child may be interested in lighting matches and an older one in experimenting with drugs, but any parent knows that neither is in their best interest."

LES BROWN,
In Television: The Business Behind The Box.

". . . . a program in which a large part of the audience is interested is by that very fact . . . in the public interest."

DR. FRANK STANTON,
President, now Vice-Chairman of the Board of CBS, 1970.

"I believe that he (Stanton) despaired of the broadcast schedule about 1960; thereafter he did not bother to watch much of it except for news and special programs."

FRED FRIENDLY,
Former President, CBS News,

We do not have to watch, either; but we do write for it and under arbitrary and restrictive conditions imposed upon no other people in this country. We cannot explore, we cannot discuss, we cannot criticize. Lawyers and police and teachers and clergy all have the right publicly to explore their professions and to criticize where they feel criticism is merited. We cannot; writers in television are absolutely prohibited that right of speech. The NBC Radio and Television Broadcast Standards and Practices Book, Page 8, Paragraph 1, reads:

"Respect for lawyers, police, teachers and the clergy should not be diminished by undue and unnecessary emphasis on unfavorable aspects of members of these professions."

The Standards and Practices books do not spell out the many other restrictions under which we labor. Of course, they do not have to. We all know what the rules are by now and we know how to obey them if we hope to survive.

These unwritten rules, which were born out of the union between Television and Business and which limit so drastically our right to speak and your right to hear, were carved in granite long before 1959. But never have they been better expressed then in a memo of that year, when Hubbell Robinson was in charge of all Programming for CBS Television. The following is a letter he received from the general manager for radio and television of a major advertising agency:

"We have already passed along to your people something of the flareback that came to various members of the sponsor organization and, in turn, was passed along to us.

We know that your series is striving mightily to do things that are different and outstanding so that as a series it will rise above the general level of TV drama. This is fine but since the series is a vehicle for commercial advertisers, it must also be extremely sensitive to utilizing anything, however, dramatic, however different, however well done, if this will offend viewers. Creative people, of course, are constantly protesting against being stifled by what they may think are the narrow, limited or prejudiced views of other people, and certainly creative people must be offered an opportunity for the full development of their creative talents—but only under certain circumstances. This cannot be true in the case of a commercial vehicle.

You know that we can never lose sight of the fact that the sole purpose for which an advertiser spends money is to win friends and influence people. Anything that he might do, however meritorious in one direction, that makes enemies is a bad action and is to be assiduously avoided. As long as this series wishes commercial sponsorship, all of the creative people associated therewith must never forget that not to offend people must be an inviolate rule for guiding their operation. Narrow, prejudiced, ignorant, or what you will, though any part of the population may be, as a commercial vehicle the series must be ever alert not to alienate its viewers. I think you can gather that from the sponsor's point of view this matter is serious. We would like to hope that as a result of this second major flare-up in one season we are taking such steps as may be necessary to insure that no future program in this series violates the public concept of what is right."

ROBINSON,
Introduction to Electronic Drama.

Dollars, ratings, sponsors, affiliates, networks—the whole economic base of television has been so thoroughly documented that it requires no elaboration here. Suffice to say that in the same year Robinson received that letter, Walter Lippman wrote "While television is supposed to be 'free,' it has in fact become the creature, the servant and indeed the prostitute of merchandising."

What is in the sponsor's interest is clear. What is in the network's interest is also clear. We only get into difficulties when we ask, as the law invites us to, what is in the public interest?

Realistically and unsurprisingly, every writer who wants to make a living knows what the rules are: learning is the beginning of survival. As a consequence, censorship invariably and unhappily begins, like charity, at home. The unwritten rules are so well known that it is a recklessly brave and probably independently wealthy writer who attempts to buck The System in an attempt to get anything of substance on the air. The majority of writers who hope to sell know enough to come in with safe ideas.

If they do not, the network quickly tells them.

Writes William Froug:

"During the two years I served as an Executive Producer at CBS-TV it was repeatedly made clear to me that the network was in the business of 'pure entertainment', that nothing of a controversial, provocative or disturbing nature was to be permitted in programming. The philosophy, often explicitly expressed, always implicit in the day-to-day operations, was to provide the greatest number of people with the least offensive material. As noted writer Walter Brown Newman, author of the original GUNSMOKE script in radio from which the series originated, stated it to me: 'In television the writer's job is to write about nothing.' "

But if a writer screws up his courage and mortgages his house, he can try. Many do. They can go in and meet a Producer with a story they want to do. With what prospects? What is the Producer's function? Writes Froug:

"As the producer of many television series ('Twilight Zone,' 'Mr. Novak,' 'Playhouse 90,' 'Alcoa-Goodyear Theatre,' 'Bewitched,' 'Dick Powell Theatre,' etc.) it was a correlative of the work that a precise form of pre-censorship and self-censorship be exercised at all times. That is to say that my function was to discourage writers from thinking in areas which the networks would find too 'sensitive'."

Froug never was given a written copy of the unwritten rules, either. He never had to be:

"The rules existed and to my best knowledge still exist. They were the topic of many meetings with network officials and it was rarely necessary that they be written down. Everyone always clearly understood everyone else when it came to what could and what could not be dramatized on television. There was no chance for misunderstanding for, if a submitted story violated any of the precepts . . . it was quickly returned with a phone call to the effect that such-and-such could not be approved unless the offensive material were deleted."

Even writers who should know better censor themselves and each other when they get into positions of responsibility as producers and executives. Two weeks ago a writer-producer who serves on the Censorship Committee of the Writers Guild told another writer that he would not buy a script about the practice of some otherwise reputable drug companies which manufacture excess amphetamines for the illicit market on the grounds that, although the problem was factual and serious. "You can't get away with taking on a drug company on television and you know it." In other words, you can attack dope-pushers on television only up to the point where they become a vested interest; and then you must stop.

If the fact is that we do admittedly censor ourselves, if only to prevent the networks from doing it to us, why are we here criticizing The System and the networks?

The answer is that the network is to blame because it sets a climate, a tone, a standard which requires us to write only the material it will put on. The tone is set when they schedule only action-adventure melodramas and situation comedies and variety shows to write for; it grows through the meetings at which they expound the unwritten rules; and it reaches full flower when they hunt through our scripts looking for words and ideas and dreams to delete. Does anyone believe for a moment that if the networks actively sought creativity, ideas, provocative themes handled with conviction, that if they encouraged writers to use logic and reason and emotion and truth in our scripts instead of three shootouts, two auto crashes and a karate chop on the neck, we would not jump at the chance?

They say they are an entertainment medium although the law says they must program in the public interest. They say they are an entertainment medium and then define entertainment to rule out the actions and passions of our time. They allow laughter but not tears, fantasy but not reality, escapism but not truth. Television chooses almost never to stretch its boundaries to include serious drama, or indeed any drama that is not melodrama; chooses not to allow points of view not 'safe', not its own; chooses not to include art or music or literature in its giddy chase after what it considers entertainment.

We want to entertain; writers don't want to bore anyone any more than executives do. But why cannot entertainment be truthful? Free from distortion? Why cannot television ever reflect the real world? Why must it always be that television brings you a detective in a wheel chair and that is a success so next they bring you an insurance investigator who is blind and that is a success with the result that now ABC is trying to put together a new show about—I wouldn't kid about this—a Sheriff in the Old West with a stiff trigger finger. In the public interest, presumably.

Earlier we said we would challenge the whole premise that a clear majority of the people want this kind of programming and the corollary to that premise, which has become the credo and raison d'etre and justification of the television industry, that the people will watch no other kind. I hate, personally, being held in such base contempt by the television industry, and I don't believe them. When THE SENATOR was on, so briefly, it had an average 29-rating share for the year, which translates into imprecise millions but means that

29 out of each hundred television sets were turned to a show of significant content. On occasion THE SENATOR went over a 35-share, meaning that more than one-third of the national audience was watching this show. Or viewed another way, probably more people watched one episode of THE SENATOR on television than have seen, live in theatres, all the plays of Shakespeare produced in every language in every country of the world since they were written.

Does this not suggest that we are smarter, more aware, more eager to be informed and involved in the world around us than these men who program shows in such disregard for us can know or will admit? And isn't it vitally important to ask the question raised by former Senator William Benton, as cited by Commissioner Johnson of the Federal Communications Commission in his book *How To Talk Back To Your Television Set*:

"I can only ask, if this alleged 'wasteland' is indeed what the American people want, is it *all* they want of television? . . . Is it all they are entitled to? . . . Are not . . . these dwellers of the wasteland . . . the same Americans who have taxed themselves to create a vast educational system . . . are they not the same who have established an admirable system of justice, created a network of churches . . . when they turn their TV knobs, do they not by the millions have interests broader than the entertainment which is so complacently theirs? . . . I think the American people should expect that the greatest single instrument of human communication ever developed must make its due contribution to human security and human advancement. . . . A high common denominator distinguishes our people—as well as a low one—and both denominators apply to the same men, women and youngsters. Television has crystallized into the low road. . ."

There is still another collateral question which must be asked. Is television really giving us what we want, as its spokesmen claim, or has it, rather, simply conditioned us to accept and even appreciate, like Pavlov's dogs, what it programs for us? We can never truly know the price we have paid and continue to pay, individually and as a nation, for television's conditioning of us and our expectations. Like babies who have been fed nothing but Pablum, our taste has been dulled to the point that dry martinis and thick steaks taste somehow wrong.

It does not have to be this way. In Elizabethan England, the popular theatre of the day—their equivalent of our television—was Shakespeare and Marlowe. From the royalty in the galleries to the common people in the pits, it was what they got and it became what they wanted—or perhaps it was the other way 'round. We have not progressed culturally quite as far as we think in three-and-a-half centuries. Television is partly the evidence of this, and I suspect also partly the cause.

And yet, when they give us the few chances we get to see quality programming, as often as not we do respond. Dramatic subjects, provocative themes provocatively handled—these draw enormous audiences. Norman Lear is here to testify to that as Producer of "All in The Family"—and also to the three years of difficulty he had in getting the series on the air.

The Director of Sales and Marketing for Time-Life Films, Wynn Nathan, further substantiates the case for quality programming in a publication of the Broadcast Information Bureau, Inc.

"I have talked about 'quality' and specialized programs as though I assumed they would get poor ratings. And perhaps I have fallen into a trap I suggested the program makers have fallen into. Actually, when supposedly specialized programs have been tried in prime time lately, they have often done surprisingly well in the ratings. One good example was 'The Six Wives of Henry VIII,' a BBC-TV produced series of six ninety-minute plays—quite specialized in that it was about English history and was serious drama. Television programming for only a special highbrow audience, it seemed. While it was plainly quality programming, Henry VIII was not a safe programming idea for prime time. Here's what happened when it played: it increased CBS's audience for the time period 10% over the previous four weeks, getting a 25% share of the national audience; and in the key markets of Los Angeles and New York it consistently beat network A's movie in the ratings—by large margins."

So the public is truly interested in programs truly in the public interest. We can be delighted that CBS showed this series, even though someone else produced it. Still, why cannot CBS produce good television? Why did CBS, like NBC and ABC, reject the prize-winning British series 'Civilization,' hosted by Sir Kenneth Clark, when it was offered to them, and let PBS—Educational Television—carry it?

One answer is given by William Froug:

"A few years ago I was employed by CBS Television as Executive Producer in charge of Dramatic Programs. On my first day of work I reported to Hunt Stromberg, Jr., Vice President in charge of Programs for CBS, Hollywood, at that time. Mr. Stromberg briefed me on my duties with the following statement: 'Your job here is to produce s---.' "

And the British Broadcasting Corporation is left to produce "Civilization," "The Six Wives of Henry VIII" and "The Forsythe Saga."

It's a disgrace and a scandal but it's also something worse, a source of national sadness and concern for all of us that American television imports "Civilization," "The Six Wives of Henry VIII," and "Forsythe Saga," while American television exports "The Beverly Hillbillies," "Green Acres" and "Gilligan's Island." You are not the only ones in this country who have to worry about a Balance of Payments deficit.

And every year it gets worse.

Ours is not a new complaint. Television has long been delinquent in its responsibilities. Even its most ardent defenders concede that:

"Too often the machine runs away with itself . . . instead of keeping pace with the social needs it was created to serve."

WILLIAM S. PALEY,
Chairman of the Board, CBS, 1936.

What, if anything, is significant and new in our appeal?

The difference might be only that now the country seems of a mood to demand its rights. to ask for itself what it believes to be fair. There is a bright new spirit afoot which says that if air pollution is legal and institutionalized, it ought not to be. A protest must be made and must be listened to.

It is our belief that air pollution is no less a problem in television than it is in the automobile industry or a mill town or a crowded city, and that the public interest means that we can no more afford the one than the other.

The men who control television do not agree with us. But their view of the public interest was made painfully clear several years ago when, long after the Surgeon General issued his report conclusively linking cigarette smoking with cancer, they persisted in advertising cigarettes and stopped only when Congress passed a law forbidding it.

Their view of the public interest as being subservient to their private interests has not changed for the better. And now it seems clear that something must be done.

The solution could possibly lie in our hands as writers, if only our hands were untied. There is little wrong with television that could not be cured by diversity of ideas and programs, by the freedom to explore and discuss anything in this world free from the fears and structures which dominate our business. At least it would be a beginning.

We are sometimes asked what we really want, why the end of censorship is so important to us. Sometimes the question is meant to imply that we are little boys who want to write dirty words on bathroom walls.

Nothing could be further from the truth. What we want is the freedom that everyone else in this country has and which we alone are denied—the freedom not to have to distort the truth as we see it.

We are also asked what difference it will make. Aren't we all writers of fiction anyway? Aren't illusion and fantasy our stock in trade? Here the answer is easier.

Perhaps among us there is a Zola or a Dickens, a man who can see a wrong and by his skill and zeal require us to right it.

Perhaps we can stimulate and excite the country to care about its deeper heritage, its drama and art and music and history and poetry and literature and science, all the glories which television now denies us.

But the real difference would be that whereas now we are required to foster, without critical examination, a mythology which states that a punch in the mouth solves all problems and doesn't really hurt anyone, that bullets wound without killing, that ours is a society hampered in its strivings to improve its acknowledged greatness only by the efforts of a few sinister malcontents who seek to undermine us for their own perverse purposes, instead of this mythology we could proceed to an honest evaluation of who we are and where we are headed. Once we become aware that in real life the cavalry does not always arrive in time, that the good guys do not always win, that it must hurt deeply to be black and unemployed or to be hungry in land a of abundance, once we strip away the cliches and look at the problems, then we can make that new first step toward our great and shared goals.

We want desperately to aid in this effort, not hinder it.

A member of this Senate sees deep implications in refusing to make the necessary effort. Senator Robert Dole poses the following questions?

"Every day and every night for most of their lives your children and mine have watched (on television) the major problems of the universe solved in 30 to 60 minutes. Is it possible—and I throw this at you as a question, not a conclusion—is it possible part of the unrest in this country, part of the dissatisfaction with our leaders is that, as far as our children are concerned, they do not solve problems fast enough? The smog that is here today is here tomorrow. And so is the civil rights problem. And so is the war. And you name it. In real life problems are solved and go away very slowly. Are our children having trouble separating the immediacy of TV from the reality of life? Are they demanding more than we can ever deliver, or more than they will ever be able to deliver? Is TV creating a frustration with reality that can only be relieved by threats and demands for change, and that failing, by violence? I don't know the answer but I suggest that we think about it."

We, too, have raised a great many questions here today and, like Senator Dole, we do not pretend to know all the answers. But it seems to us that the problems we have discussed are so grave and the consequences for America so great that a new attempt to examine the course of television, drawing on the nation's best minds, must now be made. We therefore hope that you will recommend creation of a Citizens Committee to Examine Television which can make the necessary study and detailed recommendations that will, hopefully, start us on the high road.

We ask partly for ourselves. Doestoievski has written, "There is one punishment so terrible that even hardened convicts tremble at the prospect, and that is simply this: to take a man's lifework and render it meaningless." But much more than for ourselves as writers, we ask for the country.

Senator ERVIN. I certainly would agree with your observation that television is a most powerful instrument. As I ride around the country I notice houses which may have a broken-down car in the yard, or no car at all, which may look like they are about to fall into ruins, but there is always a television antenna sticking out of the roof, no matter how dilapidated the roof is.

On several occasions I have been very much astounded by the many quotations, even from commercials, that my 5-year-old granddaughter quotes verbatim.

I think that it is undoubtedly true that television does not present some things that I think should be presented. Furthermore, I get tired of the barrage of these commercials about underarm deodorants that keep you reliable all day, and things of that kind.

For that reason, I am tempted to turn off the commercial television and to to public broadcasting. But public broadcasting also has its problems, particularly in getting financed.

Mr. RINTELS. Yes. It can't get long-term financing.

Senator ERVIN. I was in hopes that you would have solutions to all these problems.

[Laughter.]

Mr. RINTELS. I was in hopes that you would, Senator.

Senator ERVIN. After all, television depends upon its receipts for its ability to survive. I am sure that none of us wants the government to be the exclusive agent of the broadcasting industry, because

I am sure the things they would broadcast would be as dull as the *Congressional Record*, and some of them would have as much fiction as the *Congressional Record* also has.

So we have a problem here. I sometimes fight some bills and advocate others, which television doesn't pay attention to. I wish they would entertain the same sound notions as I do on all subjects.

I do think we have a pragmatic problem here: None of us wants censorship, that is, we don't want official censorship by government, because we recognize that it would certainly be destructive to the absolute free dissemination of information. I mean free in the sense that a person could select from whatever information is disseminated, and ideas presented.

The question comes down to this: What is a practical way in which you can induce television to buy and disseminate ideas which it either does not like or which it deems unpopular?

Mr. RINTELS. It seems to me that an implicit bargain has been struck, that the government has granted to the networks and television stations the right to sell the time to advertisers, but the grant comes with a small condition to it, and that is that you must serve the public.

The question is raised, does a succession of action adventure melodramas and comedy shows and variety shows well serve the public interest?

I think that it does not, that it interests part of the public, but that there must be some accountability, by the networks, they must respond somewhat to the real public interest, to the interests of the people. They must not present one point of view, not present a narrow or distorted or a limited point of view.

This is what terrifies me so about television programing, that by refusing to deal with issues of substance and controversy, they are presenting a false picture of what is happening in this country today. They are gulling the American people by their refusal to deal with issues. That is what frightens me so.

Senator ERVIN. Certainly the laws and acts of commerce which relate to the licensing of broadcasting and assignment of frequencies contemplate that they will provide a public service and that they will present different points of view on controversial questions.

The opinion you have expressed was expressed, I think, by Fred Friendly who has had vast experience in the broadcasting industry and a very profound thinker in the field of journalism, and that is to the effect that the national broadcast systems are more concerned about their financial profits than the public service.

On the other hand some of the broadcasters come before us and say that the Fairness Doctrine prohibits their expression of views on controversial questions because they immediately have an inordinate demand for time by people who disagree with the broadcast.

Too much governmental regulations will tend to kill almost anything. On the other hand, you have the great privilege given to the broadcast industry, and there can be no doubt of the fact that it is the most powerful and potent force in the world today for the dissemination of ideas or lack of ideas.

Mr. RINTELS. Yes.

Senator Ervin. So you would think that the best way to approach this problem would be to establish some kind of commission composed of citizens to study the question and make recommendations with respect to broadcasting and with respect to commerce?

Mr. Rintels. That would be a good start, Senator. I will think about your question and make more detailed recommendations, if I may, to add to the record at a later date. Or, perhaps, hopefully, even come back.

Mr. Lear. Mr. Chairman, I am Mr. Lear; as Mr. Rintels said, and as writer and producer of "All in the Family," I seem to be enjoying a rather singular experience insofar as network censorship is concerned.

Senator Ervin. I will have to confess that I always enjoyed watching "All in the Family," because I think it presents so well and in such a dramatic fashion some of us people.

I confess that my next favorite program is Gunsmoke because the good guys always come out good in it——

[Laughter.]

Senator Ervin (continuing). And, that is so different from my own experience. I sometimes propose some good legislation and other guys don't enact it, and sometimes I am trying to kill bad legislation, and the bad guys pass it by an overwhelming majority.

Mr. Lear. I am indebted to you. A few weeks ago we did an episode that had I the right and opportunity to make a dedication, because the subject was on surveillance and the invasion of privacy, I would have dedicated it to you and to this committee.

Senator Ervin. I enjoyed it very much. While that program was on, Dr. Albert Coats of the University of North Carolina called me and said, "I want to be sure you are looking at 'All in the Family'."

STATEMENT OF NORMAN LEAR

Mr. Lear. I am happy to say that I am completely free to delve into any subject matter, no matter how sensitive, bound only by the limits of my own taste and discretion. This is not to say that program practices does not make suggestions, many of which I am happy to accept, but they are offered as suggestions only.

The history of "All in the Family" was not always so peaceful. The first pilot tape for this series was made by Tandem Productions, a company owned jointly by myself and partner Bud Yorkin. I wrote and directed this pilot for the American Broadcasting Co. The script was exactly the same as the one that eventually became the first show of the CBS series 4 years later.

This early pilot also starred Carroll O'Connor and Jean Stapleton, the present stars of "All In the Family." ABC reacted quite favorably to the first pilot, but they were concerned about the extent of its departure from the norm, and it failed to make their fall (1968–69) schedule.

I am taking the liberty of making some deletions in the interests of time.

There were only 3 ballparks in the network television, and we couldn't play in any of them, so I returned to making films for theatrical release.

Two and a half years later Mr. Robert D. Wood became the new president of the Columbia Broadcasting System and Fred Silverman, his vice president in charge of programing. Mr. Wood was eager to begin his regime with something innovative and when he expressed this desire they introduced him to "All in the Family."

I was editing the film I had written and directed in the intervening 2 years when the call came that CBS was interested in "All in the Family" and wished to meet with me to discuss it. In the ensuing months I spent literally dozens of hours in conversation with various members of the department of program practices, especially its head, Mr. William Tankersley, a vice president of the network. He is no longer with the network, by the way. He has been replaced very recently. But Mr. Tankersley was vice president of the network at the time.

In reflecting upon that first meeting, I realize that Mr. Tankersley and I had really not reached a meeting of the minds. We had enjoyed a lively discussion and had reached a degree of mutual respect which allowed each of us to think that the other fellow was so reasonable we could ultimately change his mind.

For example, in that first meeting Mr. Tankersley stated objections to certain areas of the pilot script, which he termed explicit sex.

In refuting his argument I told him I believed that explicit sex in an honest and real situation would not upset the American television audience and that personally I found it more tasteful than the kind of sex by innuendo that was presently allowed by program practices on various shows.

I might add that is on all three networks. All of my early talks with the department of program practices at CBS were on this ather esoteric, nonspecific plane, until a week before the show was heduled to premiere. By that time we were in production and had lready filmed four episodes.

Now I began to experience the kind of pressure that Mr. Rintels as referred to and Mr. O'Brien will refer to in his statement.

In the week prior to the premiere of "All in the Family," Mr. Tankersley first asked me if I would agree to plan the second show as the remiere episode. He felt the second show was a lot more tame than he first and would therefore offend fewer viewers and affiliates.

I neglected to mention that one of the network's prime concerns vas the affiliate stations around the country and their owner-managrs. They did not want to air a show which might cause these men o drop the series after one episode.

I explained to Mr. Tankersley that I had designed the first show o introduce Archie Bunker as fully as I knew how so that there as no doubt as to what he was. In my opinion CBS and "All in the amily" had to jump in the water together and get fully wet the first me out. I felt if we didn't do that with the very first episode the ries would never get further than wading.

And so, in hours of discussion on the subject I held firm to my sition that the first show—the pilot show—must air first.

Two days before the scheduled premiere program practices agreed o air the first show first. With two or three suggestions and trims,

however, said trims or deletions were all in the area of what pr
gram practices called, explicit sex.

I refused to allow the trims and in literally hours and hours o
cross-country conversation with Mr. Tankersley I held to my theor
that the American public was ready to accept the degree of realit
that "All in the Family" represented.

And I preferred not to go on the air at all if it meant tamperin
with the reality one iota. I suppose again it was in the last hours o
these discussions that Mr. Tankersley and I learned that neither o
us was as reasonable as we had believed at the beginning. In an
event, it wasn't until 7:05 p.m., California time, the day before "A
in the Family" was to premiere that I could call my wife, France
and tell her the show was going on the air.

The network was committed to making, or at least paying for 1
episodes, but until that moment when Mr. Tankersley agreed to a
the first show with no deletions I had absolutely no reason to be ce
tain that "All in the Family" would make it to the air at all.

I am aware from reading the statements prepared by David Ri
tels for this committee that my own remarks regarding network cen
sorship seem soft-pedaled. There are several reasons for this. First,
am not censored. Second, I don't own a network so if Robert Wo
had not backed me at the last minute, "All in the Family" would n
have seen the light of day. Third, I think I understand wh
accounts for the provincial, narrow attitudes of the executives wh
occupy posts in the departments of program and practices at th
three networks. Somewhere, some time ago, someone coined th
fiction that the mentality of the American motion picture patro
averages between 12 and 13 years of age. And in the thinktanks o
all American business, not just in the mass media area, but in a
American business, this fiction has been accepted as truth and th
truth has been extended to the American public as a whole.

Mr. Tankersley and his conferees are trapped by such myt
Another myth is: The average man doesn't want to come home fro
a hard day's work and be faced with problems on television. H
wants escapism, entertainment, and fluff. "All in the Family" has tac
led many everyday problems and the average American, returni
from his hard day's work, has not only accepted it but made it t
most popular show on TV.

We lose perspective if we fail to see the situation in network pr
gram practices as only one part of the fabric of the think-tank ph
losophy which also dictates what Americans will eat and drive a
listen to, et cetera, et cetera. American think-tank leadership is o
of touch with the American people.

My personal feeling is that this is also true in government,
business and commerce, as well as in the mass media. Although t
purpose of this hearing is to inquire into censorship in the televisi
area only, I would feel remiss not to mention this connection.

Parenthetically, however, there are times when government a
entertainment seem to be one. I could write steadily for 6 mont
and fail to come up with one single invention, one single line
Archie Bunker as funny and outrageous as the recent remarks
Mr. H. R. Haldeman. I wish I had thought of it for Mr. Bunker!

Mr. **Rintels**. You will.

[Laughter.]

Mr. **Lear**. In any event, it was this think-tank mentality or philosophy which doomed "All in the Family" at ABC 5 years ago and came close to snuffing out its life before it was born on CBS last year.

As an indication of how out of touch—this think-tank leadership is with the needs and desires of the American people, the network hired extra switchboard operators to man the large switchboards at all its major affiliates across the country to handle what it thought would be an avalanche of protesting phone calls when the first episode of "All in the Family" was aired.

The avalanche never came. No States seceded from the Union. And no affiliates jumped off the network line. The phones rang to some degree but the calls were largely favorable.

The experience of "All in the Family" leads me to one question: What would happen if TV turned to other individual creators and went with their instincts as to what the American public will accept?

The public deserves to be allowed to see more of what its writers, directors, and producers really wish them to see. Right now they are only able to see what the think-tanks feel they will accept.

This has resulted in a level of entertainment that the country at large has deemed a disgrace through the years. This is not simply my opinion; we all know that season after season the critics and much of the public tell us we have arrived at another wasteland.

It is time, I feel, to take a new direction in television. There is nothing to lose and everything to gain. The American public is the final arbiter anyway, and it tells us very quickly what it likes and does not like. What it will be allowed to see, however, is another matter, and there the writer deserves the right to express life as he sees it.

Senator **Ervin**. I want to commend you on a very interesting statement. I have been very pleasantly surprised on many occasions by the fact that the network here which carries "All in the Family" has permitted Archie Bunker, his wife, his son-in-law and daughter, and their companions to discuss highly controversial subjects which the American people discuss every day.

I think that is very informative as well as very interesting, and you have proved in this program that TV is capable of broadcasting things which are serious in nature and can do so in a way which is very amusing and with a good deal of very general satire.

Archie Bunker is very much like a lot of folks I know. He has strong convictions which those who disagree with him think are prejudices, and which he is convinced are the ultimate truth. And I think in this program you show the generation gap between Archie and his son-in-law, which I think is very educational.

Mr. **Lear**. Senator, I wonder if you wouldn't agree that the largest tribute should be paid the American public which accepts this, which for so long has been told that it doesn't want to be faced with its problems in the evening, that it cannot think, it doesn't wish to reason, and that certain things are beyond its capability to understand?

Each week we have to run into this. We dealt recently for example with the subject of impotency on the show. It was very difficult to get the program made, even at this late date, but when it was made the reaction from the public was incredible. Even those people who felt that perhaps the subject was too adult for the time period, which, by the way, only the network controls—they were excited by what happened in the house—by the fact that when the show was over children were asking questions, and they were forced to answer, the parents were forced to answer questions and conversation was taking place in the homes where conversation in many cases had become kind of a forgotten art.

What I mean to say is that I think the public has been for so long underestimated, and whatever success we have, I owe to the public who understood the show in the first place.

Senator **Ervin**. I think the public is ready to accept more frank discussions on many subjects, both on TV and as to what politicans say. We had quite a prominent political figure in the country a few years ago, whose name I am not calling who addressed a meeting attended by a friend of mine. I ran into this friend right after this politician had addressed the meeting, and my friend said he had just heard the most remarkable speech he had ever heard. He was in rhapsodies about what a remarkable speech it was.

I said, "What did he talk about?" My friend looked kind of blank and said, "You know, he didn't say."

[Laughter.]

Senator **Ervin** (continuing.) I think most people would rather talk about a controversial issue. I think the American people are more intelligent than some of the broadcasters and some of the politicians think. Your series with Archie Bunker shows that because the American people have accepted it.

I will have to state that the few times I saw it, I was astounded by some of the subjects you dealt with, because the discussion of those subjects has been taboo. However, they were presented with such a wonderful amount of humor that I think it is one of the great public services, not only in amusement, but also in the themes that you deal with—themes that concern all of us.

Mr. **Lear**. Thank you, Senator.

STATEMENT OF LIAM O'BRIEN

Mr. **O'Brien**. Mr. Chairman, my name is Liam O'Brien. I have been a professional screenwriter and playwright for 30 years. I have written some 25 screenplays for feature films I have also written plays for the New York and London theater. Over the years I have encountered minimal censorship in feature films, dwindling to none at all in the most recent years. I have never ever encountered censorship in the legitimate theater.

In January of 1970 because the pickings were lean in both the theater and feature films, I took the plunge into network television. I signed on for 1 year as story editor to the CBS series, "Hawaii Five-O." "Five-O," a moderately successful series, had climbed in its second season to 28 on the Neilsen scale. It was approaching its third year on the air. Its executive producer and creator was and is Leonard Freeman, who wrote the original pilot story, as Mr. Lear wrote the pilot story for "All in the Family."

"Hawaii Five-O" is owned by Mr. Freeman in association with the CBS network.

I was to work under Mr. Freeman's supervision with a knowledgeable and experienced TV producer, Stanley Kallis. Mr. Kallis, among many outstanding TV credits, had most recently produced 2 years of the very successful series, "Mission Impossible."

Stan Kallis and I approached the production chores of the upcoming year, 1970–71, with enthusiasm. We were encouraged in our beginnings by our executive producer, Leonard Freeman, who stated the melodrama form, in his opinion, was wide open for a variety of subjects. "Go anthological," was the phrase Mr. Freeman used. We agreed we could and would.

After all the form, melodrama, had proved challenging to such disparate and talented writers as Edgar Allan Poe, Arthur Conan Doyle, Gilbert Keith Chesterton and Agatha Christie. They could be proud of their work. There was the possibility we could be proud of ours.

Let me state here a television year or season is a busy time for producer and story editor. Twenty-four 1-hour films must be conceptualized, then scripted with the aid of writers, reviewed in script form with network authorities, cast, produced, edited, scored, dubbed, reviewed again, as completed films with the same network authorities, then shipped for broadcast—all on a relentless, unyielding schedule. Air dates, one a week, must be met.

Our first air date was mid-September. Starting in January, the first 16 weeks were all honeymoon. We hired, in our opinion, our choice of the better writers. We soon had some 14 stories and teleplays in work, some completed, and some nearing completion.

All 14 stories, with the exception of one—a ripple of discontent to mar the honeymoon—had been approved by our executive producer, Leonard Freeman.

All 14 were also so approved by the personnel of the CBS programing department, including Russell Stoneham, CBS program executive and Paul King, CBS vice president, west coast nighttime programing. The same 14 stories and scripts, with that one exception, had also been carefully scrutinized, scrubbed and passed by Thomas Downer, chief, CBS program practices, west coast.

CBS program practices, west coast, is the network euphemism for house censor. All 3 networks have similar departments and they function, now and again cooperatively, now and again abrasively, with the so-called creative people, executive producers, producers, story editors, directors, et cetera.

We had also achieved, in our opinion, Leonard Freeman's, Stan Kallis' and mine, a variety of subject material. We had among the 14, a love story told in melodramatic terms, a la "Laura" of movie fame in which our policeman, McGarrett (Jack Lord), hankers after a lost love, and that love, a lady, may well be a murderess; a political story in which a Greek emigree, escaped to Hawaii, pledged to return to Greece to fight for democracy, becomes the target for an assassin's bullet; a cowboy story (yes, there are real cowboys and real ranches on several of the islands), of a minority figure, a pure Hawaiian cowpoke-ranch-owner, driven to accidental manslaughter under the economic pressure of mainland high rise developers invading the ranch land of his home island, Maui; a comedy melodrama, a la "The Lavender Hill Mob," of Alec Guiness fame, of an insurance investigator turned master thief against his former employers, a company he had served well for 30 years only to be fired because the same company deemed him superannuated at 50; a young veteran returned from Vietnam is found dead and his draft-resisting brother is accused of the murder. McGarrett discovers it is suicide, not murder. The elder brother, guilt stricken with his complicity in the My Lai type massacre, had taken his own life. A sampling. Now back to the story and teleplay that caused the first ripple of dissent in the honeymoon.

It was the Greek emigre story on democracy plus assassination as a political tool. It was titled "The Second Shot," written, in my opinion excellently, by Eric Bercovici. Thomas Downer, chief, program practices, first suggested we not name the country Greece.

Couldn't it be some fictional country—Transylvania? We demurred. Why not the country of Myopia, we asked. Then the assassin and the government that sent him must absolutely not be Greek. Gentlemen, we can't say Greeks murder Greeks. We demurred again. Greeks, on occasion, do murder Greeks for political reasons. Read the newspapers, Mr. Downer.

(Later, a feature film, made in Europe, entitled "Z", was to handle much the same generic material and become a prestigious and financial success worldwide.)

Because of our intransigence and with Leonard Freeman's enthusiastic support of his producer and story editor, the matter was relegated to Mr. William Tankersley, vice president, CBS program practices, east coast. Mr. Tankersley, recently retired from CBS, was then chief guardian, watchdog, censor, et cetera of all that appears on CBS' air.

Two days before "The Second Shot" was to go before the cameras in Hawaii, our first film to be shot that year. Mr. Tankersley called from New York, Leonard Freeman, Stan Kallis and I, on a conference phone in Hollywood, talked for over an hour with Mr. Tankersley in New York.

Mr. Tankersley went over the same ground most recently trod by Tom Downer: Don't say Greece, et cetera. Why can't we make it a fictional country . . . we absolutely cannot have the assassin be Greek and/or his mission be an assignment of the present military junta government in Greece, et cetera, et cetera. We countered: Greece has been specifically chosen as the story's background because that country was presently in the political headlines and because, as a speech in the script so stated, the very word democracy came to us from Greece and the Greek language. We couldn't or wouldn't eliminate Greece as the background country of our story or speeches, references to Greece as the etymological source of democracy, etc.

An hour or so's debate later, our executive-producer Leonard Freeman settled, against Stan Kallis' and my resistance, for compromise. Mr. Tankersley would permit us to name Greece as Greece, a real country.

We could include the speech and speeches on democracy but trim them and amend them. In exchange for these concessions, we must identify the assassin and the group that sent him as some amorphous, non-Greek, revolutionary group from nowhere. We agreed. At worst, a Pyrrhic victory. You win some, you lose some, in television.

But the honeymoon was still on, or so we thought. The second ripple of discontent came from Paul King, vice president CBS nighttime programing through channels via Russell Stoneham: our cowboy story was too soft. Not enough action. Action, I was to learn later, is the CBS euphemism for violence. I never heard anyone in the programing department use the word violence. But I heard Tom Downer of program practices, CBS, the other department use it often. He told us of his troubles with other CBS series, that year, and their addiction to gratuitous violence.

Michael Dann, CBS program chief east coast, arrived from New York to projection room view several upcoming CBS series offerings. Mike Dann, vice president Perry Laffeaty, vice president Paul King, and Russell Stoneham viewed 3 or 4 of our already filmed "Hawaii Five-O" episodes.

The most actionful of the 14 were carefully selected by Leonard Freeman. Word came back to us through Leonard Freeman of Mike Dann's deep disappointment, to wit: We had turned a damned good action, cops and robbers series into an anthology. Anthology is a dirty word in television.

We had all but destroyed the series by softening it, by writing people instead of action. Unless we changed course on the remaining 10 stories to be selected, the public would soon evidence its dissatisfaction with "Hawaii Five-O" on the Neilsen charts come September. When Mike Dann had returned East, a meeting was called in Leonard Freeman's office.

Paul King and Russell Stoneham firmly told us we were to go more action type stories. Violence, I inquired? Paul King said, I didn't say violence, Liam. I said action. Look at "Mannix." That is a great CBS series. Lots of action.

Later in the meeting Paul King said to me:

> Liam, the proof that you are not selecting the right story material for the series is that Tom Downer and Program Practices have approved all but one of your 14 teleplays. You should be fighting with Tom Downer and Program Practices on every script, fighting to hold on to the action.

One of our later actionful stories went before the cameras in Hawaii. It was called "Kono's Ransom." We instructed the director, Michael O'Herlihy, that CBS now wanted action. Michael understood. We got back a film of brutal and bloody footage wherein Kono, a regular on the cast of Hawaii Five-O was beaten over the head by the heavies with the butt end of a telephone besides being kicked in the groin several times. The screen ran red with tomato juice from Kono's bloody skull.

Thomas Downer of CBS program practices, on seeing the film, made loud and angry sounds. When he refused to approve the final cut version of Kono's ransom for air release and Stan Kallis and I were to recheck the film with him, Leonard Freeman advised us both: "Don't give him a frame, fellers, keep it all on the screen." Paul King later told us "Kono's Ransom" was our finest effort. He also said he was thinking seriously of running it for all CBS working producers and story editors as an example of what a good "action" episode should be. I did not agree with Paul King and told him so.

I found the enthusiasm I had begun the series with had dissipated. There was no challenge any longer for us to work, and we couldn't challenge the so-called second kind of writer, the action writer. We couldn't challenge him to do the work.

Leonard Freeman, who had encouraged us to be independent in the beginning of the year, now watched the films in the room with us. We didn't even know, finally, what was a "Five-O," because Leonard had different ideas than we did, obviously. And as for Mike Dann it is interesting that, since his resignation from CBS he has gone into children's productions.

The on-the-air season started. On opening night in September, after one public airing of the first episode of Executive Producer Leonard Freeman's second series, "The Storefront Lawyers," Fred Silverman suspended shooting. It was deemed "too relevant." Relevance, by now had become a dirty word in network language. Much of what was yet to come by "Hawaii Five-O" was "relevant." The network was afraid—but in a matter of weeks, "Hawaii Five-O" which heretofore, short of summer reruns, had been no higher than 28 on the Richter scale of Neilsen ratings, soon climbed into the first 10, then the first five, and wound up as Fred Silverman said in *Life Magazine*, "CBS top sharing show." Nobody could determine whether it was the effect of the first 14 shows or the latter "actionful" 10 that had boosted "Five-O" to preeminence in the ratings.

There was no comment to either Stan Kallis or myself from the CBS hierarchy on "Five-O's" new Neilsen position.

One of the shows we did, the film about the My Lai massacre, which they felt should not be shot, but had to be shot with the threat of a writer's strike, when it got on the air caused some few letters, 50 or 100 possibly. I was later told by Paul King that that show would never be aired again. It was obviously too controversial.

Stanley Kallis is now working at Universal Studios producing "Movies of the Week" anthologies and pilots for Universal and NBC. I am once again happily finishing up work on a new play for Broadway, and about to start an original screenplay for Warner Brothers—a motion picture. I have joyfully felt no censorship or dictation of taste but my own on either project.

Senator ERVIN. Well, I congratulate you on that today. Your experience indicates that sometimes there is a lot of controversy between those who have charge of determining the programs to keep them from becoming controversial.

Counsel?

Mr. BASKIR. From your examples and from your testimony I infer that you feel programs such as "All In The Family," which are controversial and frank, and say things the way they are, are not only possible but they can also be very popular.

Is that your belief, and has that been your experience?

Mr. **Lear.** It is true that television goes by the Neilsen rating, and "All In the Family" by some 7 points has for many, many weeks been the top show in the Nation.

So its popularity in terms of what television uses as a measuring rod is good.

Mr. **Baskir.** Some of the arguments you have heard appear to be economic. In order to survive economically on television, you must appeal to the broadest possible audience, and in order to do that you must offend as few people as possible and get the broadest kind of taste.

Otherwise, you can't get the kind of returns on the program which make television feasible, and this is an argument for not putting on programs such as yours.

Again, your experience is that you can offend people, if you will, and still attract them and still be a success.

Mr. **Lear.** You can offend them and find they are stimulated by being offended, enjoy things that they may not agree with, because it stimulates them to talk about it afterwards, and they don't have that experience very much in television.

Mr. **Rintels.** May I add something to that? People are not what count, or what ought to—but to the networks it's the money that matters. Richard Powell is former president of the television branch of the writers guild and he has a statement which I would ask permission to include in the records. He says in response to the question, "Is television only a commercial medium?"

"Why? Where is this engraved in marble and by whose hand? What law, other than the stale hand of custom gives the private sponsor the right to dictate the content and character of a public resource, administered supposedly by the networks in the public interest?"

What I am afraid has happened is that the networks have begun to program, or are continuing to program, in their own interests and in their sponsor's interests, but not in the public interest. It is not in the public interest to refuse to stimulate the public.

(The document referred to follows:)

STATEMENT OF RICHARD M. POWELL[1]

Whatever the aims and rationalizations of censorship, the end result is the removal from the censored work of all truth and reality. Surveying the field of commercial "entertainment" television, the conclusion is inescapable that censorship must be total, for almost nowhere in the countless hours programmed by the networks can there be found the slightest semblance of any reailty.

In a country whose current leading national product seems to be social problems, television grinds on nightly without involving the mind or troubling the conscience of the viewer. A current controversy may be occasionally mentioned but is never resolved. Both sides are always protrayed as wrong. In the unlikely event of a television drama examining the Indochina War, the plot line would take this invariable course: We may have been wrong in going there but They were certainly wrong in trying to keep us out.

Comedy suffers equally with drama from network television censorship. The three networks have taken the old truism that all comedy is based on reality and attempted to convert it to a new maxim: that all comedy is based on unreality. The attempt has never worked and never will. Excise social awareness from the comic genius of George Bernard Shaw and something will still remain. But it will not be "Pygmalion;" it will be television.

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[1] Member of the Writers Guild of America, west, and a past president of its television branch.

Given the many hundreds of shows programmed yearly on network television and the total conformity of almost all of these shows, the logical assumption would be that a vast censoring organization exists at each of the networks, staffed by powerful and ruthless men. One would also assume that were these modern Torquemadas deprived of their power, television would immediately undergo revolutionary and life-giving change. Neither assumption is true.

The vast bulk of television programming is made up of episodic series. There are, in addition, a mix of old movies, new movies made for television, and specials, but the weekly half-hour and hour shows—"Doris Day," "Marcus Welby, M.D." "Mission Impossible"—make up most of the nightly schedule. These programs are censored directly, on occasion, but the most effective kind of censorship occurs before the first episode of the series is ever telecast; before the pilot film is shot and even before the script is written.

This censorship is built into the "format" of the series, or what the program is all about. If the program is essentially about nothing and if the format has no contact with reality then there is little need for continuing censorship on the series. "My Three Sons" is never going to become a battleground for the freedom of expression. The writer of Episode Number 211 of "Bonanza" is never going to become another John Peter Zenger. The average brainchild of the television writer comes out of the first story conference a hydrocephalic and out of the final rewrite a quadrupal amputee, and departs the cultural world without ever uttering a word retained by 20 million viewers past the closing commercial.

But if the format is the governing factor and if most tv series carry the name of a writer as creator of the format, why do writers bind themselves with creative straitjackets? Don't television writers have their own vision of truth that they wish to communicate—the raison d'etre of every writer?

The answer is this: it is virtually impossible for a writer to create a television format and have the resulting series even approximate the author's original concept. Network involvement in the creation of formats is total. And invariably, the involvement is destructive.

Here is a brief outline of a typical (and factual) case. Writer A, well known to the network for his work on previous television pilots, is called in by that network to discuss a project. An idea for a half-hour comedy series has been evolved through discussion between Writer B and network executives. A pilot script has been written but the network is unhappy with it. Several conferences follow between Writer A and network program executives. (These conferences take place in Hollywood, where almost all television pilots are written, cast, and produced.)

The series idea is this: a family from another planet—husband, wife, and 10-year-old son—are sent to Earth to observe and report back on our strange doings to their home planet. Writer A and the Hollywood network people agree that the approach should be satirical—how we look from outer space. A new story line is agreed upon, and Writer A completes a pilot script.

Reception to the script in Hollywood is good, and after a few revisions by Writer A the script is sent to New York. The overall head of network programming in New York sends back some suggestions which are relayed—with a trace of embarrassment—by the Hollywood network executives to Writer A. The man in New York is generally pleased, but wants three more children and a dog added to the family from outer space. The relayed reasoning is that this makes it more of a television family, with more elements on which to hang story pegs. Writer A states that you can't insert three more children and a dog into the format without throwing out all the satire; what you would end up with would be a "Brady Bunch From Outer Spaec." After nervous laughter, it is pointed out to Writer A that "The Brady Bunch" has become a successful show in the Neilson ratings, and that the network has been analyzing the elements responsible for its success. Writer A states that there is only one element responsible for its success—the fact that it precedes the very successful "Partridge Family." No one listens, since the power of decision is not in that room but in New York. And it is the obvious view of the man in New York that if the "Brady Bunch" has six kids the minimum for a family from outer space should be four kids and a dog. Writer A then resigns from the project.

From the above case, we can glean quite a few reasons why television is bland, banal, and downright bad. For openers, there is rarely if ever any direct contact between the creator in Hollywood and the decision-maker in New York. This insures that the head of programming in the East will be in a position to claim credit for a winner and pass off the blame for a loser. The process is creatively and economically disastrous, but then network television is a monopoly industry and not a competitive one.

In the case of creative conflict, the judgment of the executive in New York (who has never written, produced, acted, or directed) is automatically assumed to be superior to that of the creator in Hollywood. (Writer A, in the above case, has written 12 pilot scripts for television series in the past few years. 9 of these were rejected at the script stage by network executives. Of the 3 that were made into pilot films, 2 found a place on the schedule. One ran for six years and the other is now in its 3rd season.)

Program development at the executive network level is exclusively mechanical. A series is created by "putting together elements." It is a non-creator's play-it-safe approach to creativity. You put together two boys and a cat from one successful show with three girls and a chimp from another, and then turn loose the publicity department. It is also considered advisable to put in an element to attract the older audience, an element for the younger married audience, an element for the woman audience and an element for the man audience. This is known as "insuring" the show.

In the creative process, of course, no insurance is possible. A successful dramatic or comedic work comes from the characters, their point of view, and their interplay. It is a delicate piece of work, but always in balance. Subject it to massive organ transplants and it will fall to the floor and stay there. Graft on an extra head and it will still talk, but be forever incoherent.

None of this is even remotely understood by those men making the final creative decisions in television. They are a homogeneous, interchangeable group, and there is not a creator among them. Currently, those rising most often and most rapidly to the top have a background in network sales. They know, presumably, "what will sell." (So does a publisher, but very few of them write their own novels.)

The single talent of these men is for survival, and even at that they are incompetent. The top programming jobs are revolving doors at the networks, year after year. This is inevitable. The $100,000-a-year witch doctor can shake his rattle and mutter his Nielson incantations, but four out of every five patients he works on will die, and he has no way of knowing why.

There are those who will deny that all of this has anything to do with censorship. They will argue that a network should have the complete right to determine not only the type but the content of the shows they program, and that this is not an abridgement of free speech but merely a part of free enterprise. They will grant the mediocrity of most television programming but state that "this is what the public wants," and argue further that network programming practises are an integral and shrewdly-functioning part of the system of supplying to advertisers high-rated shows that will carry the banner of their products. "After all," the argument goes, "it's a commercial medium."

Why? Where is this engraved in marble, and by whose hand? What law, other than the stale hand of cutsom, gives a private sponsor the right to dictate the content and character of a public resource, administered—supposedly—by the networks in the public interest?

And, what *does* the public want? Who created the myth that the public's taste is always bad? Does a bad movie outdraw a good one? Does a bad play succeed and a good one fail? Is the nightly television choice between three degrees of bland a sufficient indicator of public taste? (Interestingly, the most popular show on television today is a comedy which offers the only contact with reality to be seen on the networks. It is also an import; had "All In The Family" not been a hit in England it would never have had the remotest chance of acceptance with any of the three American networks.)

Finally, we come down to this: television has become our culture. Past the age of 25, people in the United States do not, in any significant numbers, go to movies, attend plays, or spend their evenings at concerts. They watch television; they watch it because it is there. Our children are raised on it, and their behavior patterns are formed by it to an extent we have yet researched. Most adults do not read books; they watch television. It has become our cul-

> ture, and the question is this: Should the culture of a nation be a mere by-product of the selling of soap?
>
> As a nation, we are threatening to rip apart at the seams. We are angry, confused, and afraid. We need, vitally, the historic contribution of the theatre—to hold up to us the mirror of what we are and where we are; the artist's intuition of our reality. Television is now our theatre, and television is potentially the greatest theatre that man has known. It must be liberated from the censorship of small minds.
>
> Theodore Schroeder, an American libertarian, said:
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> "Censorship always protects and perpetuates every horror of the prevailing forms of oppression. With us, its subtle disguises increase its evils by creating delusions of safety, liberty, and democracy. It precludes that intelligence which is necessary to hasten a wholesome and natural social evolution. By that same ignorance it makes revolutions by violence more certain, more bloody, and less useful."

Mr. BASKIR. "All in the Family" is perhaps the only program of its kind on, despite its success. Do you have any idea why there aren't other programs as frank, if you want to put it that way?

Mr. LEAR. Well, we have only done 34 episodes, and I hope it will open up the possibility for other shows on that network and other networks.

David or Liam might have information in that area.

Mr. O'BRIEN. Mr. Baskir, I spoke to several writers who, encouraged by the program, "All in the Family," have gone to all three networks with ideas that say, "Let me do this kind of show," meaning a show such as that, without of course stealing the idea of "All in the Family." The networks' attitude is:

> We have that now, let it alone, let it stay over there in the corner. We made that one mistake in a sense. It is a tremendously handy and successful mistake, and it is the number 1 show in the country, far outstripping any other show, but let's not do that again, once is enough.

Now I don't think once is enough when there are three networks, and all the prime time hours. There should be more of that kind of freedom of discussion and freedom of ideas on our air, because as we say, it is for the public good.

Mr. BASKIR. If it is so successful, what are they worried about? It would seem to me that rather than putting on a whole week of westerns one year and a whole week of drama the next year, they might put on a whole week of "All in the Family" this year.

Mr. LEAR. It is a question of breaking down what I term this "think tank" philosophy. There have to be people, I suppose who assume they understand what America is all about, and what it will accept and what it will reject. They exist not just in television, in broadcasting, but in every area of business and government and so forth, and what they dictate as to what America will accept and reject is the only thing that becomes available when we talk about television for an audience to accept or reject.

In the case of "All in the Family," because of very particular circumstances, I was able to get on the air with something that I felt positive the American public would accept. It surprises me that more of that medium, television, as well as other areas of business and commerce, don't understand from the single example that this country is ready for a great deal more truth than it is getting everywhere, in all areas of public life.

It is ready to face its problems, and I don't think that is quite understood as yet.

Mr. **Rintels.** Could I add to that only that because old myths and fears and prejudices die rather slowly, what is required to kill these myths and fears are brave men, and with the exception of Norman Lear and a few like him, television suffers badly.

We have a shortage of brave men.

Senator **Ervin.** Gentlemen, I thank you for a most illuminating discussion of the kinds of programs that the American people have in some cases the privilege to see and in other cases are compelled to see.

Thank you very much.

Mr. **Baskir.** Our next witness is Mr. Chet Casselman, president of the Radio Television News Directors Association.

Senator **Ervin.** Thank you for appearing and giving us the benefit of your experience and observations in this field.

STATEMENT OF CHET CASSELMAN, PRESIDENT, RADIO TELEVISION NEWS DIRECTORS ASSOCIATION; ACCOMPANIED BY J. LAURENT SCHARFF, GENERAL COUNSEL

Mr. **Casselman.** Thank you, Mr. Chairman. My name is Chet Casselman. I am news and public affairs director of KSFO Radio in San Francisco, but I am appearing today as president of the Radio Television News Directors Association.

Appearing with me is Mr. J. Laurent Scharff of the law firm of Pierson, Ball and Dowd, general counsel of the association.

Senator **Ervin.** We are delighted to have Mr. Scharff with us today.

Mr. **Casselman.** We are most pleased and honored for this opportunity to give you our thoughts on the so very vital question you are exploring.

My feeling is that you would be most interested in how the organization I represent feels about the state of the patient we are examining together, a constitutional guarantee, and its right to survive. I mean that same constitutional guarantee of a free press, which you, Mr. Chairman, have pictured as perhaps on its death bed if first amendment principles are held not to apply to the broadcast media with the same degree of protection afforded the printed press.

Our association is comprised of approximately 1,000 professional journalists dedicated to the improvement of all aspects of broadcast news, to provide the information and understanding the public needs to participate effectively through government and society in the conduct of the life and business of all citizens.

Under our code of ethics, the members of the Radio Television News Directors Association agree that their prime responsibility as journalists is to give the public they serve a news service as accurate, full and prompt as human integrity and devotion can devise.

Article six of the RTNDA code of ethics says that broadcast newsmen shall seek actively to present all news which will serve the public interest, no matter what selfish, uninformed, or corrupt efforts attempt to color it, withhold it or prevent its presentation.

They acknowledge the newsman's ethic of protection of confidential information and sources, and urge unswerving observation of it except in instances it would clearly and unmistakably defy the public interest.

These excerpts from the RTNDA code of ethics seem very closely aligned with the provisions outlined in the twin bills being proposed by Senator Pearson and Representative Whalen (S. 1311 and H.R. 4271). RTNDA supports the bill with certain qualifications to be discussed in a moment. It is interesting to note that it has been a little more than 40 years since very similar legislation was introduced by Senator Arthur Capper. Radio, of course, was barely 10 years old at that time and television was a mere flicker on tiny experimental tubes.

Since then broadcast journalists, like newspaper, magazine and wire service reporters—have earned the confidence of persons who have valuable information to convey to the public, but will do so only if their names, and in some cases, other information, are kept secret.

It is truly regrettable the fact that radio and television were born so many years after the birth of the First Amendment. Had broadcasters been on hand to chronicle its framing, it is quite probable it would have read a bit differently.

Perhaps to the effect that:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, print and electronic . . .

In this connection, we certainly would favor congressional adoption of the House Concurrent Resolution 502, recently submitted by Congressman Pepper, expressing the sense of Congress that the provisions of the First Amendment do apply to radio and television broadcasting.

And I wonder if it isn't much more accurate to view "freedom of the press" as freedom of the people. Not freedom for one class of person, the reporter, but freedom of the people to know what is going on in their various layers of Government, what is going on in their neighborhoods and in the world all about them.

No citizen of course, can make proper decisions without a proper flow of information. There cannot be a proper flow of information if all the sources of that information must be identified, against their wishes.

This is generally discussed in the context of great events involving the nation and the world. But the hundreds of radio and TV news directors in our organization are concerned about this at a much more local level.

They are covering news at the level closest to the people, the city, county, and State level. It has been said many people can name their mayor, Congressman, and U.S. Senator but not their city councilman or State legislator—the latter being political areas where the challenge to a proper flow of news is often greatest.

The city hall or statehouse reporter developing his news sources must develop in them the assurance that he will respect their confidence—a tip about a questionable contract, or the like, will hardly be forthcoming if the informant worries that he will be retaliated against, directly, or indirectly.

Some 19 States now have so called "shield" laws, which generally provide newsmen an immunity from being adjudged in contempt for refusing to disclose the source and/or substance of information given in confidence. But these State laws generally are not models for a truly effective newsman's privilege.

Not every State law covers both the source and confidential information; but, wisely, the pending Federal bills do. Not every State law applies to so complete a range of congressional, judicial, and other governmental proceedings as these bills do.

Not every State law applies to so broad a cross section of journalists in all media; but still we believe that the pending legislation should go even further to make clear that photographers and accompanying technicians are protected to the extent that they come into possession of confidential information in the course of their assignments.

We also urge Congress to encourage the development of professional journalism in community antenna television systems, by expanding the coverage of the Newsmen's Privilege Act to persons gathering and presenting news for CATV companies. RTNDA recently recognized the potential of CATV as a journalistic medium by broadcasting its membership categories to include CATV news personnel.

Further, to make the congressional intent perfectly clear on another point, the bills should be modified to protect from subpena such journalistic tools as notes, letters, calendars, phone indices, and other materials that could be used to determine the identity of a source and confidentially-disclosed information.

Section 4 of S. 1311 makes the protective provisions inapplicable in certain situations. Perhaps section 4 is necessary to gain enactment of Federal law on this subject. Our belief is that, although the Newsmen's Privilege Act would provide less than total privilege, it would permit us to operate more effectively in the public interest than is possible now. And it would serve as an acceptable model for further legislation by the States.

However, we believe that paragraph (2) of subsection (b) of section 4, if not eliminated, should be amended by omitting the words "or other," after the words "grand jury" and before the word "proceeding," in order to restrict the effect of the paragraph to grand jury proceedings.

Instead of subsection (c) of section 4, if not as a substitute for all of section 4, we prefer the substance of the position which we took in our amicus curiae brief filed in the Earl Caldwell case before the Supreme Court (*United States* v. *Caldwell*, Oct. term 1971, No. 70–57). Perhaps the Court itself will provide precise guidance as a matter of constitutional law, but, if not, Congress should surely not fail to act.

Our view is that, because of the virtual certainty that speech and press are effectively restrained when there exists a substantial possibility in the minds of informants that disclosure of information or source may be compelled later, there should be a standard which in the normal situation would raise no more than the slightest possibility of later disclosure.

To accomplish this purpose without unduly restricting the Government's subpena power in an extreme case of immediate need, the Newsmen's Privilege Act should demand that, before a newsman's confidential relationship with an informant can be breached by a grand jury, the Government must demonstrate convincingly (1) that the newsman is likely to have the information sought, (2) that the Government cannot elsewhere obtain the information sought, and (3) that, without the newsman's appearance and disclosure of the information sought, the gravest irreparable harm would likely occur to person or society. But by such a standard, informants and newsmen would be relatively certain of protection for their confidential relationships, and the public would be assured of a free flow of information from important, anonymous sources.

The suggested standard recognizes that there may be occasions on which human life—or the life of the community or nation—may be so clearly at stake that no reasonable person should expect newsmen, lawyers, physicians, or anyone else in a confidential relationship to withhold such information—for example, information about a murder plot or plans for violent civil insurrection.

Indeed, if such a test were adopted by the Court, it is not likely that courts would often find the need to compel newsmen's testimony on these matters. By way of contrast, in the pending *Caldwell* case, the Government's attempt to subpena the *New York Times* reporter on the basis of Black Panther rhetoric of revolution was not persuasive to the court of appeals and would not meet the test suggested here.

The hope here is that under these conditions a newsman will be able to perform his work without fear of official interference or intimidation.

It is the rare newsman these days who doesn't feel some intimidation occasionally, particularly the broadcast newsman, since his livelihood depends on the continuation of the license his station holds, and intimidation, obviously, can take many forms.

It can even be a simple criticism if delivered from a position considerably higher than the intimidated.

Now I certainly don't mean to imply that broadcast newsmen are above criticism or that the product they supply is completely free from fault. Far from it. I agree wholeheartedly with those critics who feel that we need to improve our product greatly. If I didn't, I personally wouldn't be investing so much time and effort in RTNDA, Sigma Delta Chi, the California Freedom of Information Committee, and several other professional improvement committees.

I do, however, feel that when verbal pressure is applied continuously on a sensitive industry by highly placed officers in the Government that may grant or deny the continuation of life in that regulated service, then there is cause for some concern.

There is is also the concern now that one experiences when he learns that a colleague, such as Daniel Schorr has suddenly become the center of a quiet, but at the same time, intimidating FBI investigation on the stated possibility that he may be offered an assignment by the very hand he has bitten.

Then what about the newsman covering very tense and well attended news events who discovers that some of the men next to him running recorders or cameras have had absolutely no experience in radio or televison but are lawmen on special assignment.

That newsman instantly knows two things: If he has spotted a phony, it won't be long before some of the principals of the event do, too. And he, as a working journalist, already has all the problems he needs these days without the added burden of being figured for an enemy by those same story principals.

Newsmen already are thought by many dissident factions to be tools of the establishment, particularly the law enforcement segment of the establishment, since our tapes and films of dissident faction activities may be used against the radicals by police.

An intriguing factor here is that at the same time we are believed to be so solidly in the camp of the establishment by the dissident factions in the nation, the establishment has us labeled as being closely allied with the dissidents since we put them on the air.

There are even those like Edith Efron who count every word uttered in news broadcasts upon occasion and in a rather free-swinging, highly personalized judgmental process determine which words are for, which are against, and without even getting all the words correct.

Here is where we get to the super-critical question of who should really decide what is news and what isn't, who is going to do the editing, just what is going to be edited, and how it is going to be edited. This was at the very heart of the CBS "Selling of the Pentagon" case.

Government intrusion into the editing process, whether it be by a direct prior restraint as in the "Pentagon Papers" incident or by an overly extended Fairness Doctrine can't help but have a debilitating, intimidating effect on news personnel. Even after RTNDA and several broadcast licensees succeeded in convincing a Federal Court of Appeals that the FCC personal attack and political editorializing rules were unconstitutional restraints on broadcast journalism, the Supreme Court decided otherwise in the *Red Lion* and *RTNDA* cases (*Red Lion Broadcasting* v. *FCC*, 395 U.S. 367 (1969), rev'g *Radio Television News Directors Ass'n.* v. *United States*, 400 F. 2d 1002 (7th Cir. 1968)). The Fairness Doctrine and the political candidate provisions of section 315 of the Communications Act have put radio and television in the roles of distant country cousins of the print media.

The Campaign Communications Reform Act (S. 382, title I), just passed by Congress, creates new discriminations between the broadcast and print media through compulsory favoritism for political advertising; most unfortunately, the conference committee omitted a key provision of the Senate bill which would have repealed the equal opportunities requirement of section 315 insofar as it applies to Federal elective offices.

This partial repeal would have been a good beginning to complete repeal of the equal-time requirement of section 315, a course which should be encouraged by this subcommittee.

Under section 315 a broadcaster is effectively prevented from broadcasting candidate debates and documentaries concerned with political contests with bulging fields of candidates. Let me give you an example. In the recent election in San Francisco, there were 11 persons running for mayor and 33 for county supervisor.

The print media have no such problems. In fact, as recently reported, they have been aided financially by Congress' discriminatory ban against cigarette commercials on radio and television.

Now, the Federal Trade Commission and some private groups are attempting to extend to all issues—expressed and implied in commercial announcements—the FCC government policy under which broadcasters were first ordered to carry anticigarette messages.

Some recent appellate court decisions have suggested that many commercial announcements may give rise to obligations on the part of broadcast licensees to provide members of the public with the opportunity to present counterprograming in the name of fairness.

These proposals for a right of free as well as paid public access to broadcast station microphones and cameras are presently before the FCC on its fairness inquiry (docket 19260), the first of such broad scope since 1949.

These and other proposals go well beyond the present Fairness Doctrine, and, if adopted, would threaten to destroy the profitability and workability of the commercial broadcast system. A financially healthy private broadcasting system is obviously needed for the support of a courageous and professional brand of broadcast journalist.

By minimizing or opposing the broadcaster's present role of selecting and editing significant contrasting views, the public access proposals—proposals for the removal of programing discretion from broadcasters—would further threaten the development, if not existence, of professional journalism in the electronic media.

FCC licensing procedure has been used as a justification for the agency supervision which denies broadcast journalism its proper status as part of the most modern embodiment of the press protected by the first amendment. If the present system for licensing broadcast stations cannot be squared with a free press, it should be changed, rather than permit—as has occurred—the sacrifice of press freedom to the logic of a poorly conceived licensing scheme.

We recommend that this subcommittee stand ready to review the Commission's policy decisions when they are rendered in the fairness inquiry and to conduct hearings at that time to determine whether any new Commission access requirements and the Fairness Doctrine in its increasingly more detailed form are in the best interests of an informed electorate.

That electorate is dependent upon a robust journalism unrestrained by governmental oversight.

If not eliminated the Fairness Doctrine should be reformed by clarifying legislation to codify the prior Commission policy recognizing broad discretion in licensees for the achievement of fairness in overall programing.

This was the policy of the Commission in 1959 when Congress amended section 315(a) to include what has been construed as the specific statutory authority for the Fairness Doctrine. The reinstituted policy would eliminate the fairness doctrine refinements which have been developed since the early 1960's. The more recent detailed rules and case-by-case rulings have encouraged the filing of an increasing flow of burdensome and intimidating fairness complaints, and they have narrowed the range of journalistic discretion in broadcasting.

This most commendable subcommittee is doing so very much to focus some desperately needed light onto some vital aspects of American life: The rights, duties, and responsibilities of the free.

RTNDA is encouraged to see that the subcommittee is interested in those rights, duties, and responsibilities as they apply to our profession of journalism, particularly with respect to the current problems of broadcast journalism.

We believe that the answer to the imperfections of journalism is not government supervision, but the exercise of a higher degree of self-disciplined professionalism by journalists and their publishers—print and broadcast alike. This is the only way to make certain that every citizen in this land has an uninterrupted and untainted flow of information, without which he cannot long remain free.

Your continued interest, effort, and assistance are important contributions to that goal, and we are forever grateful.

Senator ERVIN. I want to thank you for a very fine presentation of the problems confronting the broadcast industry.

You point out the fact that perhaps if the broadcasting industry had been in existence at the time of the phrasing of the First Amendment, the amendment might have been phrased differently. It seems to me that one of the geniuses of the Constitution is that the men who framed it had a rare capacity to frame a document which applies, according to its terms, to things which they couldn't even envisage ever coming into existence.

For example, at the time the interstate commerce clause was framed, the people who framed it didn't have any idea that there would be such things as railroads or telephones, or telegraphs, or radio, or television, and yet they framed a clause that covered all of those automatically as they came into existence. Certainly the men who framed the First Amendment had no concept of such marvelous instruments of communication as the radio or television, and yet their phraseology was sufficient to encompass those discoveries which they had never anticipated.

That is one reason why I am just a little reluctant for the Congress to act on the Pearson bill until the Supreme Court has passed on the *Caldwell* case.

I share your hope that the Supreme Court, in passing on the *Caldwell* case, and two companion cases which it now has before it, will manifest the same judicial statesmanship which the Circuit Court of Appeals manifested when it handed down its opinion in the *Caldwell* case.

I certainly agree with you that Congress should explore the desirability and I might say indeed the necessity of enacting legislation in the nature of a newsman's privilege bill if the Supreme Court does not exercise broad judicial statesmanship when it hands down its opinion in the *Caldwell* and related cases.

I had the privilege of speaking to the National Newspaper Association sometime ago, and I was asked about the furor that was aroused by the speeches of the Vice President on the media. I told them that I thought we had to keep things in proper perspective and had to recognize that the right of public officials to criticize the broadcast media is co-equal with the right of the broadcast media to criticize public officials.

Mr. CASSELMAN. That is exactly right.

Senator ERVIN. But I do recognize that there have been a lot of governmental actions and statements by people in high positions which have an intimidating and chilling effect on the exercise of first amendment rights by the news media, and——

Mr. CASSELMAN. That is true.

Senator ERVIN. In other words, a person in business has stockholders he has to produce dividends for. He is naturally quite reluctant to adopt a course of action which has a tendency to antagonize people in high governmental posts, and that is particularly true in the broadcast media since it has the Damocles sword hanging over them at all times in the form of renewal of their licenses to broadcast. I certainly agree that indiscriminate use of the Fairness Doctrine would tend to inhibit them rather than promote what the law was designed to encourage, that is, a discussion of controversial issues.

If the FCC grants to one group, displeased with an expression of an opinion, free time on an indiscriminate basis, they can certainly make it very hard for a broadcast medium to operate profitably because of the necessity of granting free time to other dissenting groups.

I certainly think that we have a lot of people in the United States who just are afraid of freedom. It is unfortunate. Some of these people are really people who profess to love our country the most. There is no doubt then in my mind that we have staked the very existence of this Nation on the proposition that a free press and free speech must continue to exist if this Nation is going to continue as a free society. I think that we need a good study here in the field of broadcasting, particularly, as to how we can make certain that the broadcasting industry will not be inhibited by governmental action.

We have had some surprising governmental action. I think you alluded to the Dan Schorr case. I was always impressed that Dan Schorr was a very objective broadcaster of news. But the nature of politicians, is that they would like for all the news media to spend the time picturing them in the most favorable light and to suppress any news that doesn't picture them in a favorable light.

Yet the solemn obligation that the First Amendment places on anyone who exercises First Amendment rights is to try to present the truth to the public so that their minds will be free and so that our governmental institutions will function.

I couldn't help but observe, and it was rather surprising to me, that anyone having the power to make appointments to the Federal service would set in motion an FBI investigation of anyone on the pretext that it is for an offer of an ultimate government job, when he didn't even consult with that individual as to whether he would take the job if it was offered to him. To my mind, that is just stupidity, if it is not duplicity.

I agree that we have too much subpenaing of newsmen to testify. I, as a lawyer, am astounded that it is abused so frequently. Many of the things newsmen know are more or less hearsay. Very few of them have first-hand knowledge of their information and would not be competent to testify to in a court of law. Yet we have had numbers of subpenas issued.

I am glad the Attorney General clarified that practice to some extent and to some extent limited it in his directive.

You have some difficult problems in this field. Frankly, I agree with your assessment with respect to subpena of nonbroadcast documents related to the "Selling of the Pentagon." I think it was nothing in the world except an effort on the part of a congressional committee to test the exercise of First Amendment freedom by CBS and point out eventually that CBS had abused its freedom. The trouble with regulating freedoms is that they are difficult to regulate without suppressing them. I certainly agree with your observation, and I think the public has to depend largely on self-discipline on the part of the broadcast media, because if there is anything that history shows to be true, it is that all freedoms will on occasion be abused.

Otherwise, they wouldn't be freedoms. If you are not free to act foolishly as well as wisely, you have no freedom. I don't know any way you can prevent an abuse of freedom, especially freedom that is exercised by so many people as freedom of the press and freedom of speech, without a muzzle, and I don't think our system of government would endure if these freedoms were seriously curtailed.

I want to thank you for your very fine statement you have made here, and which you presented so well, on the problems which the broadcast media face in an effort to exercise the same freedom that the printed word is entitled to exercise.

Thank you very much.

Mr. **Casselman**. Thank you, Mr. Chairman.

Senator **Ervin**. The subcommittee will stand in recess until February 16th, when we hope to meet in room C–407 in the Capitol.

(Whereupon, at 12:20 p.m. the subcommittee adjourned, to reconvene at 10 a.m., Wednesday, February 16, 1972.)

FREEDOM OF THE PRESS

WEDNESDAY, FEBRUARY 16, 1972

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:50 a.m., in Room S-407, the Capitol Office Building, Senator Sam J. Ervin, Jr. (chairman) presiding.

Present: Senator Ervin (presiding).

Also present: Lawrence M. Baskir, chief counsel and staff director, William Pursley, counsel; and Stanley Ebner, minority counsel.

Senator ERVIN. The subcommittee will come to order.

Counsel will call the first witness.

Mr. BASKIR. Mr. Chairman, our witness this morning is Mr. Bill Monroe, correspondent for NBC News.

Senator ERVIN. I want to welcome you to the subcommittee and express our deep appreciation for your willingness to appear and give us the benefit of your experience and your observations and your philosophy on what I consider one of the most important matters confronting the American people.

STATEMENT OF BILL MONROE, CORRESPONDENT, NBC NEWS

Mr. MONROE. Thank you, Mr. Chairman. The news media are very grateful to you for the concern and the understanding you have always shown in the past on this subject.

My name is Bill Monroe. I am a correspondent for NBC News and Washington editor of the "Today" program. I am testifying, however, not for NBC, but as an individual.

I appreciate this opportunity to participate in hearings which have an historic timeliness. It seems to me this country is already on the road, without realizing it, to a dual system of mass media: A printed press that is free but shrinking and an electronic press that is growing but unfree. This committee, and all of us, may want to ask whether we are, in fact, on this road and whether we should stay on it.

Your committee is interested in, among other things, the tendency of various officials to haul newsmen before governmental bodies to compel them to testify as to confidential information and confidential sources. I join those other witnesses before you who have already endorsed the bill of Senator Pearson and Representative Whelan to protect such confidentiality. Their bill would add a needed stone to the wall protecting independent journalism. It would also shield honorable journalists from jail terms unlikely to profit either them or the government.

But I would like to focus my remarks more sharply on what seems to me to be an ominous contrast: The clearcut quality of freedom that pervades the field of the printed press as opposed to a chill twilight of government regulation and government involvement that envelops broadcasting. This contrast has developed from a new double standard for the First Amendment: One interpretation for broadcasting and another for print. As a result, journalism of vigor and independence comes harder for broadcast editors than it once did; it increasingly requires acts of conscious courage.

The rise of this atmosphere seems particularly dangerous in the light of events that compel continued concentration of power in the government's executive branch. Nuclear weapons burden the President with awesome responsibilities. Modern arms are so intricate it's sometimes hard for the Congress to understand what the Pentagon is talking about. Popular pressures push government expansion into new areas of health, education, welfare, and housing. Economic crises force the White House toward a guided economy. Fear of local crime increases demands for the FBI, with its special skills in law enforcement and surveillance, to edge toward the status of a national police force. These trends obviously combine to put in jeopardy the citizen's ability to understand and control his own government. And it seems to me that the single realistic hope for accommodating such trends, and yet retaining democratic control of the executive, lies in keeping at least one part of the American machinery rigidly clear of Government influence—the channels of information.

But we have already allowed some Government pollution of those channels, and it has happened without substantial outcry from those who customarily act as sentries—intellectuals, newspapermen, legislators, lawyers, and judges. Even civil libertarians have made little protest.

There are, of course, factors that may account for this strange complacency.

The fantastic new technology and sudden impact of television may have misled us about its most vital function. Seeking to fit it into familiar categories, some of us have been impressed with the size and wealth of television, and have put it down simply as big business. Some of us have been impressed with its evening parade of singers, dancers, actors, and comedians, and have put it down as the new vaudeville. But nervous pictures that bring the White House, Capitol Hill, Vietnam, and London into our living rooms don't strike us immediately as the new front page. So we have missed the main fact about television: It is press. And if television and radio spend more time on entertainment and commercials than on news, so, in fact, do many newspapers with their acres of advertising, their sports pages, gossips, astrologists advice to the loveless and fat Sunday editions with the news tucked inside the colors of "Dick Tracy" and "Peanuts." Radio and television are, at bottom, instantaneous, warmblooded press. Like the printed press, they carry the flesh of commerce and entertainment on a hard skeleton of news. And like the printed press, they are massively engaged in exactly that kind of communication which the First Amendment was written to protect.

The requirement for licensing has encouraged the tendency to define broadcasting as nonpress. But the problem is not licensing itself, it is the method of licensing. If Congress and the courts had entered this area originally with a clear understanding of broadcasting as 20th century press, they could have devised licensing procedures that kept Government out of news and program decisions. But they didn't. They devised licensing procedures that encourage government intrusion. When we begin to recognize broadcasting as press, the legislature and the courts can then strip away the intrusions and reverse the Government-media entanglement.

Another version of the argument that what is licensed cannot be press holds that the public owns the airwaves, therefore the Government must police them and look over the shoulder of editors. This suggests that, because the public owns the airwaves, the public must be denied the most important benefits these airlanes can bestow: Information sources clear of Government contamination. The first amendment declares that private sources of information serve the public interest. Surely then, it also directs the Congress and the courts not to wield the concept of public ownership of the atmosphere as a weapon to rob the public of such private sources. What price ownership under these circumstances? It comes at a calamitous cost.

The whole licensing process began with radio, which came into the world as a little black music box. When radio developed into a vital news medium, the licensing formula was already set in concrete. Then came the new monster of television, which struck us initially as more like big business or like an explosion of vaudeville, not much like press. So we treated it as we had radio, as nonpress. We fit it into a licensing system that allows Government review of its performance. That system itself made television and radio look even less like press. But the system is now widely accepted, in part because of our hasty assumptions and in part because it serves the purpose of those who are nervous about the new media and want to tie strings on them that don't square with the first amendment.

There are liberal intellectuals who direct their natural instincts for regulation toward television in the hope that a paternal Government can make it do better—put on more talk shows, more opera, less Flip Wilson and less Matt Dillon. There are conservatives whose natural inclination might be to extend old-fashioned freedom to this new-fashioned medium. But many of them are fearful it has a liberal slant, so they settle for Government guidance instead. There are incumbent politicians who want to lay down rules to make their own life with television more comfortable and less prone to upset by challengers—rules they'd probably like to apply to newspapers as well if they could manage it. And there are the new media populists with an access doctrine they want to try out on television, then apply later to print, a doctrine that attacks free press under the banner of amplified free speech. They insist the Government must direct editors how to divide media time and space into little chunks for all.

So we arrive at a double standard for the First Amendment. The broadcaster must apply to a government body every three years for the right to stay in business. The publisher does not. The broadcaster, in his decisions on journalistic fairness and balance, has to go beyond his own conscience and the disciplines of public reaction; he has to consider also the attitudes of a government commission. The publisher does not. If a news program stirs up public or official criticism, the broadcaster may get a letter from a government commission directing him to explain and justify the program within 20 days. The publisher does not answer to any governmental body. The broadcaster is prevented, by statutory conditions, from presenting a debate among major candidates for the political enlightenment of his audience. The publisher is not. The cumulative restraints and inhibitions create an uneasy atmosphere which is hard for anybody outside of broadcasting to appreciate.

Fifteen years ago, long before broadcast regulation intensified to its present complexity, I had left an assistant editor's job on a newspaper to work for a television station as news director. I was astonished to note the infinite care with which one of the Nation's best television stations prepared its elaborate application for license renewal. Station executives spent hours, days, and weeks in assembling the proper documents. They combed station files exhaustively for documentation of community involvement, for proofs of programing eligible for gold stars from the Government, for confirmation of "public service" efforts known to be smiled on in Washington. They consulted lawyers at every step of the process. They enlisted department heads in the small and large details of the project. The superior record of this station made it one of the least likely in the Nation to have license trouble. But I began to realize that its owners, nevertheless, felt no solid assurance of a stable and precise licensing process that translated responsible station operation predictably into continued corporate existence. They had a sense of change and turbulence in Washington, an awareness of a Government mixing men and laws, an impression of a Federal Communications Commission with changing members appointed by changing Presidents—men of competence and goodwill, yes, but nevertheless so many Democrats and so many Republicans depending on who was in the White House. Here, I discovered, was a deep anxiety unknown to newspaper publishers—a built-in requirement for concern about the favors and penalties available from Government.

Since that time, the rules have multiplied, the uncertainties have worsened. Apprehension over license renewals, however unreasonable statistically, has risen. I was not surprised to learn recently that a major metropolitan TV station had decided to devote the full time of one of its executives, year in and year out, to preparation of its every-third-year application for license renewal.

I have no atrocity story to tell about outright Government censorship. I have never seen it happen. Perhaps it never has. But I know that what might be called indirect or unintended, Government censorship has happened. It cannot fail to happen in this atmosphere. And it happens by a natural process that keeps all incidents of suppression subterranean and invisible. If fear of Government inhibits a station executive from approving a new project perhaps in the news field, he is motivated not to admit that even to his own newsmen. He may blame it on money problems or other factors. In the first place, he is not proud of consulting his own anxieties. In the second place, any admission along these lines could eventually be held against him by FCC. The FCC takes the righteous position that its harassment of licensees is occasional and reasonable, and that the licensee's duty is to be of stout heart and make his decisions boldly just as if the harassment didn't exist. It becomes almost impossible, therefore, to cite cases documenting the atmosphere of repression.

I once asked four executives from four specially reputable TV and radio stations if they had ever been intimidated by Government or fear of Government.

"Intimidated," of course, is a loaded word. They all answered "No." Then I asked them, "Have you ever made decisions affecting news coverage or editorial policy in which you felt you had to consider, among other factors, how much of a problem a certain course might cause with Government?" They all answered "Yes."

I once suggested to my bosses at a television station an editorial criticizing Newton Minow, then Chairman of the FCC. They agreed. But, they said, "first let's consult our lawyers." The lawyers said to go ahead. (I should have known they would because I worked for people of courage and such people usually hire lawyers of courage.) But suppose the lawyers had said, "No, wait a minute, why make trouble?" The community would hardly have suffered substantially from the loss of our backtalk to Mr. Minow. The only loss would have been known to just a few: the tiniest sacrifice of freedom, a precedent perhaps, the melancholy consciousness that we had held our tongues out of vague and nameless fears. I couldn't help but wonder what lawyers for other stations say in such cases. And what do lawyers have to do with whether a station that criticizes the mayor can also criticize a Federal official? The answer is that broadcasters consult their lawyers about fears publishers don't have, fears of the Government that licenses them.

How much of the blandness in television and radio is due to keeping clear of Government involvement and how much is due to what Fred Friendly calls "dollar censorship?" Nobody knows. But we do know there are stations that don't do investigative reporting. There are stations that confine their documentaries to safe subjects. There are stations that don't editorialize. There are stations that do editorialize but don't say anything.

There are stations that do outspoken editorials but are scared to endorse candidates. My opinion is that much of this kind of caution, probably most of it, is due to a deep feeling that boldness equals trouble with Government, blandness equals peace.

Let me suggest a scenario which is fictitious but which I believe is typical of what is happening in hundreds of television stations today. A television producer goes into the office of the station manager. The producer has been given a budget to do four documentaries over the next year. He tells his boss about four subjects he would like to deal with. But the manager has an objection.

"Tom," he says to the producer, "I know these are all good, lively topics. But at least three of them are going to get me in the same hot water I wound up in 6 months ago when you did the program on 'The Poles of Extremism.' We made two congressmen mad. We got a letter of inquiry from the FCC. We had to make a long internal study of how fair, or unfair, that program was on certain points. Then, even though we were happy to stand behind it, we had to write dozens of letters, make phone calls to Washington lawyers, and I just can't go through that much of a hassle again next year on three more tough subjects." After 30 minutes of mild argument, the producer leaves with an agreement that he can tackle two sensitive subjects if he devotes the other two programs to travelogues that won't make waves.

NBC News Producer Fred Freed discussed this problem of Government harassment in an article he recently wrote for Variety. He said that documentary producers have both economic and political problems. Of the political problems, he said this:

> If you do something controversial, you know you will spend months defending yourself to the Government. That's not conducive to doing something controversial.
>
> We are not part of the free press. We are licensed by government and required always to justify ourselves to a Government agency. Anyone can complain about us, and a battery of network lawyers will be required just to keep us even.

What to do about the chilling effects of answerability to the Government in regard to both license renewal and editorial decisions?

Basic, clearcut reform to give broadcasting genuine first amendment integrity may take decades, if it comes about at all. Attitudes will have to catch up, as usual, with technology. Pretelevision judges will simply have to grow out of the myopia that applies the First Amendment to monopolistic print but not to competitive broadcasting. Intellectuals will have to get over their blanket hostility toward television. Legislators will have to lose some of their suspicions. The deep upperclass aversions to television, exacerbated certainly by the bumptiousness of the medium and the occasional arrogance of television people, apparently must run their course before we will be able to see this big-eyed thing clearly as, first and foremost, American press.

If press freedom is to mean freedom for all the press, I believe the newspapers will have to become engaged in the struggle for broadcast freedom. The courts will have to reverse decisions they're now making, some of them unanimous. The Congress will have to reform the licensing procedure and, if the courts don't do it first, forbid any imposition of government concepts of fairness or equal time on any media.

The newspapers have played a shameful and shortsighted role in the past few decades. They have been complacent witnesses to the weakening of first amendment rights for broadcasting. They have consistently consulted their own competitive interests instead of the long-range needs of the Nation, which they appeal to so loudly when print is attacked.

In fairness, many broadcasters have been complacent about their own First Amendment status. Not bred in the free press tradition, they have been inclined to approach their problems with Government more like businessmen than journalists. Recent events have begun to educate them to the historic responsibility they bear for the future quality of American press freedom. But it is small wonder, what with the indifferent concern of all the media, that Congress, the courts, and the White House have been less than attentive to broadcast freedom.

As we come to recognize, hopefully, that the First Amendment itself holds firm, or weakens, depending on its full application to broadcasting, then the legislative and judicial structures necessary to guarantee genuine free press status to the new media will come clear to us. They will almost certainly require the conversion of the present licensing proceess into a system of permanent franchises. The First Amendment clearly means that, for the sake of the public, the media shall not be answerable to Government. It is the license renewal factor, more than any other, which has breached the first amendment and introduced into the American system for the first time media answerability to Government. But if that whole, rugged First Amendment concept is, God help us, too revolutionary for our times, then license renewals should at least be made more automatic and more predictable, perhaps on an every-10-year basis.

Some critics argue peevishly against permanent licensing on the basis that a broadcast license is a permit to mint money. But on this point, what is the distinction between renewable and permanent licenses? All that the present perverse system manages to achieve is to turn broadcast profits against the public interest because it motivates broadcasters not to jeopardize those profits by offending the Government. On another level, the argument against profitability is no more relevant than an attack on the First Amendment itself because it has led to fortunes for Hearsts, McCormicks, Luces, Newhouses, Grahams, and others. The overriding concern is media freedom. It should be noted, however, that some of today's prosperous television stations operate on licenses originally granted when the risks were severe. Most of the early TV stations lost money so impressively over a period of years that some prospective competitors actually won licenses and then gave them up rather than accept the economic penalties of establishing the infant medium. Even today FCC figures show that, in 1970, 18 percent of U.S. television stations and 32 percent of radio stations (AM and FM) showed a loss.

The writers of the Constitution anticipated that enemies of press freedom would attack it by abridgment, by a thinning process. They did not anticipate today's Supreme Court, which is attempting to fatten the First Amendment. In the *Red Lion* case, the high court said that Government fairness rules "enhance rather than abridge the freedom of speech and press protected by the First Amendment." The court's "enhancement" took away from the broadcaster a right held basic by every newspaper editor: his right to decide issues of fairness without Government guidelines or Government referees. Reuven Frank, the head of NBC news, has suggested that the First Amendment may become "the first constitutional provision repealed by technological advance."

But for how long in this climate will the old media escape Government capture? If the First Amendment can be "enhanced," why not for print? The advocates of "access" want to fasten it on print and electronics with its unhealthy appendage of Federal arbiters. A former FCC commissioner has said that, when newspapers begin transmitting by cable, they'll be subject to FCC regulation. And if the belief spreads that official prodding of the media get better results for the public than media freedom, wouldn't it work best of all on monopolistic media?

The case against such experiments as Government-imposed fairness doctrines and equal time rules goes beyond the principle of nonanswerability under the First Amendment. It goes also to the absurdities of Government intrusion which are already visible and mounting.

We have already seen a network ordered to provide time to the Republicans to answer what the Democrats said in time granted them to answer several appearances by a Republican President. That bit of "fairness" was finally called foul—but not until CBS had to take it to court. The FCC and the courts are now grappling with demands for counter-advertising aimed, initially at least, at the broadcast media—the claim, for example, that commercials for large automobiles require balancing by antiautomobile messages from ecology groups. For the past 20 years, the FCC has been sending almost 200 fairness doctrine complaints per year to broadcasters around the country asking for explanations of their performance by specified deadlines. The possibilities for economic damage to broadcasters, for multiplication of Federal mediators of editorial content and for Government harassment of stations and networks extend as far as the eye can see.

With Congress turning "equal time" on and off as it sees fit, the networks have been allowed on one occasion, in 1960, to offer the major presidential candidates a radio-television platform for debates. The astonishing number of more than 100 million Americans watched those four debates on television. The public, in effect, voted overwhelmingly for campaign debates. But Congress shut them off for succeeding elections because the candidates wanted a law to hide behind rather than have to answer publicly yes or no to legal debate invitations. With the Government editing the electronic media, the public interest has been clobbered by politics.

But, without all this big brother regulation, what would assure the country of fair broadcast news? The answer is, the same mechanisms we've relied on for 200 years to discipline print: competition, diversity of ownership, multiple sources of information, public criticism. Like other democratic mechanisms, these are not perfect. They have permitted the existence of shabby, partisan newspapers in the past and in the present. They could not guarantee against all abuses by radio and television. But the old idea remains profoundly relevant: to choose the lesser danger over the greater, to provide stonewall protection against the Government for all organs of information and opinion, even when they're wrong or offensive, lest Government come to dominate them and its voice eventually override them all.

In broadcasting today competition is robust and growing. Here in

Washington, for example, there are seven television stations and 41 radio stations, with more television outlets in the offing by cable transmission. (Perhaps I should say six active television stations. The seventh station ceased operating just a few days ago because it was losing money, leaving the license open if somebody wants to buy it.)

The typical American city enjoys an abundance of radio-TV competition alongside a daily newspaper monopoly. Additional national competition in news and information is available now in the possible development of a strong, well-financed system of public television insulated from Government influence, but both the White House and the Congress seem bent on discouraging it.

Some people are worried about the power of the commercial television networks. But there are two things to be said about that. One is this: If they're powerful, and they are, that's an argument for freedom, not regulation: better to have their opinion-molding force divided up among three networks than concentrated in one government. Second, they are hardly all-powerful. Local stations, for instance, outweigh the networks by far in total time devoted to news and in the size of news audiences.

Nor are the networks, for all their occasional touchiness, unresponsive to public criticism. CBS didn't win the battle over "The Selling of the Pentagon." Its critics also scored when the network put out a new guideline on film editing. Many network reporters, I among them, find ourselves traveling more than we did to do interviews and film stories in the South, the Midwest and the West—quiet acknowledgment of the complaint, in which Vice President Agnew was not alone, of too much focus on Washington, New York and the East.

But, in the final analysis, the continuing validity of the First Amendment doesn't depend on affection for, or trust in, the media. It depends on a healthy distrust of government. It depends on the knowledge that the government itself provides the only ultimate danger to any society of total censorship. It depends on recognition that a long, high wall is necessary to block the tendency of any government to influence then guide, then dominate the media. It depends on the simple arithmetic of freedom: multiple private sources of information versus a single official source.

The problem today is that the government, in all three of its branches, is seizing on the newness of broadcasting and the convenient handle of licensing to do what comes naturally to government: establish controls over the media. So, for the first time in American history, we have regulation of media content.

Within the familiar paragraphs of the Constitution there is an unfinished phase of the American Revolution waiting to be born. But it will not come to life for our children unless we believe in it. At present we face a conscious choice between allowing the First Amendment to wither or applying it to our times with all of the boldness and zeal for freedom that its authors wrote into it.

Senator ERVIN. It seems to me that we often lose sight of the fact that the First Amendment was written to benefit the people of the United States. In my opinion, the real purpose of the First Amendment is to do two things for the American people. The first is to implement what Thomas Jefferson meant when he said, "I have sworn upon the altar of God eternal, hostility to all forms of tyranny over the minds of man."

The First Amendment says Congress shall make no law abridging the freedom of speech or of the press. The genius of the writers of that provision of the Constitution was that they wrote a provision whose words would fit and give rights to methods of communication of information which I guess they could not have envisioned would ever exist. Yet those words apply just as well to the broadcasting media, which was undreamed of in those days, as they do to the printed word.

I think that the object of the First Amendment was to make Americans politically, intellectually, and spiritually free. The drafters of that amendment recognized that a full flow of information and ideas and views was necessary to keep Americans free from the worse sort of tyranny—that is, tyranny over the mind.

Second, I think the reason for writing the First Amendment was that the institutions of government which the Constitution created would not function in the absence of a free flow of information, uncontrolled by government. I think your statement shows that you share these views in full measure.

Mr. MONROE. Thank you, sir. I have noticed previously your feeling that the First Amendment should apply to new technology if that technology is engaged in a spreading of information, as the printed press was originally, and still is. I do not think many people on Capitol Hill or in Washington or in journalism schools have a clear concept of the possibility of a full application of the First Amendment to these new media. I do not think that, in fact, we are now applying the First Amendment fully to the new media.

Senator ERVIN. Now, do you agree that the First Amendment was designed to make it certain that the people of the United States would have a free flow of ideas and information from all sources and that the government should not control the dissemination of these notions and views?

Mr. MONROE. Yes, sir, I certainly do.

Senator ERVIN. You mention in your statement the fact that when you start out with government regulation, as time goes on, the regulations apply to increasing numbers. And, for some strange reason—I do not know whether it is so strange—since the people who run the government are quite human and think they can manage other people's affairs better than the people can themselves, the government has an insatiable thirst for power. If you give them a little power, they want more power. Fortunately for the country, it has been impossible to regulate the printed word to any great degree, because the people understand the printed word. They understand a free press. Broadcasting was intended, as far as the words of the First Amendment are concerned, to be as free as the printed word in the dissemination of information and ideas.

Do you agree with that?

Mr. MONROE. I agree completely, Mr. Chairman.

Senator ERVIN. But the fact that there was an insufficient number of broadcasting frequencies did require Congress originally to step into the picture and to regulate the allotment of the existing broadcasting frequencies.

Mr. **Monroe**. Yes.

Senator **Ervin**. That was done, or at least was justified at that time, because if everyone who wanted to go into broadcasting was permitted to do so, you would have had such a confusion of words on the air waves that what was disseminated by means of the air waves would have been unintelligible.

Mr. **Monroe**. Yes.

Senator **Ervin**. So licensing is justified to the extent that it is necessary to make a distribution of available channels in order for the transmissions that are made to be intelligible to the hearers.

Mr. **Monroe**. I would like to find a way to do away with that much licensing, but I cannot find a way.

Senator **Ervin**. I think everybody professes in public to love the First Amendment, but a lot of people are afraid of the First Amendment. They are perfectly willing to have free speech for themselves, but they do not believe in free speech or free broadcasting of ideas which they think are unwise or disastrous to their political positions or their economic positions, or which disturbs their thinking.

Now, is it not true that the First Amendment was intended above all things to make the people who exercise this freedom free from Government control of the expression of their ideas?

Mr. **Monroe**. I think so, sir.

Senator **Ervin**. And one of the troubles incident to freedom is the fact that there is only one way to prevent the abuse of freedom and that is to destroy freedom. Is that not true?

Mr. **Monroe**. Yes.

Senator **Ervin**. And if the Government is going to control either directly or indirectly the ideas expressed or the information conveyed, it is going to destroy freedom—freedom of speech and freedom of the press and freedom of broadcast?

Mr. **Monroe**. It will indeed.

Senator **Ervin**. So you have a situation wherein the necessity of procuring a license every 3 years or renewing the license is a Damoclean sword hanging over broadcasters.

Mr. **Monroe**. If you have been in the print media and you transfer to the broadcast media, you are impressed by a sort of unfree atmosphere that comes primarily from the renewal process.

Senator **Ervin**. The proper function of both media is exactly the same—to inform the American people. The only way they can inform people is by the collection of information and its dissemination by the expression of ideas based on that information. There is such a thing, as you point out so well, as chilling the exercise of freedom. The First Amendment, I frequently say, was written for the timid as well as the bold, especially in view of the fact that the timid are pretty easily coerced by governmental acts.

I received a note with the observation that those of us in the public office do not like to be criticized. That shows we are quite human. And great pressures are brought on the broadcast media, particularly because it is so powerful, by Government to try to get the broadcast media to paint Government and public officials in the kind of light they would like to be painted in, instead of what the facts may justify in certain cases. So there is constant pressure on the broadcasting media. It has to obtain and renew its license every 3 years which renders it more susceptible than the printed word to governmental pressure.

I think you have made the finest presentation of the necessity of extending the First Amendment rights to the broadcasting media that has been made. That is a high tribute, because we have had some very fine presentations here. I think the broadcast media is entitled to the same rights as the printed page, because if the Government can deny a license to a broadcasting station because it does not like the ideas it expresses or the way it disseminates information, then the end of the First Amendment is in sight.

Mr. Monroe. Yes, sir.

Senator Ervin. I think that the First Amendment was written so that the Government could not say to the people of the United States, the Government has the possession of all the truth on a subject and those who disagree with the Government have none. So we have freedom of the press in order to have a diversity of opinion.

I happen to come from a State that produces tobacco and manufactures many cigarettes and the economic interests of my State are wrapped up in tobacco. Yet we have the FCC adopting a policy which says that it and the Surgeon General have all the truth with respect to smoking and those who disagree with them have none. Therefore, they will not permit any answers or they will not apply even what they call the fairness doctrine to the defense of smoking.

Mr. Monroe. Apparently they are now reconsidering what they have wrought, in the sense that they are not sure now they ought not to permit tobacco advertising to be back on the air so that anti-tobacco messages can be put on the air, which indicates that when people start trifling with the flow of information, they bring about results that they do not anticipate.

Senator Ervin. They have had some requirements affecting advertising. I think that advertising of products which are legal to be sold to the general public is an exercise of the right of freedom of speech, subject, of course, to restrictions respecting fraudulent advertising. But the limitations upon the exercise of the First Amendment rights are very limited. These include the limitation about the defamation of character, the limitation that freedom of speech must not be exercised in such a way as to create a clear and present danger that will incite others to crime and violence, and there is some controversy as to the limitation on the dissemination of information which jeopardizes the national security, a rather vague field which is dealt with in the "Pentagon Papers."

But if there is anything that is true about the freedom of the press, it is that eternal vigilance has always been the price of liberty. God grants freedom to those who love it and are always ready to guard and defend it.

I certainly agree with your proposition that we are going to have to recognize that the broadcast media, after being licensed, should have the same rights to freedom of speech over the airwaves that the newspapers have by the printed word.

Your statement is so excellent, I would like to have it as widely disseminated as possible, and since more people read the *Congressional Record* than one would suspect, I would like to have your permission to put it in the *Congressional Record.*

Mr. MONROE. I would be honored, sir.

Mr. BASKIR. You made reference to the Vice President's criticisms about broadcasting. Some of the witnesses before us have, in turn, been critical of the Vice President's speeches because they see them as an attempt by Government to intimidate the press and to influence the flow of news and ideas to be more favorable to the administration. I wonder if you would comment on your view of the propriety of the Vice President's making his criticism.

Mr. MONROE. I have mixed feelings about the Vice President's remarks about the media. On the one hand, I do feel he said some things, going back a couple of years ago, that I felt were a little unbalanced and went a little farther than a Vice President ought to go, particularly when he suggested that there might have to be some way to make the media accountable if the media did not do better. And in the same speech, he made reference to the fact that the electronic media are licensed. The proprietors of radio and television stations and of networks could hardly accept that in any way but some kind of a threat, because the Vice President suggested that we might have to go in the direction of using government—it sounded that way—to apply pressure on the media to behave better according to the government's views of behavior of the press and the media. And he mentioned licensing. And that looked like intimidation.

On the other hand, I am reluctant to go too far in criticizing the Vice President and his series of criticisms of the media because I feel the Vice President, like everybody else, has a right to criticize the media and that the media needs the criticism of public officials as well as others, and we should not be too touchy or unhappy about criticism, including harsh and consistent criticism. I think the Vice President has a right to criticize the media, but I think some of the impressions of a few of the things he said could be construed, and have been construed, by some of the people in the media as a form of intimidation.

Senator ERVIN. The policy we do not like is that the criticism comes in the context of government control.

Mr. MONROE. I think the Vice President himself is unaware of how difficult it would be for the people in the media to accept some of the things he said without considering them threats of intimidation. I think he went farther than he realized he was going, as his remarks had to be viewed by the people in the media.

Senator ERVIN. The fact of criticism itself is not harmful, because as you were saying in your statement, that is one of the controls imposed upon broadcasting and freedom. It is just criticism by a high government official in a context of control that is harmful.

Mr. MONROE. Yes.

Senator ERVIN. It would be better to have criticism and not the control.

Mr. BASKIR. We also heard testimony from a witness last week, Miss Edith Efron, who apparently had done a study of the content of news broadcasting during the 1968 campaign and she had some very harsh conclusions to draw about the bias in terms of the spread of views across the political spectrum. I think it was her conclusion, if my recollection of her term is correct, that it showed a left-liberal, pro-Hubert Humphrey, and antiwar bias, to the general exclusion of other points of view. I wonder if you have any comments about her criticism?

Mr. MONROE. I have read about three quarters of Miss Efron's book. I may manage to get through the rest of it someday. I found her book substantially useless.

Miss Efron's book suffers from grave defects of argument and of evidence. Continually throughout her book, in every chapter, she has a device of suggesting that a reporter on a particular night in a particular newscast did something which she would characterize as an attack on this or an attack on that; or similar derogatory words describing what the reporter did. In each case, she is referring to a passage amounting to a few sentences. And every time she used these phrases during her book, which is every second paragraph, I wanted to know what the reporter said. She was accusing reporters of doing things that they should not be doing.

"Reporters have no business in their reporting on campaigns attacking Mr. Nixon, attacking Mr. Humphrey. That is not the role of reporters, as I see it." And I wondered whether the reporters she was talking about had, in fact, done the thing she said they did.

But nowhere does she allow you in her book to see what the reporters actually said. She is making judgments as to whether the reporter in each case was attacking or was marking something down. or glorifying violence, as she says in parts of her book. She could easily have allowed the reader of her book, in 50 percent, or most, or all of these areas, in her index or in a few footnotes, or at least in a few of the cases, to see what the reporter said that she was characterizing. She does not do it anywhere. In order to find out whether her judgment itself is biased, you have to go beyond her book, which she invites you to do. She says you can see her research, go up to her place and look through it all.

Now, if someone writes a 325-page book claiming bias, I would expect her to do more than that, not just leave the proof to some papers that you have to go through.

The only counter I know to Miss Efron's book was done by Mr. Salant of CBS News, and I have read a report he put out in which he quoted something like 15, 16, or 17 passages from CBS reporters which she had in her book. She characterizes these as a reporter editorializing or attacking and so on. and you get nothing to draw your own conclusion from. In the passages in Mr. Salant's statement, where you get an idea of what the reporter said, they are not criticizing or attacking or editorializing. So I feel Miss Efron's book is a perfect example of bias itself, rather rampant bias.

I have talked to a good many print reporters, and a good many of them are happy to cut the throat of electronic journalism if they can do it. Most of these print reporters have the feeling that the book is such an example of bias and personal judgment that it is useless to read and many have given it up after a couple of chapters.

Mr. BASKIR. Now, would you agree that if a television correspondent has just a couple of seconds to report on, let's say, political affairs in Washington and he has a speech by the chairman of the Democratic committee and a speech by the Republican national committee, he has to make a choice? Ideally he could report both, but he has to choose between one or the other. And if you went through the news broadcasting of a network or of a station over a period of time and found that those choices tend to give opportunity, tend to air statements or positions on one side of an issue more than another—could you then say that the editorial policy or the station was giving more access to one point of view as opposed to another, and therefore you could conclude was biased in favor of the point of view it is giving air time to?

Mr. MONROE. I do not think it can be done on a strict arithmetic basis. I think if it developed over a period of time that one side to an argument had 60 percent of the air time and the other side had 40 percent, that would not of itself necessarily be an occasion of bias. It might be a situation in which the side that got 60 percent of air time was pushing its case more vigorously, where more spokesmen for that side were making speeches in various places, on the floor of the House or the Senate, and where there was more to cover on that side, and the side that got 40 percent coverage, had fewer persons speaking for it, or speaking less effectively or frequently.

I do not think that television or radio newsmen or print newsmen should be in the position of counting up, that since one side has now gotten 60 percent coverage and the other side 40 percent, for the next week or so, we had better give, the 40 percent side exclusive coverage and forget the 60 percent side until things even up. I do not think arithmetic balance makes that much sense.

Mr. BASKIR. I raised that question because in her testimony last week, she did come to the conclusion, again as I recall, in terms of news exposure. She had very distorted ratios—6 to 1, 9 to 1, even greater—in terms of, let's say, statements by the Republican candidate on the one hand as opposed to statements favoring the Democratic candidate, the same thing with the war issue, the same thing with other things, which leaves the public with the impression that somehow things that are being said are not getting over the air.

Mr. MONROE. In her book she said some coverage was favorable to one candidate or another candidate, and my impression of the coverage where she describes it is that one time it may turn out to be favorable, another unfavorable, and it is impossible to judge unless you do a poll following the newscast the next day.

Mr. BASKIR. One interesting thing about your testimony, although you seem to disagree very violently with respect to your assessment about news bias with Miss Efron's conclusion on this, was that the solution to this was not more government control or more government influence, but indeed less. In fact, she said none. I think she went even further than you in suggesting that the allocations of news frequencies could be taken out of the government's hands and accomplished in some other way or indeed not at all, and she seems to come down in favor of more freedom, total freedom, as a solution for the bias which she was describing. So in the end, the two of you, although coming from different points, seem to end up in the same place.

Mr. MONROE. I fully agree with Miss Efron's conclusions.

Mr. BASKIR. We also have testimony last week from a number of television writers of fiction programs. They agreed there was a lot of censorship with respect to the ideas conveyed in these programs. I wonder if you believe that the First Amendment is also as involved when you look at entertainment programs as with respect to news?

Mr. MONROE. No, I do not, Mr. Baskir. I think I would probably sympathize with some of these writers if I were in their shoes. I would probably chafe at some of the restraints they feel are imposed on them and I would probably feel that network or station program directors are a little fearful of reality in their programs, and I applaud the reality that is getting into some of the programs, as in the "All in The Family" series. I believe Mr. Lear was one of the people before your committee, but I do not look on a decision by a network program director, or whoever makes these decisions, that the entertainment has to be done in a particular way as censorship in the same sense as government censorship. It seems to me that there needs to be a very clear distinction between government censorship and decisions that have to be made in any medium by somebody.

Somebody has to run a newspaper, a big magazine, a network, a television station. Someone has to say this goes and this does not go. If the person making these decisions is a private person, that is totally different from the government saying this can go and this cannot go. So in a way, the word censorship is applicable, but not in a way that concerns me with the same concern I have about the government making editorial decisions.

I think these writers should be able to make their case in print, in forums, possibly before congressional committees. I do not see much of a First Amendment problem in it, but I think they ought to be able to criticize the networks for not allowing enough reality in these programs and make other criticisms that they want to. But I do not think there is any essential First Amendment problem.

Suppose you would turn over a night between and 8 and 9 o'clock to one of the writers testifying here and let him put anything he wanted in the program. That would be a little backward way of doing it, but in that case he would be making decisions about what went into the program, and he would be a censor between 8 and 9 o'clock the way he looks at it. Somebody needs to decide. If it is a private person, I do not look on it as government censorship that abridges the First Amendment.

Senator ERVIN. Is it not true that if a private medium refused to take a certain program which is good, or for which there is a demand at least, some other private medium will probably take it?

Mr. MONROE. Yes.

Senator ERVIN. So you get a diversity of programs from private mediums that you would not get at all if the Government exercised the censorship?

Mr. MONROE. Right.

Mr. EBNER. Mr. Monroe, I find your reactions to Mr. Baskir's questions about Edith Efron very interesting in that you take the same view as CBS, that her book in itself evidences a bias in the manner in which she approached her study.

I find it equally interesting that several reputable people in the field, such as Prof. Paul H. Weaver of Harvard University of Government and Dr. George Weinberg, who is a noted statistician, both support wholeheartedly her methodology in approaching this study. With that kind of difference of viewpoint, whom are we supposed to believe?

Mr. **Monroe.** I am sure those two gentlemen are better authorities in their field than I am, and if I were faced with the question between those two men and me, I suppose I would take their word for it.

Nevertheless, I cannot take their word that her methodology is any good, because her methodology looks atrocious to me and I do feel I have some credentials in judging when a thing is done objectively or relatively objectively. I agree there is no such thing as complete objectivity, but I do not believe in free wheeling advocacy journalism. Miss Efron's book is riddled with bias in every sentence and every paragraph, as far as I am concerned. It is a matter of astonishment to me that two authorities such as you cite can approve her methodology. I would like to know more about who they are and on what basis they approved it.

Mr. **Ebner.** Stating hypothetically, if we may, that her conclusions are accurate, at least as to the 1968 Presidential campaign, would you also agree with her conclusions that less government interference rather than more is the answer to this type of bias, again assuming it did exist?

Mr. **Monroe.** Yes, I would.

Senator **Ervin.** Could you tell us how that would have the effect of eliminating this sort of bias if there were, say, virtually no Government interference?

Mr. **Monroe.** I am not sure it would eliminate the bias, but I have a feeling that it would eliminate the bias because these media depend on audiences. If a single network began to be recognized as having a bias that was more pronounced in a particular direction than some other network, it is going to lose some of its audience. A local station, a network, depends on credibility, and the American people, if they become angry at a particular network or station out of a feeling that there is a consistent blatant bias being exhibited in its newscasts, some of them, enough to be important in terms of audiences, would disappear and go to another channel or to another network. So the network and the stations are not beyond the reach of the public in terms of having to be fair.

But even if this mechanism of competition would not guarantee an elimination of bias, the only way, the only other way, to approach it is by the Government attempting to eliminate the bias, and when the Government attempts to eliminate the bias, here is no way for the Government to do it without ending up imposing its own bias, which is much more dangerous than toleration of the bias in the media which may exist.

Mr. **Ebner.** Thank you, Mr. Chairman.

Senator **Ervin.** Thank you for a most excellent statement.

Mr. MONROE. Thank you, sir.

Mr. BASKIR. Mr. Chairman, our next witness this morning is Mr. Charles A. Perlik, Jr., president of the Newspaper Guild.

Senator ERVIN. Mr. Perlik, I want to welcome you to the subcommittee and express our appreciation for your willingness to be here and give us your views and observations in a field in which you have had much experience.

STATEMENT OF CHARLES A. PERLIK, JR., PRESIDENT, THE NEWSPAPER GUILD, AFL-CIO, CLC; ACCOMPANIED BY JAMES M. CESNIK, DIRECTOR, RESEARCH AND INFORMATION

Mr. PERLIK, Thank you for that welcome, Mr. Chairman. Let me introduce a colleague of mine. Mr. James Cesnik, the director of research and information for the Newspaper Guild, who played a major role in the preparation of testimony we are about to give.

Senator ERVIN. We are delighted to have him with us, too.

Mr. PERLIK. Thank you. Let me add as a preface to our prepared testimony my appreciation for your arranging this additional appearance and additional sitting of this subcommittee to hear our testimony and that of Mr. Monroe. We are especially appreciative since we feel and know that we speak for the one organization which represents men and women who work for the media, who sometimes feel the brunt of the erosions of the First Amendment first. When I say feel, I really mean feel, and I hope our testimony will demonstrate that point.

The Newspaper Guild is the union which represents some 40,000 news and commercial department employees of newspapers, news services, magazines, and related enterprises in the United States, Canada, and Puerto Rico.

As the only national organization of working newspapermen in the United States—and let me note parenthetically that we use the term "newspapermen" generically—the Newspaper Guild since its founding in 1933 has had a deep and abiding concern and has worked to assure that the press by truly free of any influence that would subvert its right to gather and disseminate news and opinion—whether that influence be public or private and whether that influence be brought to bear directly or indirectly.

The Newspaper Guild's concern is practical, to be sure. Working newspapermen, it almost goes without saying, have a most immediate and direct interest in the maintenance and application of the First Amendment's guarantee of press freedom. Working newspapermen are the foot soldiers of the press. They most immediately and directly feel the effects of actions which threaten, slow or stop the free flow of information and opinion. Newsmen are threatened with jail—sometimes they are jailed—if they refuse to disclose their information and/or its sources to public authorities or private persons. They feel the displeasure and wrath—sometimes administered physically on their persons—of those who see them as agents of vested interests—public or private in nature—right, left, or somewhere between, in posture. They bear the frustration of restrictions imposed on the gathering and publication of news by press managements unable or unwilling to risk the financial burden that might be incurred through retaliatory action by those who might be offended or annoyed by that news.

The Newspaper Guild's concern for press freedom reflects more than our members' self interest, however. We share those convictions expressed so eloquently at the opening of these hearings in October by this subcommittee's chairman. We have long held that ours becomes less the free society we profess it to be—less a representative democracy—to the extent that there is abridgement of press freedom: Freedom to gather as well as publish news and opinion.

The Guild is dedicated to the maintenance and extension of the right of the press to gather and to publish, and to protect its information and its sources of information, without Government interference or hindrance.

Internally this is reflected in article II, section 1, of the Newspaper Guild's constitution, which reads:

> Guild membership shall be open to every eligible person without discrimination or penalty, nor shall any member be barred from membership or penalized by reason of age, sex, race, national origin, religious or political conviction or *anything he writes for publication.*

We have applied the emphasis to the latter qualification.

Externally, since the Guild's founding, this dedication has been advanced by the Newspaper Guild and its Local unions in a continuing series of actions at the national, regional and local levels and in repeated policy expressions by our annual conventions.

While the Guild is aware that conflicts periodically and inevitably arise under the First Amendment, our most recent convention held in Boston last July, addressed itself to many of the events and issues which gave rise to these hearings and concluded that: The principle of freedom of the press . . . is under grave and unprecedented attack in the United States and Canada.

Among the occurrences cited by our 1971 convention in arriving at this conclusion were subpenas for used and unused notes, films, tapes, photographs and files; attempts to compel disclosure of the sources of information and materials gathered; what the convention described as the incredible actions of the government in attempting to muzzle newspapers in the Pentagon Papers cases, abuses of press credentials by military and law enforcement agencies, and the physical abuse of newsmen by agents of the public and private citizens alike. The complete texts of the pertinent 1971 convention's resolutions, titled Freedom of the Press and Police Press Relations, are appended to this text, I offer them for the hearing record.

Senator ERVIN. The committee is delighted to receive them and they will be printed as part of the record.

Mr. PERLIK. Thank you, sir.

This committee is expert on the constitutional and sociological arguments favoring the full and free flow of news and opinion in a free society such as ours.

At the risk of belaboring the obvious, however, I would like to emphasize a point that all too often, I'm afraid, is forgotten by the very public whose freedoms the First Amendment is designed to ensure and protect.

The purpose of the First Amendment's free press guarantee is not to create a special privilege for newspapers and newspapermen. Its purpose is to ensure that the public may be informed of events which may affect it and of what its government is doing in its name and be free to express itself thereon, for good or for ill. Flowing from that, to the extent necessary to ensure that the public may be informed, we believe that the First Amendment does create unique rights for newspapers and newspapermen in our society.

One of these rights, championed by the Guild for the past 37 years, is the right of newsmen to protect their information and materials as well as their sources from forced disclosure—a right presently being challenged by the government before the Supreme Court, as you are aware. (The Guild has filed an amicus brief with the Court.)

It is the Newspaper Guild's position that this right is absolute and unqualified, and that it applies to any information or source, confidential or not.

Demands for disclosure of newsmen's notes, tapes, films, photographs or files, or for disclosure of their sources, whether made by the government or by private persons, endanger the trust between newsman and news source. And that trust is essential both to the ability of the press to provide the public the information to which it has a right under the first amendment and to the newsman's ability to carry out his function under the First Amendment.

The basis for our position was laid down by the Guild's first annual convention in 1934, when it adopted a code of ethics affirming the newsman's obligation to refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies. That position was reaffirmed by our 1959 convention, which noted that a newsman who discloses confidences and/or sources can expect to soon be unable to collect the information necessary to give meaning to a free press. . . .

The 1969 Guild convention, reacting to the first signs of what became a trend, cited its belief that the Bill of Rights should permit a newsgatherer to protect both the ethics of his craft and his own future ability to practice it and condemned any attempt by the courts or law enforcement agencies to use newsgatherers as arms of the court.

By the time the 1970 Guild convention met we were in the middle of a virtual flood of demands that newsmen disclose their information, materials and sources not only to law enforcement bodies but to defendants as well. And some newspaper managements had been turning over files, containing published and unpublished photographs, verified and unverified information, the names of sources, etc., to governmental agencies—sometimes without any subpena being involved—without so much as the courtesy of informing the newsmen involved. The subcommittee has heard from at least one publisher who apparently sees no possible problem in this type of activity. Some subpenaed newsmen had also been refused support by their publishers in resisting subpenas.

These events resulted in a pair of actions by our 1970 convention.

In one we committed the Guild to negotiating specific contractual provisions to forbid a publisher to disclose file materials without permission of the newsgatherers involved and to require a publisher to support a newsman refusing to honor a demand for disclosure and to guarantee that the newsman will not lose his income and employment as a result of that refusal.

At the same time the 1970 convention, while calling for enactment of legislation to protect a newsman's rights against forced disclosure when careful study indicates conditions to be favorable to its passage, cautioned that legislation crippled by qualifications may be worse than no law at all.

Senate bill 1311 in its present form, in our opinion, falls into the category I just mentioned: legislation that may be worse than no law at all.

Senate bill 1311, like bills introduced in the last Congress, is in our opinion so full of exceptions and qualifications that we fear it would invite prosecution against newsmen rather than protect their rights—that it could contribute to the destruction of the purpose it purports to serve. Senate bill 1311 in fact appears to us to be more restrictive than rulings by some courts in recent years.

In any event, it is our opinion that enactment of any privilege legislation while the Supreme Court is considering the matter, is premature. We do not believe in legislation for legislation's sake.

Briefly, some of the difficulties we see in Senate bill 1311: It would restrict the privilege against compulsory disclosure of information to information which is confidential. We are at a loss to see how in a great many instances a newsman or anyone else can properly sort out that which is confidential from that which is not. Not much information gathered by a newsman in the course of his daily activity comes neatly labeled.

I would like to draw the subcommittee's attention at this point to a clipping from the January 28, 1972, *New York Times*, bearing the headline, "Village Voice Loses Court Test to Protect Source." The article goes on to describe how the *Village Voice*, published in New York, attempting to resist demands that it turn over an original manuscript under the banner of the New York legislation in this area, which is considered to be among the most liberal laws in the privilege area, how under that law, a publisher was indeed forced to turn over an original manuscript. I would like to have that appended to my testimony as well.

(The article referred to follows:)

[From the New York Times, Jan. 28, 1972]

VILLAGE VOICE LOSES COURT TEST TO PROTECT SOURCE

(By Lesley Oelsner)

In one of the first judicial tests of the state's "newsman's privilege" statute, the *Village Voice* has just been overruled in its attempt to avoid a subpoena directing it to turn over the original manuscript of an article it had published.

The article was purportedly written by an inmate who was later indicted for his alleged role in the 1970 riots at the Manhattan House of Detention for Men, called the Tombs, and the Manhattan District Attorney's office wants it for use in his trial.

The case has far-reaching significance becuse the decision, by State Supreme Court Justice Harold Birns, sets forth specific limits on the newsman's right to claim his newly won privilege—limits which, according to lawyers for the *Voice* and other media, are inconsistent with the purpose of the law.

Justice Birns, in an opinion published yesterday, said reporters may claim their privilege to withhold information they have gained on the job or the sources of that information only when they obtained it "under the cloak of confidentiality"—when the information has been given the reporter with an "understanding" that the "information or its sources not be disclosed."

As the manuscript given to the *Voice* reporter, Mary Breasted, was subsequently published under the byline of the purported author, Ricardo de Leon. **There was no "cloak of confidentiality" at all, Justice Birns reasoned.**

The prosecution wants the original manuscript because it could be far better evidence against Mr. de Leon than the printed article. The printed article would have to be verified by the Voice, which could cause additional legal battles, whereas the original manuscript, if submitted along with evidence by a handwriting expert that it was written by Mr. de Leon, would be clearly admissible.

STATE LAW CITED

The state law, which went into effect in May, 1970, makes no mention of the word "confidentiality." It simply says that no "professional journalist may be held in contempt for refusing "to disclose any news or the sources of any such news coming into his possession in the course of gathering news" for publication or broadcast.

And thus, media lawyers argued yesterday, the statute was meant to have a broader reach than yesterday's decision would allow. "The words of the statute are that all news is protected," said Nathaniel J. Bickford, attorney for the Greenwich Village weekly. "We feel the Legislature knew what it was doing," he went on, in a view echoed by attorneys for several other press groups yesterday. "If they wanted the word 'confidential,' they would have put it in."

The effect of Justice Birns' interpretation of the statute, such lawyers feel. would be to allow the Government to interfere, with the "internal operations," as one lawyer put it, of the media.

As for the man who sponsored the bill in the Legislature, he said he did not know if the lawmakers had intended "confidentiality" to be a factor or not—"I'll have to study the memos and read the opinion," said Assemblyman Emeel Betros, Republican of Dutchess County.

"I will say, though, it was at the time considered a very broad law," he said. It was "intended—and in fact it—one of the broadest," a characterization echoed by those who have studied the newsman-privilege laws of the 18 states that have them.

The case comes at a time when courts from the United States Supreme Court on down are considering suits raising various aspects of press freedom.

And though there have been a scattering of other opinions on the New York law—lawyers interviewed yesterday cited three others—Justice Birn's decision, the lawyers said, was the first in-depth interpretation of the law. The *Voice*—which considers the decision, as its editor, Daniel Wolf, put it, "thoroughly regrettable"—is now reviewing the matter to decide whether to appeal.

In its opposition to the subpoena, as Mr. Bickford noted yesterday, the *Voice* had made such points as these: that sources would not give information to the media if they thought the media would be playing the "double role" of aiding the prosecution as well as reporting news; that if the media had to worry about endangering a person who gave them information, they would not publish it, and thus would be giving the public less information than it should.

The *Voice*, though it relied largely on the new state law, also argued that it was protected by the First Amendment. Several lawyers on both sides of the free speech debate, however, suggested that as the amendment was now interpreted in the courts, that argument would not be upheld—by printing the article, they said, The *Voice* could be held to have waived its First Amendment rights.

Senator ERVIN. I hate to interrupt, but could you suspend for just a moment? I have to go to the Judiciary Committee for a time.

I have read your statement and it is an excellent statement. I would like to say before I go that I share your misgivings about the advisability of legislating with respect to what is called the newsman's privilege, until we see what the Supreme Court of the United States may decide in the *Caldwell* and the other two cases that it has agreed to hear. I do not mean to cast a reflection on my colleagues or myself, but I think the men who wrote the first amendment had a better gift for language than possibly we have and the trouble with legislation is that sometimes you may limit a right rather than secure it. So I would prefer the Congress to delay any legislation in this field until after the Supreme Court has handed down its decisions, because if the Supreme Court hands down as enlightened a decision as was made by the ninth circuit in the *Caldwell* case, I think it will protect the rights of news gatherers better than any act that Congress may pass.

Please excuse me, you may proceed.

Mr. PERLIK. Thank you, sir. We are sorry you cannot remain for the rest of the testimony. We appreciate the opportunity, however, and I will continue to read it for the record.

Had this bill been law last summer, it seems to me, its explicit denial of privilege for information "which has at any time been published * * *" might well have enabled the Government to "inspect and copy" the Pentagon Papers in the *New York Times*' possession as it sought to do. Once the first story on the papers had been published U.S. district court Judge Murray I. Gurfein might well have been precluded from refusing as he did to allow a Government "fishing expedition" (his words) into the *Times*' files.

The bill's explicit exemption from protection of the source of information required by law to be kept secret would seem to invite prosecution in many instances, such as those involving grand jury investigations, while hampering the press' ability to continue to carry out its traditional role of exposing the subversion of the public good to private interest, as has been known to occur behind legally closed doors.

And the bill's provisions for total divestiture of privilege for both source and information in cases involving "threat to human life, espionage or foreign aggression" are much broader than recent court rulings. In the *Caldwell* case, for instance, the Ninth U.S. Circuit Court of Appeals ruled that there must be a clear showing of a compelling and overriding public need that cannot be served by any alternative means before disclosure can be required.

The bill seems to us to invite investigators to seek to let newsmen gather their evidence, turning reporters and photographers into unwilling agents of the Government or other interested third parties.

If at some time, soon or not so soon, legislation to protect newsmen's rights against forced disclosure seems necessary, this bill might accomplish what it sets out to do if the word "confidential" were stricken from its statement of purpose and from line 9 and at the same time all of section 4 and references to it in sections 2 and 3 were deleted.

We fail to see how anything less than absolute privilege can be justified under the First Amendment. I am not aware of any foreign aggression against the United States, espionage against our Nation, miscarriages of justice or lives lost because the press refused to disclose information it had gathered or its sources and which might demonstrate otherwise.

The point I emphasized earlier on the purpose of the Constitution's press freedom guarantee applies equally to the issue of prior restraint on publication raised by last summer's Pentagon Papers cases as it does to newsmen's rights against forced disclosure.

In analyzing the actions surrounding publication of the Pentagon Papers there is a corollary that seems especially appropriate: That just as the public has the right to know about the operations of its Government, so do its elected representatives in the Congress.

Once Government censorship of the press and denial of information to the public's elected representatives abridges the public's right to know, two equally disastrous consequences are inevitable.

First, as I pointed out earlier, we become, to the extent of that abridgement, less a representative democracy than we profess to be.

And not only the credibility of the press, but also, more importantly, the credibility of the Government itself, is destroyed.

We do not contend, of course, that the Government does not sometimes need to act in confidence and even classify some of its papers against disclosure, particularly in matters involving the national defense.

But any system for the classification of such documents: (1) Must be narrowly defined and responsibly applied, (2) must insure periodic review and declassification, and (3) must provide for effective challenge of, and relief from, the decisions of those officials who have the initial responsibility for administering it.

We think the system's declassification process would operate best under an independent review unit with the power to make public any document classified for 2 years unless the necessity for maintenance of the classification is demonstrated by the classifying agency. Any document for which such proof is not made or offered should be automatically declassified.

The Government's present classification system, though improved and reformed in recent years, does not meet the above criteria. Classification is imposed on some information unnecessarily, and on other information mistakenly, and the Government has not been above utilizing it to attempt to manage the news. In fact, as pointed out in the press at the time of the Pentagon Papers incident, the substance and some of the precise details of nearly everything printed from the Pentagon Papers was published while it was happening, apparently deliberately leaked by persons in the administration.

While it may once more be belaboring the obvious, we must never forget that our system of Government is based on a delicate system of checks and balances between legitimately contending interests. And under our system classification and publication are and must remain separate questions; the first regulated by law, the second protected by the First Amendment.

It would be foolhardy, of course, to deny the hypothetical possibility that there might be occasions justifying prior restraint on publication. The courts, including the Supreme Court, have suggested and the defendants in the Pentagon Paper cases have conceded that prior restraint might conceivably be justified in cases involving such matters as current information on wartime battle plans, troop movements and the like.

However, it would be equally irresponsible to forget that voluntary press censorship has served our Nation well during wartime, without the necessity of prior restraints on publication, and can be expected to continue to do so if the occasion arises in the future. Like the Government, newspapers have their own systems of internal checks and balances that serve to restrain them from precipitate action.

As the chairman noted in the first round of these hearings last fall, tensions of yet another kind have arisen between newsmen and public officials in recent years in some parts of the country—tensions over abuses of press credentials, involving both their issuance and use.

A press credential—or press card, if you will—is, or at least is supposed to be, simply a document which a working newsman can use to readily identify himself as such in a situation where it is necessary to establish that identification.

Press cards differ in form and format from locale to locale and the method by which they are issued or obtained, as well as their source, also differs from one city or part of the country to another.

Tension surrounding the issuance of press cards is most prevalent in places where law enforcement officials have a hand in their issuance, and seems, where it exists, usually to vary in intensity in direct proportion to the degree of those officials' involvement.

Press cards generally are issued in one of three ways. Some papers design and issue their own.

The chairman noted in his remarks last fall that members of the newspaper guild in Madison, Wis., last summer voted unanimously to destroy their press cards that had been isued by the Madison police department.

The paper for which those guild members work, the *Capital Times*, is now one of those which issues its own press cards. These new cards, like those similarly issued, carry the designation "Press Card" at the top of one side, state the newsman's name and the fact that he is a newsgatherer in the employ of the *Capital Times*. There is a place at the bottom for the signature of the executive editor. On the reverse side is space for the newsman's photo and signature along with vital statistics: height, weight, color of hair, eyes, and so forth.

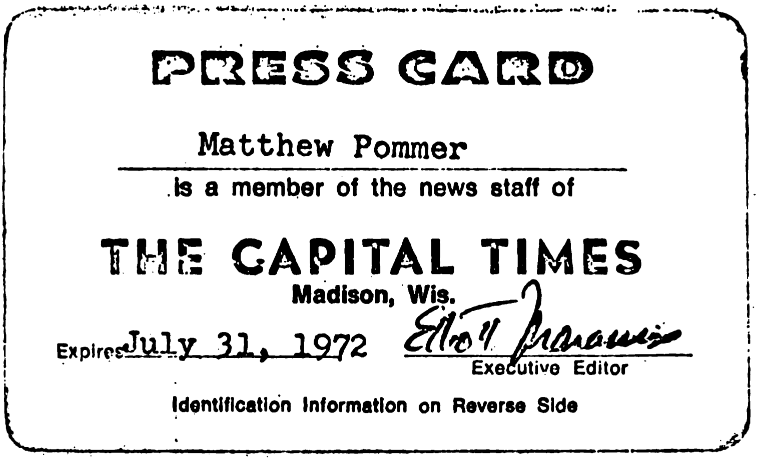
When we checked with Madison members last week, they reported no more problem establishing their identity with their new press cards than they had had with the old.

I would like to offer for inclusion in the record a copy of the press card issued now by the *Capital Times*, directly by the newspaper, to each of its reporters and to its newsmen who are qualified to make use of it in the coverage of the news in behalf of the paper.

Mr. **Baskir.** Subject to the Senator's review, that will be accepted.

Mr. **Perlik.** Thank you.

(The item referred to follows:)



PRESS CARD

Matthew Pommer

is a member of the news staff of

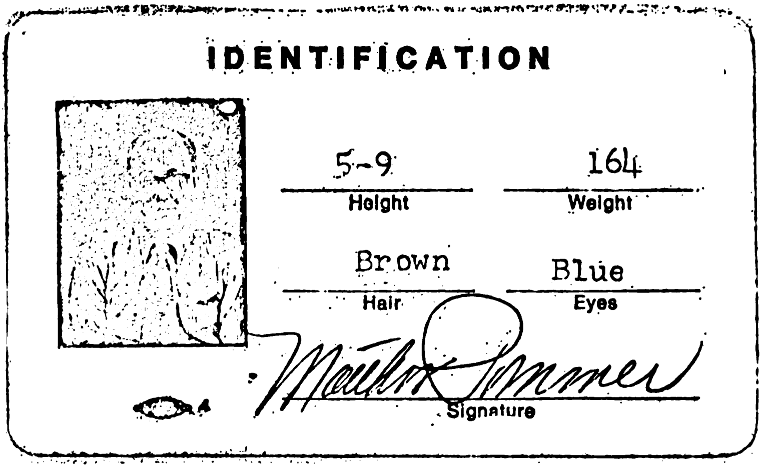
THE CAPITAL TIMES

Madison, Wis.

Expires July 31, 1972

Executive Editor

Identification Information on Reverse Side



IDENTIFICATION

5-9	164
Height	Weight
Brown	Blue
Hair	Eyes

Signature

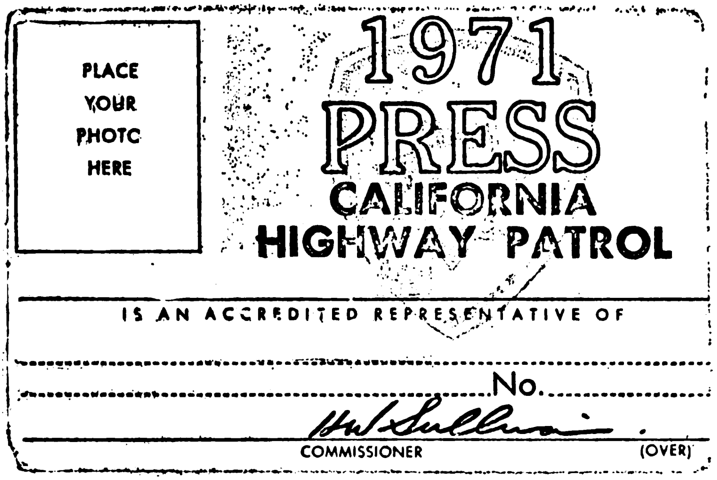
Mr. Perlik. Under a second method, a newsman receives from his employer a press card carrying both his and his employer's identity, but bearing the signature of a public official, most often a police chief or commissioner, attesting to those items of information. In these instances the public official, who issues the card, sends a number of signed cards to someone in a newspaper's management ranks—like a managing editor—and he has a newsman's name, et cetera, put on the card before the newsman receives it.

Under a third method of issuing press cards, the issuing public agency, again most often a law enforcement body, is requested to issue a card to a newsman identified in the application and the card comes to the newsman minus perhaps only his signature and/or photo. In some instances managements request and receive the card on the newsman's behalf and give it to him. In other instances the newsman himself requests and receives the card directly from the issuing official or agency.

The California Highway Patrol issues a press card under the third method. We understand it is used widely in the state. On the front of the card it issued in 1971 the legend "1971/Press/California/Highway Patrol" is superimposed on a reproduction of a police badge and appears more prominently than the name of the newsman and the paper which employs him. Again I would like to offer a photostatic copy of the California Highway Patrol press card, again under the same limitation you have put on the others.

Mr. BASKIR. Subject to the Senator's approval, that will be accepted also.

(The item referred to follows:)



PLACE
YOUR
PHOTO
HERE

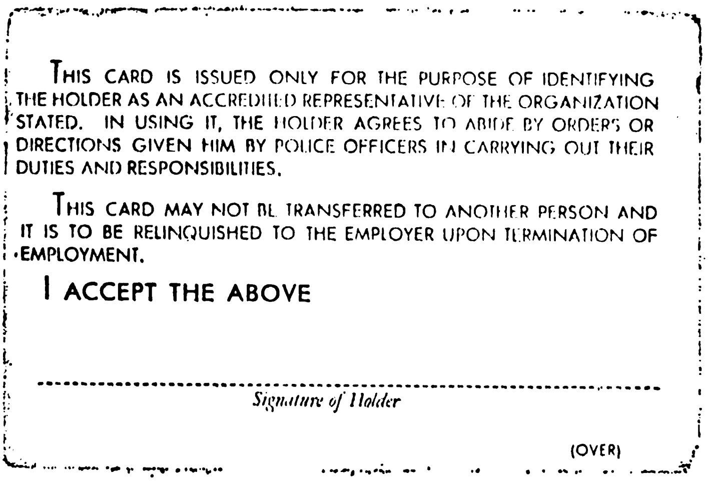
1971
PRESS
CALIFORNIA
HIGHWAY PATROL

IS AN ACCREDITED REPRESENTATIVE OF

....

....No. ....

COMMISSIONER (OVER)



THIS CARD IS ISSUED ONLY FOR THE PURPOSE OF IDENTIFYING THE HOLDER AS AN ACCREDITED REPRESENTATIVE OF THE ORGANIZATION STATED. IN USING IT, THE HOLDER AGREES TO ABIDE BY ORDERS OR DIRECTIONS GIVEN HIM BY POLICE OFFICERS IN CARRYING OUT THEIR DUTIES AND RESPONSIBILITIES.

THIS CARD MAY NOT BE TRANSFERRED TO ANOTHER PERSON AND IT IS TO BE RELINQUISHED TO THE EMPLOYER UPON TERMINATION OF EMPLOYMENT.

I ACCEPT THE ABOVE

....
Signature of Holder

(OVER)

Mr. **Perlik**. The reverse side of cards issued under both the second and third methods usually contains a statement to the effect that it has been issued for identification purposes only, a pledge that the holder will abide by orders or directions given him by police in carrying out their duties and perhaps a second pledge that the newsman will return the card if he leaves his present employer. Below all this is a place for the newsman to indicate his acquiesence to those conditions with his signature.

Press cards falling into the third category have produced most of the tension that has risen among newsmen over press cards in recent years.

When newsmen must depend on Government agents or agencies to obtain press cards—the basic document of their identity and acceptability—it is in fact a form of licensing and as such is subject to the same sort of abuses as any other kind of licensing.

When the Newspaper Guild, in a resolution by its 1968 convention, first took official notice of problems involving the issuance of press cards we called for them to be "issued without discrimination to persons employed in gathering news" and condemned their being "withheld (as reportedly occurring in Los Angeles) simply because a law enforcement officer does not like what the reporter writes."

A veteran newspaperman who recently joined the Guild's staff reports that several years ago when he worked in Las Vegas, Nev., two reporters were denied press cards issued there, at least then, by the police because a "routine" police check revealed that they had police records. They lost their jobs because they couldn't get a police press card, he tells us. (There was and is no Guild contract in Las Vegas to protect newsmen from such treatment, by the way.)

Tension also has arisen over press cards issued by law enforcement agencies when in several instances the agencies apparently have not been averse to issuing some to their own agents, enabling them to masquerade as working newsmen.

In several instances law enforcement officials have admitted employing this sort of ruse. In one of the most brazen of these admissions, just about a year ago, the California Justice Department's chief of law enforcement, backed by the State's attorney general, stated that he would not hesitate to have one of his agents pose as a newsman in order to gather information.

Our 1968 convention voiced the Guild's condemnation of this practice, too, "not only because of its doubtful ethics but because it believes such conduct could destroy news sources and the willingness of the public to be interviewed by authentic members of the press * * * as well as the trust of newsmen in general."

Our 1969, 1970, and 1971 conventions, repeated the call for an end to the practice, with our 1971 convention noting that under this practice "the public cannot be sure * * * who is a reporter and who is a secret agent" with "the result, in some cases * * * that the physical safety and the very lives of working newsmen have been placed in jeopardy."

Even if dependence on Government agents and agencies for the issuance of press cards had not in any instance had a chilling effect on the press and its practitioners' ability to function freely, the practice is a form of licensing and as such contrary to the first amendment. The practice should stop. The press should issue its own basic credentials of identification.

Despite the alarms raised by some in recent years over the press' real and imagined shortcomings, the First Amendment guarantee of press freedom has served and continues to serve this Nation well.

I would ask those who seem to favor making the press less free:

Do you really believe that the U.S. citizenry ought to have to depend on the willingness of newsmen to serve jail terms in order to continue to obtain information necessary to fulfill their function of governmental watchdogs?

Do you really believe that news which may be embarrassing to some in public positions ought be cleared with those same officials before it can be published?

Do you really believe that the Government ought to have the power to decide who is qualified to gather news?

If anything is called for today, it seems to me, it is an even broader application of the free press protections under the First Amendment, such as occurred in Supreme Court decisions on libel in recent years.

(Attached to Mr. Perlik's statement is a copy of a resolution by the 38th Annual Convention, The Newspaper Guild, which is printed on page 465.)

Mr. Baskir. Thank you, Mr. Perlik.

In discussing the issue of credentials, you mention some difficulties that members of the press have had in various areas, and I believe you suggested that you prefer to have these credentials issued by the newspapers themselves rather than from any official bodies. We have had some testimony as well as other information to the effect that whatever the difficulties are with respect to the regular working members of the establishment press, the difficulties are far more severe for members of the so-called underground press and for college newspapers. I wonder if you feel that your comments with respect to press credentials apply any differently to those aspects of the press?

Mr. Perlik. No, sir, they do not. We think for an industry to control the method of issuing press credentials, such credentials should be available to anybody who can demonstrate that he is an authentic news gatherer, no matter what forum he may wish to use the news he gathers in.

Mr. Baskir. Do you have any instances of the extent of difficulties with respect to the college press or the underground press, or would you be able to supply them to the subcommittee later?

Mr. Perlik. We are certainly aware of certain incidents, yes. I do not happen to have with me any precise details I would care to put on the record as a statement of sufficient accuracy. But if you would receive further submissions of that sort, we would be happy to supply them.

Mr. Baskir. Is my understanding correct that in the Senate press gallery, the practice is to have members of the Senate press corps admit people into membership as sort of——

Mr. Perlik. In my understanding, there is a committee elected by the correspondents, which is the regulating body in determining who else shall sit in the Senate press gallery.

Mr. **Baskir.** I seem to recall that sometime ago there was a controversy because some members of the underground press wanted to gain admittance. Can you refresh our memory as to what that incident was all about and how it eventually turned out?

Mr. **Cesnik.** I am Jim Cesnik, director of research and information with the Guild.

Eventually, at least one member of the so-called underground press was admitted. I think it was the same gentleman who was more recently denied access to the White House Press Corps, whatever the credential is that you need to get into the White House. I am not thoroughly conversant with all the details of the flap that surrounded the certification or the admission into the Senate press gallery.

There are some problems that arise in some areas which I do not know that it necessarily applies to the Senate press gallery, because there are certainly a great number of people accredited to the Senate press gallery. But there are from time to time such things as available physical space if everybody who is accredited shows up at the same time. But we think this is a kind of separate question. It does not really go to the question of whether or not access, given space, ought to be available.

Mr. **Baskir.** Of course, if you have the press corps itself issuing credentials, you will also run into the difficulty of that group of people excluding other members of the press, presumably the college press or underground press, for political reasons. The effect would be the same as if the official body had excluded those members.

Mr. **Cesnik.** I do not think ultimately, no. I think members of the press are more likely to be ultimately persuaded of the correctness of the—of the error of their ways than someone in an official capacity. I think generally speaking, people in the press, or at least in a body, are more apt to admit that they have made an error than is a police department. If, for instance, you had to have 51 members of the Senate vote to admit you to the Senate press gallery, perhaps you would stand a better chance with the working press in the Senate admitting they made a mistake, than you do with the Senate itself admitting it made a mistake, if that is not too far out.

Mr. **Baskir.** Certainly the people about whom mistakes are made are the people whose interest it is to point out the mistakes.

Mr. **Cesnik.** Yes, certainly.

Mr. **Baskir.** I suppose the other world of difference is it is one thing to have censorship by a private body, but the First Amendment applies to government and if the effect might be the same, still the principle is different.

Mr. **Perlik.** Of course.

Mr. **Baskir.** You mentioned the use of press covers. The subcommittee in other hearings had a lot of testimony about the use of press covers by investigative agencies. Do you find that this is a problem which is continuing, getting worse, lessening because of the publicity during the last couple of years.

Mr. **Perlik.** If I had to characterize it, I think the publicity is beginning to take hold, it is beginning to lessen. As my testimony indicated, we condemned it roundly in our last several conventions. Our members and nonmembers alike—we do not have as members every newsman in the country as I am sure you are well aware—are taking more courage and showing more willingness to expose agents and agencies so that they can be properly brought before persons who can do something to remedy the condition. But it still shows up from time to time. I just have the impression that it is not with the intensity that it was.

Mr. CESNIK. Perhaps you are aware that about a year and a half or so ago, the staff at the *Washington Star*, at least, got together and said, we are going to, in any instance where we discover an infiltrator, someone masquerading as a newsman who is not, we will expose him on the spot. I think this had had perhaps some effect. People are a little more reluctant, at least in some instances, to risk instantaneous exposure.

Mr. BASKIR. I would like to turn to the question of the Pentagon Papers. That case, of course, had to do with prior censorship of the newspapers in publishing classified material and left open the question of subsequent punishment of newspapers and newspapermen. I wonder if you feel that a newspaperman who violates the law—presumably violates the law by publishing classified information—can properly be punished for doing that, or whether you have the same problems with respect to the first amendment and the chilling effect as with prior restraint. Will subsequent punishment, in effect, have the same impact as prior restraint?

Mr. PERLIK. Yes, I think it has that result. The question of whether there is ultimately going to be punishment for the Pentagon Papers is still far from resolved. Grand juries at both ends of the country are looking into the aspects of it. But there is no question that punishment violates that—prior restraint has the prospect of the same impact, in our judgment, the same impact as the subpena power.

Mr. BASKIR. Are you prepared to say that in your opinion, newspapermen should not be punished for publishing classified information?

Mr. PERLIK. Well, first of all, I think it should be voluntary. I am not saying that he should not be, if he wishes as a citizen to exercise his right as a citizen to testify——

Mr. BASKIR. No, I am thinking in terms of publishing, punishment for disclosing, publishing classified information.

Mr. PERLIK. Our position, of course, as our testimony indicates, is that there is a very restricted area in which, of course, there is punishment available—publication of battle plans, respective engagements and things in war time, of course. But we insist that the history of the press's performance during war time has justified a reliance upon that type of self-restraint to further protect the country in those kinds of circumstances and we do not believe that any prior restraint ought to be exercised beyond that level.

Mr. BASKIR. Do I understand your remarks to be to the effect that prior restraint should be limited to the categories you just mentioned, very narrow categories, and that subsequent criminal penalty for publishing information should also be restricted to the publishing of immediate troop movements, battle plans, perhaps details of the construction of weapons, things of that nature?

Mr. PERLIK. Things so closely tinged with the national defense.

Mr. BASKIR. So you would have the same narrow definition, both for injunctions against publishing and also subsequent punishment of the publisher.

Mr. PERLIK. Well, I am not so sure that we would apply the definitions to injunctions for prior publication. Prior restraint seems to be never ending if it ever starts. It is my own personal view, frankly, that I think the *New York Times* and the *Washington Post* should have gone in and published them and been willing to take the consequences rather than await the judicial determination that did result.

Mr. BASKIR. As you mentioned, the question of subsequent punishment is now very much alive because of the two grand juries. The espionage laws are somewhat confusing, because there is at least one interpretation that seems to rest the punishment for publishing classified information on a matter of intent—intent to harm the Nation's interest, which could be interpreted, and some people have interpreted it, as saying that you can be punished for disclosing classified information only if you give it to somebody from a foreign nation. If you publish it in a newspaper for the public, you are presumably not engaged in espionage. This problem has led to some suggestions that the law be changed. I think even last week, there was a report of such a suggestion to the effect that the criminal laws say that the transfer of any classified information to an unauthorized person would be a violation of the criminal law, even though you gave it to a Congressman who should not get it, if you gave it to a news manager or a publisher or published it in a newspaper. This would include anything that bears a stamp of classification. I wonder, although this is not uniformly proposed, I wonder if you are prepared to give testimony on such a change in the law?

Mr. PERLIK. I think we did testify in our statement on our attitude toward the whole system of classification. We think it is far too broadly applied and must be more narrowly defined, much more narrowly enforced and applied in the future and it must be self-eliminating, classification of a document. This would go a long way toward eliminating problems that might arise on a person who makes available classified information to some party who is not by law entitled to it. But we try to separate, too, the questions. One is a matter of law, the law of classification, the Government's right to have certain classifications, classified documents, and the other is a matter of the first amendment; when it does become available to the press by some means or other, what are its obligations to the First Amendment, to make use of it, and the protections the First Amendment gives to the press and to the media to make use of it.

Mr. CESNIK. The whole thing presumes that there is a proper system of classification, the proposal that you outlined. Perhaps if there were a proper system of classification, there might be some room for something like this. But, you know, there is a story that gets told a lot about the case of the space monkey that was on display over at the National Zoo for 2 or 3 years, but his existence or the fact that he had gone up in space was still classified information as far as the Defense Department was concerned. Well, that is a pretty ridiculous system of classification. Ostensibly, the guy who might have said that it was still classified over there would be subject to penalty under that proposal.

I think first you have to revise and improve the whole mechanism before you can start talking too much about rapping people when they expose a system for what it is.

Mr. **Baskir.** How do you deal with the objection raised by the publication of the "Pentagon papers" and the "Anderson papers," that presumably tomorrow it will be somebody else's papers, concerning secret negotiations and dealings with foreign nations which could affect and injure those negotiations? Indeed, when it is concerned with the matter of a war, either the Indo-China War or the Indo-Pakistan War, it does result in great national harm and great worldwide harm because it interferes with efforts to achieve peace.

Mr. **Perlik.** Those are, of course, considerations which the press has made it known it takes into account in publishing every story, event stories that come off the police blotter, what impact they have. These are matters of degree. I happen to believe in the fundamental good faith of the press of the country in making judicious and judicial judgements of that kind to protect the national interests. It is obviously a wide open door through which many tanks and battleships may ultimately be driven, but it is our judgment that the First Amendment's inviolatability as a necessity for the overall structure of this country is so precious and so necessary that the risks are worth taking and should be taken.

Mr. **Baskir.** I gather what you are saying is that you believe the President of the United States is not the only one who may make a judgment as to what is in the national interest or what harms national security. The press, from what you are saying, has the same right and an equal right, and indeed, an independent right to make a judgment and a different judgment?

Mr. **Perlik.** I would add obligation to the right.

Mr. **Cesnik.** So does Congress.

Mr. **Baskir.** Thank you.

Mr. **Ebner.** Mr. Perlik, I am curious as to how you or the Guild, I guess, feel about the *Caldwell* decision at the Ninth Circuit level.

Mr. **Perlik.** The Ninth Circuit level—our formal position, as I have stated, is unqualified and absolute privilege. But at the Ninth Circuit level, certainly, if that were not narrowed in any sense, that would be a livable erosion of absolute unqualified privilege.

Mr. **Ebner.** I appreciate that. That was the reason for my question, because you did state the guild position about the absolute nature of this privilege, which of course, would even transcend the First Amendment. As you know, the First Amendment has been held in various situations not to confirm unqualified rights, beginning with the famous quotation from a Supreme Court Justice that freedom of speech does not give one the right to yell "fire" in a crowded theater, so there are various qualifications imposed.

Mr. **Perlik.** I also notice as well the Supreme Court has come further in the direction of more liberalized interpretations of the First Amendment.

Mr. EBNER. I guess that depends on which case you look at.

Mr. PERLIK. I suppose so.

If I may augment what I have said about our position on qualified privilege with just a brief addition to our prepared remarks: Our position obviously might appear to be massively self-serving, with a massive self-interest behind it. This is a conclusion, of course, that is hard to avoid but not to defend. For our view is that the constituency which is served by this self interest is the very largest constituency this nation is capable of producing; it is the Nation's entire population and the preservation of the broadest use and application of the first amendment is a self-interest stance we are proud to come down hard alongside of. If you will forgive that ungrammatical conclusion, that is our feeling.

Mr. EBNER. I appreciate that.

Just one last request for information, Mr. Perlik. You mention in your statement that like the Government, newspapers have their own systems of internal checks and balances that serve to restrain them from precipitate action. I think most members of the public are at least generally familiar with the constitutional system of checks and balances in the Government. I wonder if it would be possible for you to give some examples of this type of internal system that the newspapers use to prevent precipitate action?

Mr. PERLIK. One of them is the grievance machinery of the newspaper guild contract. We have approached the working newspaperman's rights in this area through the collective bargaining process, though not with all the success that we would like to claim, and it is an area in which we are only beginning to assemble experience and response. One of the most troubling and disappointing results has been the response of publishers in our efforts, especially in the subpena area, to protect the right of the newsman to protect his sources, to get guarantees that the publisher will pay for legal defenses, that the publisher will see to it that if he is thrown in jail because he refuses under a contempt citation, they will guarantee the maintenance of his salary. So there is that type of mechanism as a part of the check and balance system.

There is as well a growing tendency in the newsrooms around the country for the working newspaper writer himself to assert himself more effectively and more meaningfully in not allowing to the boss the sole judgment of what is going to be the content of the newspaper. Where this is going to take the newspaper of the future is certainly subject to wide speculation and deliberation, and indeed in the minds of many people, question. But it is that kind of thing I had in mind when I said that there are places and ways inside the newsroom itself for these very forces to undergo examination and determination.

Mr. EBNER. I take it you feel that this is vastly preferable to any attempt at outside imposition of checks and balances?

Mr. PERLIK. Indeed I do.

Mr. EBNER. Thank you.

Mr. PURSLEY. Mr. Perlik, has the newspaper guild noticed any change in the situation regarding the issuance of subpenas since the Attorney General's guidelines were issued a year ago?

Mr. PERLIK. Well, there has been a slackening off. I do not know whether I would attribute it to the Attorney General's guidelines, because his guidelines are not much different, really, than some of the legislation we have seen proposed. But I have not seen a recent case.

Jim, you can correct me if I am wrong. On issuance of news subpenas, I think the thing is standing in a sort of limbo now until we see what the Supreme Court says in the *Caldwell* case and companion cases.

Mr. CESNIK. I do not know if it is so much the Attorney General's guidelines as much as the fact that there was rather hefty hue and cry involved and public pressure, or at least the pressure of the press was brought to bear.

There was one thing that happened soon after the issuance of the guidelines. The subpenas did seem to flow, rather than into the establishment press, into the so-called underground press and the student press, the established student press. There was even a kind of new wrinkle applied out in California, where at Stanford, they used a search warrant rather than a subpena to tear apart the *Stanford Daily* offices and search, I guess for some kind of photograph.

I do not know that it was necessarily the guidelines as much as the general hue and cry and awareness of what was happening.

Mr. PURSLEY. Thank you.

Mr. BASKIR. Thank you very much, Mr. Perlik, for your testimony, and I would like to apologize again on behalf of the Senator for his having to leave.

Mr. PERLIK. I understand the the Senate must keep in business.

Mr. BASKIR. They all have about 84 things to do at the same time, and somehow they manage to get 83 of them done.

Mr. PERLIK. I would like to offer as part of our testimony, under the same guidelines you suggested with the exhibits there, an article entitled "A Deliberate Censorship" which I think appeared just in this last week's Sunday *New York Times*. It seems to me very relevant to the question of self-restraint by the press. I would be certainly happy to read it into the record, but I do not want to take any of the subcommittee's time any further.

Mr. BASKIR. We will put it into the record again according to those conditions.

Mr. PERLIK. I think it is quite pointed, especially to your question, Mr. Ebner, about self-restraint of newspapers and, indeed, whether they should engage in self-restraint, because that then makes them the judge and jury, too.

(The article referred to follows:)

[From the *N.Y. Times*]

A DELIBERATE CENSORSHIP

NEWSMEN EXERCISE THEIR RIGHTS TO SPEAK NOT AS INDIVIDUAL CITIZENS, BUT AS TRUSTEES FOR THE REST OF US

By Ronald M. Dworkin

London—There is a dangerous kind of censorship, now growing in force in both America and England, that does not rely on legal restraints on what may be said. It appeals instead to the idea that the press, television and other media have a professional responsibility to exercise their legal freedom with *self*-restraint, because their power to inform and persuade sometimes includes the power to embarrass or even cripple national policy.

The American press has been widely criticized, for example, for publishing the Pentagon Papers and the records of the Nixon Administration's discussions of the Indo-Pakistan war, television has been criticized for giving publicity to demonstrators, and for subverting morale by reporting the most distasteful aspects of the Indochina wars.

In England, the Home Secretary criticized the B.B.C. for a television discussion that gave a voice to Republican critics of British policy in Ulster on the ground that the program would aggravate an already incendiary situation; and the Tory press said that the B.B.C. was trying to usurp the authority of Parliament.

This sort of criticism may be the edge of the wedge, because it may be backed by Agnew-like hints that if the media cannot govern themselves others may have to govern them. But the very fact that legal censorship is too foreign to our tradition makes the appeal to self-restraint attractive and therefore more dangerous.

The appeal is based on a fallacious analogy between the rights of ordinary citizens and the duty of the press. Newsmen exercise their rights to speak not as individual citizens, who may give up their rights in what they think is a good cause, but as trustees for the rest of us.

We are equally cheated when the man who decides what we shall not know is a newspaper editor or a television executive rather than a bureaucrat; perhaps more cheated, because the bureaucrat's decision can be exposd and challenged in court and the editor's cannot be. The cliche that the media have responsibility as well as power advances the argument hardly at all. Their underlying responsibility is to those who want to read or watch them, and the question is when this important responsibility may be set aside in favor of some other one.

It is often said that the media must not broadcast information that will harm the community, that they must not act like Holmes' man who cried "fire" in a crowded theater. But this is not helpful when, as is almost always the case, the community is not agreed about what is harmful and what is not.

We can distinguish easy cases: of course it would be wrong for a newspaper to publish information about troop movements in wartime, because that would cause harm that is not subject to political debate.

The success or failure of Government policy in Vietnam or Ulster is a very different case, however—just because the United States and Britain are in fact divided, as a matter of political debate, on whether that policy ought to succeed.

Perhaps the United States' interests are harmed if television coverage makes the war more difficult to pursue because it hardens the enemy or confuses our soldiers. Perhaps British interests are harmed if, as some commentators have warned, the opponents of union in Ulster will tolerate violence more readily if they see their extremist heroes on telvision. But in each case it is clear that a significant number of citizens believes that these costs are worth paying if they will help to force a change in policies that these citizens count as more harmful still. That proposition, for better or worse, now lies within the area of political controversy, and it cannot be the part of the media to take it out.

The newspapers and television must make every effort to report fairly, and to present a balance of opinion. It may be that genuine objectivity is an impossible ideal, especially on television, where the choice of one image as more accurate than another must reflect hidden attitudes as well as hard facts. But we are better off asking our newsmen to pursue the ideal, as far as they can, rather than to settle for a censorship that is deliberate and that is, in the nature of the case, always on the same side.

(Ronald M. Dworkin, formerly at Yale Law School, is professor of jurisprudence at Oxford.)

Mr. BASKIR. Thank you again.

Our final witness today was scheduled to be Mr. Robert M. Bartell, public relations consultant with the Liberty Lobby. However, Mr. Bartell was unable to appear. Mr. Warren S. Richardson, general counsel of the Liberty Lobby is here representing Mr. Bartell and the Liberty Lobby. You may proceed Mr. Richardson.

STATEMENT OF WARREN S. RICHARDSON, GENERAL COUNSEL, LIBERTY LOBBY, ON BEHALF OF ROBERT M. BARTELL

Mr. RICHARDSON. I am Warren Richardson, general counsel of the Liberty Lobby. Mr. Bartell was to fly up here from Florida for his presentation but was unable to make it. I will summarize it and take advantage of your kind offer not to have to read it all into the record. I will give you a shorter summary.

Mr. BASKIR. Thank you. You may wish to identify the gentleman sitting with you.

Mr. RICHARDSON. Excuse me, this is Mr. Lafe Hooser, legislative aide at Liberty Lobby.

Mr. BASKIR. Thank you.

Mr. RICHARDSON. I am almost overwhelmed, Mr. Baskir, by realizing upon listening to the witnesses, both the other day and today, that apparently, there is a unanimity of opinion that the Government should stay out of the news business. We phrase it this way: "That freedom of the press does not exist in America as constitutionally defined and will never exist so long as the Government is responsible for our economy." We develop this theme in the presentation, and I would like to read the part from the testimony on page 2 dealing with 1962, when Mr. Arthur Sylvester, then Assistant Secretary of Defense for Public Affairs in the Kennedy administration, was giving the public false information about Cuba. Mr. Sylvester said:

> This practice is proper management and control of the news and that Government news reports are part of the weaponry that a President has in the application of military force and related forces to the solution of political problems.

We are opposed to the concept.

We develop the concept that along with freedom goes responsibility. We spend two or three pages trying to find, and I do not know that there is an answer, why, with their great power and great freedom, such as it exists today, they did not—the press, that is—do something about the so-called Bilderberger conference in Vermont a year ago. We leave that for you to peruse in the record.

The chairman addressed a letter to Mr. Bartell and specified four particular questions that he wanted comments on. As you know, Mr. Bartell is a former radio and television commentator and would have gotten to this with more flare and greater depth, but I can point out that on the Government subpena power over newsmen, we are absolutely opposed to it. If the Government is damaged, let the Government sue in the courts like anyone else. We feel the press should be free from trying to pick up the distinctions between qualified and unqualified freedom. I guess we would be classified, from your previous questions, as very, very close to supporting the unqualified type of freedom.

Now, as to the publication of secret papers or the Pentagon Papers, we do have a self-interest involved. But trying to put that aside, the classification of that information by the government in the first place was obviously wrong, and while there may be a technical violation of the security laws, we see nothing wrong in terms of the news media publishing it; we feel that it should have been published years ago.

On the issuance of press credentials, another question asked by the chairman, we feel that the Government should not, any governmental agency—police department or anyone else—should not issue press credentials. Our statement here is to the effect that the press itself should have its own organization, whether it be the guild or some other group, that would issue press credentials nationwide. In this respect, it could be similar to, but not exactly identical with the bar associations of various States. Self-policing by the fourth estate's own people would be far superior, in our opinion, to issuance of press credentials by the Government or any governmental agency, be it Federal, State, or local.

In the last category, the chairman opened it up to any other comment we wanted to make, and we chose to reemphasize what was brought out in the Bilderberger case, that the responsibility of the press is as large and as co-extensive with their freedom, and since we advocate a great amount of freedom, we wish to see that their responsibility, by their own efforts and policed by themselves, be as great.

That would be my summary of Mr. Bartell's rather long statement.

(The statement referred to follows:)

STATEMENT OF ROBERT M. BARTELL, PUBLIC RELATIONS CONSULTANT AND TAX PROGRAM COORDINATOR, LIBERTY LOBBY

Mr. Chairman and Members of the Committee: I am Robert M. Bartell, public relations consultant and tax program coordinator of LIBERTY LOBBY. I appreciate the opportunity to present the views of LIBERTY LOBBY's 20,000-member Board of Policy, and also to appear on behalf of the 135,000 subscribers to our monthly legislative report, *Liberty Letter*.

By its very nature, freedom of the press is like being a little bit dead, or a little bit pregnant; either it is or it isn't. Therefore, LIBERTY LOBBY advocates freedom of the press. It is axiomatic that control of communications means thought and speech are controlled. Insofar as government is concerned, these few words from Article I of the Bill of Rights illustrate government's limitations: "Congress shall make no law . . . abridging the freedom of speech, or of the press." It is painfully obvious steps must be taken to establish clearly a modus operandi for the working press and to protect the right of all the people to know what its government is doing in the interests of ALL the people.

LIBERTY LOBBY addresses itself to the premise that freedom of the press does not exist in America, as constitutionally defined, and will never exist so long as government is responsible for our economy.

Articulate spokesmen at these and other government hearings have taken both government and the media to task concerning alleged faults of the other, and in view of the mystifying attitude of the press upon occasion, and the "credibility" of government, it would appear there is validity to both arguments.

At LIBERTY LOBBY we feel an examination of the current status of the media vis-a-vis government proves they are wedded, if not in bliss, then in fact.

Increasingly, this government has taken upon itself the responsibility for the success of our economy. To be responsible means to have and exercise the power to give orders to all forms of free enterprise and to see that these orders are carried out. Without commenting on the success or failure of this task, it is obvious that government has this power, and of necessity is exercising it. Thus government is now in a position to coerce.

The press, being a form of enterprise, and therefore a contributor to our economy, cannot help being a victim of this power of government.

Aside from the obvious restraints placed upon any segment of our economy through the actions of government, there is the added factor of the First Amendment to our Constitution being abrogated in a fashion clearly anticipated by the framers of the Constitution.

Alexander Hamilton, in the *Federalist Papers* of 1788, attempted to illuminate the problem and succeeded in further obfuscating the answer. When asked, "What is the liberty of the press?" Hamilton answered, "Who can give it a definition which does not leave the utmost latitude for evasion? I hold it to be impracticable, and from this I infer that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government."

As untenable as the current position of the press appears to be, vis-a-vis government, I think we have to face the inescapable fact that the American media enjoys a freedom of action unknown elsewhere in the world. How has the press utilized this freedom? George Bernard Shaw is quoted as having once said, "Liberty means responsibility. That is why most men dread it."

In 1941, President Franklin D. Roosevelt said, "The American people are beginning to realize that the things they have read and heard, both from agitators of the legislative variety and the agitators of the newspaper owner variety, have been pure bunk and that these agitators are appealing to the ignorance, the prejudice, and the fears of the Americans and are acting in an un-American way."

GOVERNMENT'S ROLE IN MAINTAINING A FREE PRESS

Let's examine government's role and its responsibility toward maintaining a free press. Prior to columnist Jack Anderson's disclosure concerning Mr. Kissinger, the Indo-Pakistani war, and managed news, probably the most celebrated instance of managed news was the admission on Oct. 29, 1962, by Arthur Sylvester, then assistant secretary of Defense for Public Affairs, that the Kennedy Administration was giving the public false information about Cuba. Mr. Sylvester said this practice is proper "management" and "control" of the news and that government news reports are a "part of the weaponry that a President has in the application of military force and related forces to the solution of political problems. . . ."

No thinking person will deny that governmental control of information is the essential tool of dictatorship.

MEDIA'S ROLE IN MAINTAINING A FREE PRESS

The media has also produced some disturbing situations. In 1942 Adlai Stevenson said, "The failure of the commercial press, with few exceptions, to honestly report the news and be fair in their editorial columns, has served to retard the war effort. Generally, their campaigns for special interests have created confusion in the minds of the American people and in several instances have bordered on acts of treason."

"Communication," said Senator Fulbright, "is power." In a reference to television news, he added, "Great masses of Americans depend on television for their hard news, despite the fact that such news is both distorted and limited."

Dean Burch, chairman of the Federal Communications Commission, has declared, "The entire contents of a typical TV evening news show would take only three columns in a newspaper."

In 1968, Vice President Hubert Humphrey said, "I am convinced that just as the media can tell the facts to the people, they can also exaggerate and inflame the situation."

The Media Task Force of the National Commission on the Causes and Prevention of Violence has discovered what many thoughtful observers of the press and television have known all along . . . that "a crisis of confidence exists today between the American people and the news media."

An example of why this mistrust exists is the incredible story of the "uncelebrated celebrities." An international organization euphemistically called the "Bilderbergers" conducted a conference in April, 1971, to which had been invited some of the leading international figures of our time, as well as a number of notable Americans. The conference was held at the Woodstock Inn, Woodstock, Vt., Apr. 23–25. Normally a meeting of this nature, attended by world-renowned figures, would be front page news. Yet, unless a diligent search failed, not one word of this conference was carried in this nation's media. It wasn't until November, 1971, more than six months later, that a story appeared in a newspaper, and this despite the fact that two leading American newspaper executives were among those present.

What was there about this mysterious gathering that attracted the attention of LIBERTY LOBBY? Initially, the arrival, without fanfare, of Prince Bernhard of the Netherlands, in his private jet, at the airport in Boston. A LIBERTY LOBBY supporter notified our Washington headquarters of the arrival, and of the increase in foreign travelers to the small community of Woodstock. LIBERTY LOBBY immediately dispatched a reporter to Woodstock but the veil of secrecy was so tightly drawn around the meeting it took almost a week to get the pertinent facts.

LIBERTY LOBBY then published the entire story in its June *Liberty Lowdown*, a copy of which is attached.

What was there about this story that the prestigious New York *Times* found "unfit" to print?

Why did the Washington *Post*, so eager to attack government for its managed news, ignore what was obviously one of the most important international gatherings of the decade?

Why did the Los Angeles *Times*, so quick to attack President Johnson's credibility while he was President, choose to overlook this conference?

All of these major metropolitan dailies report with great feeling on the activities of small constitutionalist groups in America, yet apparently felt there was no news value in the Woodstock meeting.

Who issued the orders to the nation's press to ignore the Bilderberger meeting? What kind of incredible conspiracy exists in this nation that could force an ostensibly free press to treat the meeting as if it didn't exist? If this committee, or any committee of the Senate, meets in executive session, it is the target of widespread conjecture and comment, in our newspapers, on radio and TV. Safeguarding the national interests of the U.S. is the responsibility of all those entrusted with its care. But, Mr. Chairman, what and whose interests were being safeguarded at a meeting attended by 12 foreign nations and without apparent government sanction or even knowledge?

I respectfully refer this committee's attention to a story carried in the Manchester, N.H. *Union-Leader* under the by-line of Arthur C. Egan, Jr., a copy of which is also attached.

Mr. Egan, following a six month investigation of this fantastic case, reported that a top secret conference was indeed held in Woodstock, despite the repeated statements of Herbert Klein, White House communications director, that he never found evidence such a meeting took place. Mr. Egan reported that the main topic of discussion was . . . "The radical change of the American role in world affairs and the subsequent consequences." I think this committee will admit that is a most intriguing discussion for a group of internationalists. One wonders what decisions were made in Woodstock.

Mr. Egan went on to report that the U.S. State Department confirmed that it has worked with Vermont State Police in making security arrangements for at least 90 foreign and domestic figures. It was also admitted by the State Department that 12 foreign countries and the U.S. had representatives at the top secret sessions and that all expenses, including air fares, were picked up by two tax-exempt organizations, which means that American taxpayers helped pay the bill. Two American newspaper executives, Osborn Elliott, editor-in-chief of *Newsweek*, and Bill Moyers, formerly of *Newsday*, and former press secretary to President Lyndon Johnson, attended, yet a month-long search of these publications revealed that not one word was ever printed concerning the conference.

In view of Presidential Adviser Henry Kissinger's propensity for making headlines all over the world, it is indeed passing strange that the American people were told nothing of the meeting. In addition to Mr. Kissinger, one

U.S. Senator and four Representatives admitted they attended the conference. Some of the world figures involved included Prime Minister Pierre Trudeau of Canada, Prince Bernhard of the Netherlands, Baron Edmond de Rothschild of France, and many others.

I leave to this committee's discretion whether this news blackout represented "suppression of the news."

Let us turn now to the four specific areas outlined in the chairman's letter to me of Jan. 13, 1972:

1. What is the effect of governmental subpoenaing of newsmen on their ability to gather, analyze, and report the news?
2. What is our analysis of the publication of the notorious "Pentagon Papers" and the government's efforts to enjoin such publication?
3. What special concerns exist in connection with the issuance of press credentials by local, state, and national government offices to members of the press and their employers?
4. Our comments on other matters pertaining to freedom of the press.

GOVERNMENT SUBPOENA POWER OVER NEWSMEN

First, let me point out that LIBERTY LOBBY is in favor of S. 1311. LIBERTY LOBBY also opposes government subpoena power of newsmen. If government experiences damages, let government sue in the courts, and before the people illustrate these damages. If the issue involves loss of human life, espionage, or foreign aggression, as set forth in S. 1311, legal precedent can be quickly established pursuant to guidelines established by that measure.

PUBLICATION OF "SECRET" PAPERS

The publication of these "secret" papers demonstrates specifically why newsmen should have freedom of the press. It was painfully obvious the government knew one thing and told the American people another thing. While the release of this information may have been in technical violation of the security laws relating to classified information, the case proves that those laws need drastic revision. It would seem far too much is classified as "top secret" in an effort to deceive the American people. The fact that the release of the Pentagon Papers vindicated LIBERTY LOBBY's time-honored stand against intervention in Southeast Asia is beside the point.

ISSUANCE OF PRESS CREDENTIALS

Basically, we believe no governmental authority should issue press credentials, for obvious reasons. In fact, we believe the media has been derelict in its duty to police its own profession adequately. LIBERTY LOBBY recommends that the Fourth Estate publish a procedure similar to that of the Bar Association, requiring that professional standards be met, subject to the exigencies of the profession itself, in order to determine that only responsible and truthful representations of interviews of news conferences be published. The press must, inevitably, answer to the people. So must government. If either is to survive as a viable entity of the free enterprise system, it must be firmly rooted in the philosophy of operating in the "common interest." To do otherwise is to invite disaster as a nation dedicated to the preservation of the individual.

RESPONSIBILITY

Mr. Chairman, government makes news. Professional journalists are responsible for giving the public this news. Under a representative form of government, if the people are informed, the government will be informed. This is the essence of truly republican journalism.

Responsibility must be coextensive with freedom. Without responsibility we have license, which in turn degenerates (in the case of the media) to sheer propaganda. While the areas of responsibility are as numerous as the scope of freedom, we single out here three areas for special comment: 1. Fairness; 2. Non-partisanship; and, 3. Selectivity.

By *fairness*, we mean the obligation of the press to report all sides of a question fairly. All too often we see a monolithic expression of the news which tends to treat one side or the other unfairly. Coverage of the recent trial of Rep. John Dowdy (D-Tex.) is a good example of unfairness. Too much of the press led the people to believe Mr. Dowdy was guilty either before or during the trial. The not-so-subtle presentation of the news is graphically reflected in a juror's comment on TV after the trial that "Mr. Dowdy had not proved his innocence."

Selectivity means the ability of the press to select the news stories which it deems worthy of telling the public. Errors of selectivity come about by inclusion and exclusion. The entire story recited above about the Bilderbergers is a classic example of selectivity by exclusion. One Washington *Post* newman explained when the facts were set before him that the Woodstock convention was not "newsworthy." With this power to exclude, people will never become informed. In a like manner, the ceaseless, yea monotonous repetition of crime by teenagers leads one to the belief that the younger generation is a hopeless cause. One 16-year-old gets caught selling drugs in school and makes headlines; yet the story of a boy who has labored hard and long to become part of the free enterprise system is relegated to the want-ad section if he is included at all. We submit, however, that the world would be better off to hear more about the latter than the former. It is this abuse of selectivity which must be reformed.

How do we bring about needed reform in the news reporting by the press? Certainly direct government intervention is not the way! Since the internal reform of the Fourth Estate is not the topic of this Senatorial inquiry, we shall pass on the collateral effort this body can make to help with the reform.

Traditionally, people who have been defamed by the press have had recourse to the courts of law through libel action. In recent years, however, the Supreme Court has so emasculated the legal right that the press is little restrained in this direction. The ancient right of a litigant to redress for defamatory remarks could be restored by statutory enactment. This would act as a deterrent on the free-wheeling press, which abuses its freedom by an injudicious consideration of its responsibilities.

SUMMARY

Until our government divests itself of the power to coerce enterprise, there is little hope any segment of our economy, including the media, will ever be totally free. This problem calls for statesmen and scholars. To the lawmakers, we offer this quote from Alfred E. Smith, from a speech delivered at Harvard University in 1933: "Keep your eye on the Constitution. This is the guarantee, that is the safe-guard, that is the night watchman of democratic representative government—freedom of speech, freedom of the press—the right of public assembly and the right to petition the government. Save all these things in the Constitution and let the Supreme Court stand behind it, and then you can get off all the hot air in Congress and in the Senate that you want to."

To the media we offer this sage warning from Benjamin Franklin, taken from his apology for printers in 1731: "It is unreasonable what some assert, that printers ought not to print anything but what they approve, since if all of that business should make such a resolution, and abide by it, an end would thereby be put to free writing, and the world would afterwards have nothing to read but what happen'd to be the opinions of the printers." In other words, Mr. Chairman, like Franklin LIBERTY LOBBY believes that "designed news" is the antithesis of freedom—regardless of source, government or press.

Thank you again for this opportunity to present our views.

Secret World Summit Conference

Liberty Lowdown has penetrated the outer hard shell of secrecy around the mysterious Bilderbergers—the most secretive coterie of super-rich, leftist internationalists in the world. This story was first broken by Rep. John Rarick (D–La.), in the May 5 *Congressional Record*, with information supplied to him by LIBERTY LOBBY on May 3. Other than this and the article in the May 15 *Washington Observer*, this tremendous story has been totally suppressed in all of the national news media.

What makes the following so vital is not only the meeting itself but the fact that the allegedly "free press" of America has cooperated in a great conspiracy to keep it secret.

The "permanent" chairman or front man of the Bilderberg group is H.R.H. Prince Bernhard of the Netherlands, royal consort of Queen Juliana. He is the only official designated as "permanent" in the Bilderberg clique—all others are "honorary" or "temporary." But lurking ominously in the shadows behind him are the Rothschilds, Warburgs, Wallenbergs, Rockefellers, and other great international banking dynasties. For inexplicable reasons, they are highly elusive about the whole thing.

You did not read about it in the "free press" but the latest Bilderberg meeting was held Apr. 23–25, 1971, at Woodstock, Vt. *Liberty Lowdown* dispatched a reporter to the scene despite the tight security and secrecy maintained by about 150 state and local policemen working under a task force of FBI agents. Never before had there been such an array of law enforcement officers in the village of Woodstock (population 1600). The Woodstock Inn is owned by Laurance Rockefeller, who lives in a spacious home on a hillside; everyone was barred from the inn except the Bilderbergers.

THE DIGNITARIES ARRIVE

When Prince Bernhard arrived in his private jet in Boston, a terse 2-page statement was released to about 30 waiting newsmen. No further information was given out about the meeting and no interviews were granted by the distinguished personages attending. As the foreign VIP's arrived in New York and Boston, three private Rockefeller planes ferried them to West Lebanon, N.H., where chauffeured limousines whisked them away to the Rockefeller estate or the Woodstock Inn.

Several foreign ministers of cabinet level rank attended. No Nixon cabinet officer was there, but Dr. Henry A. Kissinger, assistant to the President for National Security Affairs, participated in the meeting. He arrived in a White House plane, accompanied by four U.S. Secret Service bodyguards, and Lt. Gen. John W. Vogt, director of the Joint Staff, Organization of the Joint Chiefs. (NOTE: The secret guest list of the participants has been obtained as this issue goes to press, and will be sent free to any member of LIBERTY LOBBY upon request, accompanied by a stamped, self-addressed envelope. Be sure to give Board of Policy number.)

Back in 1937, Prince Bernhard, an impoverished German princeling, was working in the Paris office of I. G. Farben, when a telegram from his mother summoned him to Switzerland, where he met and wooed Princess Juliana of Holland. During World War II, Bernhard was Dutch liaison officer with the British Royal Air Force in London. After the war, he was public relations promoter of the NATO alliance and the European Common Market, and helped promote the sale of Dutch products to South America. Prince Bernhard was approached by the Polish liberal writer and political philosopher Retinger, with his scheme for a united Europe and eventually one-world government.

Bernhard thought Retinger had a good idea, but the Dutch ministers feared that the scheme might embarrass Holland. Bernhard took off for Washington, D.C., where he got support for the Retinger plan from Gen. Walter Bedell Smith, then director of the Central Intelligence Agency, and C. D. Jackson, a White House aide also closely connected with the CIA. "Beedle" Smith had been American ambassador to Moscow, where he had been thoroughly brainwashed. His first act as CIA director was to assemble all his top officials and announce, "We can't lick world communism—no counter-insurgency plans will work. We must compromise and co-exist with communism." The CIA officials were shocked.

In 1953, President Eisenhower appointed Smith Under Secretary of State, and named Allen Dulles to head CIA. The first Bilderberg meeting occurred in the Bilderberg Hotel, Osterbeek, Holland, with funds from the Ford and Rockefeller Foundations, and covert support of the CIA.

Since 1955, the Carnegie Endowment for International Peace has administered funds for the Bilderberg organization, provided by the Ford Foundation and other sources. And Joseph E. Johnson, head of the Carnegie Endowment, has been the Bilderberg honorary secretary general for the U.S. When Prince Bernhard departed at noon on the second day of the recent Woodstock meeting, Johnson presided over the remainder of the conference.

ENIGMATIC WOODSTOCK FESTIVAL

The Bilderbergers have held 17 meetings. The recent 3-day Woodstock session was the third in the U.S. (St. Simons Island, Ga., 1957, and Williamsburg, Va., 1964—all three on Rockefeller-owned properties).

Bilderberg spokesmen say that Bilderberg is strictly a one-man thing, operated by Prince Bernhard without any permanent membership or even any permanent organizational structure. This is simply not true. The permanent Bilderberg secretariat is at 1 Smidswater, The Hague, The Netherlands. The secretary general for Europe is Ernst H. van der Beugel, professor of International Relations, Leiden University. And as previously stated, Joseph E. Johnson is secretary general for the U.S. In addition, a permanent international steering committee nominates the "participants" for each conference to Prince Bernhard, who issues invitations. And the "participants" (not delegates) are picked because of their involvement in the programs on the agenda of the meeting. The 10 U.S. members on the international steering committee picked the 30 American participants in the recent Woodstock session.

When Mrs. Dori Parker, assistant to American Secretary General Johnson, was asked the names of the American members of the steering committee, she replied, "I am not supposed to give out that information." Not only are meetings held under heavier security than the U.S. National Security Council, but even the identity of the members of the international steering committee is secret. However, *Liberty Lowdown* was able to ferret out the names of the following members of the international Bilderberg committee: David Rockefeller, chairman, Chase Manhattan Bank; George W. Ball, managing director, Lehman Brothers, Inc.; Arthur H. Dean, senior partner, Sullivan & Cromwell; Gabriel Hauge, chairman, Manufacturers Hanover Trust Co.; Henry J. Heinz, chairman, H. J. Heinz Co.; Thomas L. Hughes, president, Carnegie Endowment for International Peace; Howard Stein, president, Dreyfus Corp.; Emilio G. Collado, executive vice president, Standard Oil Co. (N.J.); Robert O. Anderson, chairman, Atlantic Richfield Co. and chairman, Aspen Institute for Humanistic Studies; and Ian K. MacGregor, chairman, American Metal Climax.

The Bilderberg steering committee members generally nominate each other as conference participants—but not always. How the original members of this autocracy are chosen is not only a secret but how they are replaced is a secret. And even the total membership of the international steering committee is also a secret. Why do great international financiers and noted educators want to conceal the fact that they are Bilderberg committeemen? The Bilderberger operations appear more like the clandestine meetings of the dreaded Mafia or the murderous Zionist Stern Gang than the harmless get-together of world leaders for a frank discussion of international affairs. Phyllis Schlafly, in *A Choice Not an Echo*, called the group an example of a "little clique of powerful men who meet secretly and plan events that appear to 'just happen.'"

The noted British authority on internationalist groups, A. K. Chesterton, in *The New Unhappy Lords*, asserts, "If the facts concerning the Royal Institute of International Affairs and the Council on Foreign Relations be accepted, it will be seen that the proper study of political mankind is the study of power elites, without which nothing that happens can be understood. These elites, preferring to work in private, are rarely found posed for photographers, and their influence upon events has therefore to be deduced from what is known of the agencies they employ. There are dozens of such agencies. Financial support received from one or the other or all three Big American foundations—Rockefeller, Carnegie, and Ford—provides an infallible means of recognizing them. One of the most blatant of these agencies, despite its adoption of a secret society technique, is the Bilderberg group. Strange, is it not, that Prince Bernhard should be the 'front' man for a powerful left-wing secret society? . . ."

IT'S OFFICIAL—THE AMERICAN ROLE 'CHANGES'

Only two topics were on the Woodstock agenda: (1) The contribution of business in dealing with current problems of social instability (2) The possibility of a change of the American role in the world and its consequences. The first subject was scheduled for only the first day, and Dr. Kissinger apparently did not consider it very important, because he skipped it. The next morning he presented his "working paper." Discussion on his proposals lasted all day, continuing to a cocktail party hosted by David Rockefeller. This "working paper" was the most significant presentation at the closed-door parley, according to informed sources. In fact, it was a briefing of U.S. estimates and intentions regarding its "changing global role."

Ironically, only one U.S. Senator participated, Adlai Stevenson III (D–Ill.), and four Congressmen: Donald Fraser (D.F.L.-Minn.), Peter H. B. Frelinghuysen (R–N.J.), Henry S. Reuss (D–Wis.), and Donald W. Riegle (R–Mich.). Frelinghuysen and Reuss belong to the CFR.

Gabriel Hauge also presented a working paper. Incidentally, when he was a White House aide, he was known as the "man who tells Ike what to think," according to the *Wall Street Journal*. A forerunner of Bundy, Rostow, and Kissinger, he held the status of American foreign policy arbiter. Now he is in a strategic spot in the power elite as chairman of Manufacturers Hanover Trust, a bank with close ties with the Zionist international banking firm of Dillon, Read & Co. Manufacturers Hanover has long been controlled by Horace Flanigan, father of Pete Flanigan, vice president of Dillon Read, now on leave while serving as a top Nixon aide. The Flanigans and Dillons have joint oil investments tied to Union Oil and Standard Oil of California; the Dillon Read firm also has close tie-ins with the Rockefeller and Standard Oil of New Jersey.

PEACE CARNEGIE STYLE

The notorious Alger Hiss left his high State Department post to become president of the Carnegie Endowment for International Peace. A few years ago, the group prepared a plan for a U.N.-sponsored military operation against South Africa. The U.S. and Soviet air forces were to cover the invasion of the republic by national forces from a number of countries. When the plan leaked prematurely before the liberals could "condition" public sentiment, a furor arose.

Three years ago Henry Kissinger and Charles W. Yost, then Nixon's ambassador to the U.N., helped prepare the *Future of the Strategic Arms Race: Options for the Seventies*. The report, published by the Carnegie Endowment, advocated nuclear power "sufficiency" rather than "superiority."

In a campaign speech on Oct. 24, 1968, Nixon declared his intention to "restore our objective of clear-cut military" superiority over the Soviet Union. This strong pro-American statement doubtless helped Nixon get votes. But a week after taking office, the Carnegie Report was issued, and Nixon has since advocated nuclear "sufficiency."

Perhaps it is more than coincidental that only a few days after the Bilderbergers met at Woodstock to make it official that the U.S. was about to experience a "change in the American role" in the world, billions of dollars were rushed to Germany to profit from American dollar devaluation, one aspect of this Nation's waning power and prestige under internationalistic leadership.

Americans aware of the sinister group that met at Woodstock in April will have no difficulty in identifying those responsible for their national troubles.

[From the Union Leader Corp., Nov. 12, 1971]

FREEZE WAS "LEAKED" AT VERMONT TALKS: THOSE IN KNOW MADE BILLIONS, SOURCE ASSERTS

(Editor's Note—The following exclusive article is the result of a six-month investigation by reporter Egan.)

(By Arthur C. Egan, Jr.)

WASHINGTON.—At a top-secret conference held last April in Woodstock, Vt., a presidential advisor leaked information on the proposed economic freeze to a select group of national and international figures enabling them, according to a Washington source, to profit to the tune of $15 to $20 billion.

The same presidential advisor also revealed President Nixon's plans to visit Red China, which further enabled these figures to make future commercial plans for Mainland China.

Herbert Klein, White House communications director, however, not only denies there was a "leak" but says he "never found evidence such a meeting took place."

From a source within the conference itself, it was learned by the Union Leader that the main topic of discussion of the secret conference was "the radical change of the American role in world affairs and the subsequent consequences."

The informant said the proposed visit to China was discussed but said it was done "very discreetly" with a favored few of those invited to attend the conference.

In the past two weeks, one U.S. senator and four members of the House of Representatives not only confirmed that such a meeting took place, but admitted they participated in the top secret conference.

Also, the U. S. Department of State confirmed that it worked in conjunction with the Vermont State Police, in making security arrangements for "at least 90 foreign and domestic figures."

The conference in question was held April 22–25 at the Woodstock Inn, owned by the Rockefeller family. The guest list is reported by a very reliable source as reading like a summit conference of national and international bankers and business leaders.

Some of those attending the four-day conference were presidential advisor Henry Kissinger, Prime Minister Pierre Trudeau of Canada; Robert Bourassa, prime minister of Quebec; Prince Bernhard of the Netherlands; Baron Edmond de Rothschild of France; U.S. Sen. Adlai Stevenson 3rd, and Lt. Gen. John W. Vogt, director of the Joint Chiefs of Staff.

The secret sessions were hosted by David Rockweller, chairman of the board of the Chase Manhattan Bank and Joseph E. Johnson, president of the Carnegie Endowment for International Peace.

Johnson is known for his close friendship with Alger Hiss, convicted of perjury for denying he passed secret U.S. government information to the Communists.

During a meeting with executives and editors of the Manchester Union Leader last July, Klein was asked if Dr. Kissinger attended the Woodstock meeting as "an official representative of the U.S. government."

Klein denied at that time of knowing about Dr. Kissinger's involvement in the secret conference but promised he would "check very thoroughly into the matter" and relay his findings to the Manchester publication. His comments last week were in reply to repeated inquiries from this newspaper.

The White House aide expressed amazement when informed that a top security agent of the State Department was instructed by his Washington superiors to answer questions concerning the department's role in the unpublicized conference.

John W. Richardson, special agent for the State Department said he conferred with local and Vermont State Police and government agencies in connection with the security arrangements for the visiting dignitaries.

Richardson said although the State Department did not sponsor the highly secret four-day session "they were concerned with security because of the distinguished national and world leaders involved."

The State Department agent commented, "Naturally our department wished to insure the safety and privacy of those taking part in the conference."

Richardson said it was his understanding that both the Ford and Rockefeller Foundations underwrote the expenses for all those participating in the conference.

Maj. Glenn Davis of the Vermont State Police confirmed he met with Richardson and planned part of the security. "It was a hairy scene," said Davis, who explained, "No one seemed to know just who was in charge of what."

Davis said his department supplied 30 men, all in plain clothes and in unmarked police vehicles. "We were instructed we were to have 'no physical contact' with anyone attending the conference," recalled Davis.

The State Police head said he was "advised there were numbers of Secret Service agents in the area as well as FBI agents. I heard there was a private, armed, security force drawn in tight around the inn," said Davis.

It was admitted by the State Department that 12 foreign countries and the United States had representatives at the top secret sessions and that all expenses, including air travel fare, was picked up by the two tax-exempt foundations.

At the conference were representatives of the United States, England, France, Italy, Turkey, Switzerland, Germany, Belgium, Norway, Sweden, Denmark, Finland and the Netherlands.

Besides U.S. Sen. Stevenson, the four members of Congress who were present, by their own admission were Henry S. Reuss (D) of Wisconsin; Donald W. Reigle, Jr. (R) of Michigan; Donald Frazer (D) of Minnesota and Peter H. B. Frelinghuysen.

Neither Sen. Stevenson nor the four congressmen would talk personally with this reporter but answered questions through their administrative assistants.

Harold Levy, spokesman for Sen. Stevenson, said the Illinois senator arrived at the conference Thursday night, April 22, and remained for the entire conference. Stevenson reached the area by commercial aircraft to Boston and commuter plane to Woodstock. On the return trip the senator rented a car in Woodstock and drove to Boston.

Levy was very evasive about the object of the four-day meeting. However he did admit "international policies" were among the topics of discussion and said the senator was an "invited guest."

Although Levy promised to return a call with additional information he has failed, over a two-week period, to reveal any more than in his first conversation.

William T. Kendall, assistant to Rep. Frelinghuysen, said this was an "off-the-record" conference and said any agreement reached at the Woodstock sessions could not be binding on the government.

Kendall would only admit that "international and monetary policies" were discussed. He cut off all questions by saying it was a "top secret meeting" and was not to be discussed generally.

Mrs. Arvonne Frazer, wife of Rep. Frazer, refused to discuss the nature of the conference, saying, "It was a highly secret affair and no one was to reveal what transpired at Woodstock."

However, Mrs. Frazer said her husband paid his own way to and from the conference, but disclosed that Rep. Frelinghuysen had returned to Washington "with a high general from the Pentagon." Mrs. Frazer refused to reveal the general's name, saying, "Get it from the New Jersey congressman."

A second call last week to Frelinghuysen's office drew from the congressman's assistant that Lt. Gen. John W. Vogt was the Pentagon officer involved. The member of the Joint Chiefs of Staff flew his personal plane into the Lebanon, N.H., airport and motored to the Woodstock meeting.

Spokesmen for Reuss and Reigle refused to discuss the nature of the Woodstock conference saying "it was a private affair only for invited guests."

Both administrative assistants stressed the fact that the "theme" of the conference was "absolute secrecy" and by their acceptance of the invitation to attend, the two congressmen adhered to that element.

It was learned, however, that two top American newspaper executives were among those present; Osborn Elliott, editor-in-chief of Newsweek, and Bill Moyers, formerly of Newsday.

A month-long check of these publications revealed that not one word was ever printed concerning the Woodstock conference.

Because of the extreme secrecy connected with the Woodstock conference, the Manchester Union Leader was unable, after six months, to obtain a complete guest list.

However, from the source within the conference, and from other sources in Washington, a partial list of those attending the conference is printed below. These are in addition to the other important leaders already named earlier.

From the United States:

—Robert Anderson, chairman of the board. Atlantic Richfield Corp.
—Cyrus Vance, former undersecretary of defense.
—Howard Stein, president, Dreyfus Investment Corp.
—Gabriel Hauge, board chairman, Manufacturers Hanover Trust Co.
—Henry J. Heinz, chairman of the Board, H. J. Heinz Co.
—George W. Bell, an officer of Lehman Brothers, Inc.
—John D. Rockefeller 4th, secretary of state of West Virginia.
—Karl Bendelsen, board chairman, U.S. Plywood Corp. and Champion Papers, Inc.

The Canadian representatives were Paul H. Leman, president of the Aluminum Company of Canada; Donald MacDonald, minister of defense; and Anthony Griffin, president of the Triarch Corp.

From Belgium came Baron Lambert, board chairman of the Banque Lambert; and Henri Simonet, a member of the Belgian Parliament.

Three representatives from Germany were present along with a number of other high German officials. Those known to be at the conference were Gerhard

Schroeder, former minister of foreign affairs; Egon Bahr, state secretary of the Federal Chancellery; and Hans Merkle, board chairman of the Robert Bosch Co.

Svend O. Sorenson, general manager of the Bank of Denmark, was the only known representative from his country.

From Italy came two known visitors. Guiseppe Bordogna, treasurer of the Federation of Italian Industries; and Guiseppe Glisenti, chairman of the Confederation of State-Owned Industries.

From Norway came two ship owners and industrialists, Leif Heogh and Greig Tidemand.

Also attending from France was Wilfred Baumgartner, honorary governor of the Bank of France.

From England came two members of Parliament, Sir Frederic Bennet and George Thomson. Also from England were Ronald Grierson, board chairman of the Orion Bank, Ltd.; Reginald Maulding, secretary of home affairs, and Sir Eric Roll, a director in the S. G. Warburg Co.

The Turkish representative's name was unknown but he was said to be one of that country's delegates to the North Atlantic Treaty Organization (NATO).

Mr. BASKIR. Thank you.

Your statement discusses at least two examples of what I suppose could be called press bias, or press censorship itself. One is the conference in Vermont which you mentioned, and the other was with respect to the trial of congressman Dowdy. I wonder if you are in general agreement with the statement of Miss Efron with respect to television broadcasting, that it is not entirely objective, it does not give all points of view or fair representation on the public air waves?

Mr. RICHARDSON. Mr. Bartell would have been a much better witness on this subject, but essentially, we are in agreement with her conclusions. I noticed with a great deal of care the colloquy between you and the first witness today as to whether it was adequate, whether her methods were right and so forth. I do not know and I must admit that the extent of my personal knowledge of her testimony is confined to the testimony and not to the book. But if her testimony reflects what is in the book, I would say that we are in general agreement that her conclusions are correct. Our personal experience confirms her conclusions.

Mr. BASKIR. Your personal experience is that the press and broadcasting is biased?

Mr. RICHARDSON. Is biased.

Mr. BASKIR. Whether or not you agree with or even care to comment on her methodology?

Mr. RICHARDSON. Right, and I would add for those members of the press that are still here, if any, we would still defend their right to be biased.

Mr. BASKIR. That is the point I wanted to get to, because the criticism from both ends of the political spectrum, the very conservative and the very liberal——

Mr. RICHARDSON. We are in the middle.

Mr. BASKIR. From other points of view at both ends of the spectrum, let me say, that the fourth estate tends to give exposure to a very narrow segment of that spectrum. If you look at what is popularly called liberal or conservative or radical comments in the press, and I mean both newspapers and broadcasting, the exposure seems to be more to the middle ground and the points of view on either end of the spectrum, widely differing from the middle ground.

are not found very often. I wonder if it is your experience that the kinds of points of view that the Liberty Lobby expresses are given, first, as much exposure as you like, and I can anticipate your answer to that question may be no, or as much special exposure as you think they ought to to be fair?

Mr. **Richardson**. Preliminarily, let me answer that question by saying that 2 years ago, in testifying before this same subcommittee, and I believe you were also sitting in the approximate position relative to the chairman, we testified on quite a controversial subject involving the Extension of Voting Rights Act. I believe that after our testimony, even Senator Bayh, who is not known for sharing views similar to Liberty Lobby's, was impressed by the fact that our views are not that far away from his. I think that the misrepresentation, if there is such—and I think there is—of our position, our Liberty Lobby position—lies in the fact that it is not understood, rather than that they do not give it. What is given in the papers are the peripheral fringes or things that do not exist. I think if you were to take a look at the testimony we present here and to other committees, you will find that we are definitely within the mainstream of what is normally reported but is not. And I attribute this phenomenon to the fact that the organizational institution of Liberty Lobby has been characterized by the press in a certain way and that automatically turns them off. They do not ever reach the substance of the testimony or of the position stated, as far as I can see.

I do not want to be unduly critical, but I believe that to be the truth.

Mr. **Baskir**. Despite your criticisms of press coverage, nonetheless, you seem to agree with Miss Efron and with Monroe that the solution to improving the press does not lie in Government helping the press to be better?

Mr. **Richardson**. That is correct.

Mr. **Baskir**. But quite the opposite?

Mr. **Richardson**. Every time the Government tries to help, it gets worse, in our opinion.

Mr. **Baskir**. There have been witnesses before and there will be some more tomorrow who view television as one of the most important, if not the most important, means by which ideas are communicated. They feel that broadcasting has a public responsibility as well as a public right to make sure that all points of view are given an opportunity to be presented. This is generally called the right of access, which the Court has already expressed itself on. Their feeling and some of their positions are to the effect that there ought to be an enforceable right, either through the FCC or through the courts, or perhaps some other mechanism, to insure that persons with different points of view, be allowed access to broadcasting time, because in their opinion, unpopular new ideas are just not given access.

In the early days, before it was generally thought that cigarettes were dangerous, people with that point of view could not get on. Now, of course, it looks like it has turned full circle, and if you think cigarettes are not so bad, you cannot get on.

In other words, as a solution to this problem in all areas of public interest, they feel there ought to be an enforceable right to get on television to get their view across to the public. I wonder what you feel about that position?

Mr. RICHARDSON. No; I would oppose an enforceable right if it is enforced by the Government. I think that Miss Efron's solution, which is our solution, is far better: Make the establishment of new stations, open it up to a greater degree of freedom of enterprise and allow more people to air their views on different stations by creating more competition. I think a great deal of her testimony was to the effect that you have a near monopoly with your television media, and it is her view, and I think we share the view, that if this monopoly could be, in a sense, broken up and greater competition allowed. the problem you pose would solve itself. I feel definitely that for a Government to give, for example, Liberty Lobby, a right to be on a particular show simply because an opposing point is there does not solve the problem.

Mr. BASKIR. Let me give you a hypothetical case. Baring that solution of opening up full competition, consider a situation in which the use of large automobiles, new highways, and high powered gasoline. are constantly being pushed on television through advertising. There is a loud but perhaps small—it could even be large—point of view in the country that we ought to either do away with gasoline powered engines because of the dangers to the atmosphere or go to electric automobiles or even ban automobiles throughout most parts of the country. Because of the economic power of the petroleum industry and the automobile companies, so the argument goes, you cannot make any money—you could not make it economically feasible, you would lose all your advertising—if you gave vent to these other opinions. So as a practical matter, it would be impossible to air points of view which attack the source of revenue—that is to say, advertising—of television stations. How could you guarantee that you would get all points of view across if you are faced with this economic reality which squeezes out the second point of view?

Mr. Richardson. Do we have now in your hypothetical case the absence of Governmental coercion?

Mr. BASKIR. Well, the solution imposed is to enforce that right of access by making sure that opposing points are on view.

Mr. RICHARDSON. We oppose the idea that the Government should enforce the right or to grant a right which the disadvantaged could then enforce. We rely more upon the concept that your free enterprise system will solve the problem on its own.

For example, in your automobile case that you just mentioned, it is true that the advertising tends to be overwhelmingly in favor of larger cars and more horsepower, greater consumption of gasoline. But I also note that the importation of small foreign cars steadily increases every year to the point now that Detroit motor manufacturers are forced to build competitive automobiles. In other words, the population at large either have not been listening or watching those TV commercials or else they are voting with their pocketbook. Whatever it is, they have indicated a contrary view.

Another good example of the same point. I do not see very much on TV or read, until very recently, much in the papers regarding the busing situation of school children. Even Senator Proxmire found and published in one of his newsletters that some 80-odd percent of the people polled by him in his State were opposed to forced busing. The media, however, would indicate up until recently that the opposition to forced busing was reasonably negligible. However, every poll that comes through these days shows somewhere near 80 percent opposed to it.

By force of numbers—I do not know where people come up with the opinion, but by sheer force of numbers, the media is now forced to present evidence to the contrary. This morning in the newspaper, we have two or three pages filled with mostly commentators and news stories, but we are beginning finally to see opposing points of view. This was done without, in effect, Government coercion. And we would prefer it that way.

Mr. **Baskir.** You would rather rely on the free play of political and economic and social forces to take care of bias, inevitable or otherwise, rather than have the Government stand as a traffic cop on ideas as well as on frequency?

Mr. **Richardson.** Right. I think this traffic cop concept is one that does a great deal of damage to the First Amendment by the Government.

Mr. **Baskir.** A traffic cop could say that two cars could not occupy the same place at the same time, but could not tell you in this particular case how fast you can drive or how recklessly you can drive?

Mr. **Richardson.** Right.

Mr. **Ebner.** You have made it plain that the Liberty Lobby is against any Government intervention in the exercise of the free press. Do you feel that criticism of the press expressed by a public official such as the Vice President amounts to Government intervention of the type that you disapprove of?

Mr. **Richardson.** I assume in giving my answer that you have reference to Vice President Agnew's remarks, among others.

Mr. **Ebner.** Among others, that is correct.

Mr. **Richardson.** It is my understanding, and I do not have the data at hand, but it is my understanding that prior to his initial criticism, there had been self-criticism by the TV network people on their own in TV Guide to the effect that there was a great deal of bias on the behalf of the press. Not 2 or 3 months subsequent to that time, the Vice President made his initial charge, and miraculously, the press took a different viewpoint.

I do not feel, although there is no Liberty Lobby mandate on it, but answering this personally, I do not feel that his views represent Government interference. He is entitled to personal opinions. I think that there is probably room, from some of the remarks, but not the bulk of them—there may be—I notice today there were two or three instances picked where if you were a newsman, you would feel that you had been coerced by the Government. I would not argue the point in those one or two cases. Let's give them that as a debating point. But on the bulk of his remarks, I do not believe that even the news media would consider them to be a form of coercion by the Government.

Mr. **Ebner.** I appreciate that answer, because the subcommittee has heard testimony on several occasions which implies, if it does not state, that there is a form of Government conspiracy that now exists on the part of this administration to manage the news or to stifle the free expression guaranteed by the First Amendment.

Mr. RICHARDSON. That may be. We quoted in here management of the news by the Kennedy administration and we will not pick any favorites politically. It can just as easily be managed by the Nixon administration. But the instance of the Vice President's criticism is not an example of such management, in our opinion.

Mr. EBNER. Well, that is what makes your answer interesting, because the Vice President has been used as an example, an overt example of that sort of conspiracy.

Thank you.

Mr. BASKIR. One might, from the two examples discussed here from the Kennedy administration and the Nixon administration, or at least the charges, perhaps come to the general conclusion that Government's efforts to make sure the news is all favorable to it and not all disfavorable transcends party lines and administrations and is an inherent part of Government; and that indeed, perhaps the First Amendment, recognizing that fact, may be wiser than we are by making sure that we keep Government out of it as much as possible.

Mr. RICHARDSON. I would certainly concur with your injection, because I worked for the Government for 5 years as an attorney, and I think administrations come and go but the policy of the Government never changes.

Mr. BASKIR. And the desire of bureaucrats not to be criticized is—

Mr. RICHARDSON. Constant.

Mr. BASKIR. Constant and never changing.

Mr. RICHARDSON. Never changing.

Mr. BASKER. We appreciate your coming, Mr. Richardson. Again let me apologize on behalf of the Senator for his not being here.

We will recess until tomorrow at 10 o'clock and tomorrow we will meet in room 318 in the Old Senate Office Building.

(Whereupon, at 12:15 p.m., the subcommittee was recessed until Thursday, February 17, 1972, at 10 a.m.)

FREEDOM OF THE PRESS

THURSDAY, FEBRUARY 17, 1972

U.S. Senate,
Subcommitte on Constitutional Rights of the
Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:50 a.m., in room S-407, the Capitol Office Building, Senator Sam J. Ervin, Jr. (chairman), presiding.

Present: Senator Ervin, (presiding).

Also present: Lawrence M. Baskir, Chief Counsel and Staff Director, and William Pursley, Counsel; and Stanley Ebner, Minority Counsel.

Senator Ervin. The subcommittee will come to order.

Counsel will call the first witness.

Mr. Baskir. Mr. Chairman, our first witness this morning was to have been Prof. James Q. Wilson of Harvard University and a member of the Sloan Commission on Cable Television. Professor Wilson can't come today because of the death of a close friend, but he will submit a statement for the record.

Senator Ervin. I am sorry he cannot be here and for the circumstances that keep him from being here, but we will receive his statement and include it in the appendix.

Mr. Baskir. Our first witness this morning is the Reverend Everett C. Parker of the United Church of Christ.

Senator Ervin. Reverend Parker, I am delighted to welcome you to the subcommittee and I want to express to you our appreciation for your willingness to come and give us the benefit of your views on what I consider one of the most important parts of our Constitution.

STATEMENT OF REV. EVERETT PARKER, DIRECTOR OF THE OFFICE OF COMMUNICATION, UNITED CHURCH OF CHRIST

Reverend Parker. Thank you, sir.

Mr. Chairman, my name, as you have heard, is Everett C. Parker and I am director of the Office of Communication of the United Church of Christ. I have a rather lengthy testimony here which I would like to have in the record, but I will only deal with the highlights in it for about 15 minutes.

My qualifications are on the first page of my testimony. I would like to say that the Office of Communication for many years has conducted programs to encourage freedom of speech in the United

States and particularly for those minorities whose ideas and cultures have not received adequate access to the mass media.

We initiated the landmark court proceedings which established the right of citizens to participate in license renewal proceedings before the Federal Communications Commission, and we have been called upon by citizen coalitions in more than 100 cities to assist them in evaluating and improving broadcasting services and especially in gaining access to the air.

Few aspects of American life are as universally revered as the guarantees of freedom of religion, speech, and the press that are expressed in the First Amendment. The United States was founded on these guarantees and virtually all its democratic processes are based on their existence.

Few Americans are willing to tamper with the First Amendment. It has, in a manner of speaking, become sacred to us. But like so many other sacred symbols, we tend to accept it unthinkingly and without trying to understand its origins or its basic concepts as they pertain to our own time.

The First Amendment, of course, was conceived and adopted in an era when the technology of mass communication was undreamed of. Interestingly, Prof. Erik Barnouw has pointed out in *Mass Communication*, that the American people in the 1790's got their news largely by word of mouth. Few could read. The profession of reporting was unknown. The total subscription of the entire national output of the 35 so-called newspapers has been estimated at well under 20,000. Even half a century later, with the huge advance of the industrial revolution and the introduction of steam power, the biggest newspaper press could turn out only 200 copies an hour—one side at a time. Any one-man printshop could start a newspaper; with one assistant, the printer moved into the big-time.

Clearly, there are major differences in the media today when it is not unusual to reach 50 million persons instantaneously, and such vast investments are required that monopoly ranks equally with regulation as a threat to our basic freedoms. Suppression of news by our economic masters, by giant corporate communication conglomerates, looms as a menace to our freedom equal to suppression by a governmental Big Brother.

Lest I be suspected of some gross heresy, I want hastily to get into the record the fact that there already is substantial support for this view in opinions of the U.S. Supreme Court. Religious groups in this country have been expressing the view for some time that the guarantee of the First Amendment, especially for broadcasting, is primarily directed toward assuring the public of right of access to information, rather than toward the protection of the media. Most often, of course, the rights of both are intertwined; but when they conflict, it is the right of the public which is paramount.

This was our own argument, as *amicus curiae* in the *Red Lion* case, and Mr. Justice White, speaking for a unanimous Supreme Court, agreed: "The people as a whole retain their interest in free speech by radio, and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."

Admittedly and obviously, there are differences between the electronic media and the printed word. Equally obvious under some monopolistic conditions there are parallels.

What we are interested in, Mr. Chairman, is not any cutting down of freedom of expression, either by government or anybody else, but in administering our present laws to afford much wider freedom of expression. In this brief presentation, I shall limit myself to four aspects of the First Amendment application: The right of access. The Fairness Doctrine. The regulation of broadcasting by the Federal Communications Commission. Finally, and very briefly, newspapers.

Access—The Supreme Court in conducting the *Red Lion* decision upholding the Fairness Doctrine stated:

> In view of the prevalence of scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold that the regulations and ruling at issue here are both authorized by statute and constitutional.

The Court thus recognized what we believe is the most urgent need in broadcasting today—government protection of the right of holders of minority views to have access to present them.

As a practical matter, the freedom to disseminate and receive information is empty indeed unless it takes place in the media of mass communication. The soapbox orator in Grant Park is no match for the *Chicago Tribune*. All too often, publishers and broadcasters concern themselves only with their own rights to publish or broadcast without giving adequate recognition to the limitations which are imposed upon those who, in a modern technological and economic era, have no practical means of disseminating their own views widely and adequately to a mass audience. There must be a balance.

The mass media pay little attention to the concern, for example, of the underprivileged until their needs are expressed in forceful protests. Persons holding minority views are finding it necessary to make their demonstrations ever more forceful and more illegal to sustain media interest. No one should have to break the law to be heard.

There is no doubt in my mind that some of this inattention is simply an unwitting injury to the underprivileged without malice on the part of the media. Without members of the underprivileged among the directors, or officers, or editors, or, often, of staff, how are they to know or understand the problems of the dispossessed?

Our interpretation of access is that the media themselves have an obligation to seek out and give voice to all significant viewpoints reflected in the area of service. These opinions cannot simply be summarized by journalists; to be understood they must be presented by the partisans themselves. A means should be found to allow significant groups in the community to participate in selecting issues for decision. This approach does not involve the government in evaluating program content—always a difficult First Amendment matter—but only in multiplying the voices and ideas which may be heard. The media should also employ minority newsmen and take advantage of their insights to help identify issues of importance to minority groups and develop lines of communication with spokesmen for them.

And Senator, since I know this issue will be raised about newsmen, I also mean newswomen. They are a minority in the news field.

Now, the Fairness Doctrine. It is difficult to separate the question of access from a consideration of the Fairness Doctrine because, in many ways, they are intertwined. Perhaps the major reason for the current distinction is the FCC's failure to enforce the doctrine's positive requirement that broadcasters deal with all significant issues and viewpoints.

The FCC's Fairness Doctrine refers to television and radio as a medium of freedom of speech and freedom of expression for the people of the Nation as a whole. It calls upon broadcasters to make sufficient time available for full discussion and states that this duty extends to all subjects of substantial importance to the community coming within the scope of free discussion under the First Amendment . . .

Yet, even today, The FCC routinely refuses to enforce this affirmative obligation to cover all significant issues and viewpoints. Enforcement is limited to insuring that all sides are covered on those selected issues which the station chooses to raise.

The Office of Communication finds nothing wrong with the fairness doctrine and sees no need for any changes in it. Stricter enforcement rather than watering down is needed.

Networks, for instance, long have recognized their special responsibility for fairness. For the most part, however, they have approached this responsibility by attempting to maintain high standards of objectivity rather than by presenting a diversity of viewpoints.

Networks endorse no candidates, take few editorial positions and generally avoid commentary. Many broadcast editorials deal with subjects which already enjoy broad acceptance and rarely concern heated controversy. There are probably more controversial issues and viewpoints presented each day in the Lancaster, Pa., *Intelligencer Journal*, North Carolina's *Greensboro News*, the *Los Angeles Times*, and the *New York Times* than the three networks present in a year.

The daily editorial positions of these newspapers are more blunt and forthright than the occasional broadcast documentary like "The Selling of the Pentagon" or "Hunger in America." Such documentaries probably seem more startling to the public because it is so unaccustomed to their presentation. Although viewpoints are often balanced in television documentaries, they represent a narrow range of opinion and many views are unrepresented. Worse yet, the search for objectivity often results in blandness. Small wonder that such programs have low ratings. Audiences want to hear the arguments of the partisans and these spokesmen would like to make their own cases.

We are not impressed with the cry of some broadcasters that criticism of their programs "chills" their freedom of speech. Broadcast licensees are public trustees and it is appropriate that they be held accountable by the American people. We deem it healthy that citizens —even public officials—speak out when they regard the performance of broadcasters as something less than perfect. We see nothing wrong with political parties or public officials filing fairness complaints.

Broadcast licensees stand astride our most important channels of communication. They control an indispensable instrument of our democratic society. They must be subject to the checks and balances provided by law. A broadcasting station should not be regarded solely as a vehicle of expression for its owner. It is an outlet of expression for the people it is licensed to serve. The responsibility for an accounting is inherent in the licensee's acceptance of his license. He must not "chill" the freedom of expression of the people he has agreed to serve.

When one reads *Broadcasting Magazine* or listens to broadcasting industry lobbyists, one gets the impression that broadcasters are overwhelmed by fairness inquiries.

This view is irrelevant and misleading. Assuredly, the FCC receives thousands of letters from the general public complaining about one thing or another. But the overwhelming majority of these writers receive a form reply and there the matter ends. The station or network is not even asked to comment. Apparently, the FCC makes no effort even to make a statistical evaluation of these letters to ascertain if the complaints fall into patterns which point to important lapses in broadcast services.

Only in rare instances is a complaint specific and presents such a case that the station may be asked to respond to the allegations made in the complaint. Even in these cases the matter usually ends with the station's reply. It is the most infrequent exception when a fairness complaint is decided in favor of a public complainant.

When one compares the dozen or so successful fairness complaints with the over 8,000 licensed stations, the burden on the broadcasting industry is seen in more meaningful perspective.

Before leaving the subject of the Fairness Doctrine, I should like to touch briefly on four points:

1. Among suggestions made recently by persons close to the broadcasting industry is one that the resolution of all fairness complaints be deferred to the end of the license term as part of the review of the overall station performance. This proposal overlooks the fact that most fairness complaints involve the timely discussion of urgent public questions. Fairness after the election is over and the votes are counted is meaningless. Administrative due process requires swift resolution of complaints to protect the complainant, the broadcaster and the public's right to be informed.

2. Regulation of programming is properly directed at increasing diversity of program content, not at censoring or inhibiting it. No one could or should be penalized for broadcasting any idea or opinion. The remedy for unfair utterances is the right to present opposing viewpoints, not the avoidance of debate by prior restraint of the initial statement, either by the broadcaster or the Government. No subject matter is "too controversial."

3. Editorial judgment is inevitable when deciding what issues will be discussed. An editor, like a judge, brings subjective value to decisionmaking. We should not tolerate tampering with the philosophy or subjective judgment of either the editor or the judge, but neither should we curb efforts to analyze, criticize or even correct these judgments.

Such evaluation, however, must be open and on the record. Subtle efforts to intimidate through grand jury subpenas, threats against commercial interests, demands for outtakes, fishing expeditions into confidential records and news sources are not to be tolerated.

4. The FCC must simplify the system for filing fairness complaints and must afford the public access to program records of material already broadcast by television and radio stations.

One of the reasons why it is so difficult for a public complaint to be sustained is the total secrecy of broadcast records. Program logs should be open to the inspection of the public.

Now, regulation by the FCC—All discussions of freedom of speech and press, access and fairness eventually lead to the question: Who is to decide?

The broadcaster is convinced that he alone must determine what the public will hear or see. The partisan is equally convinced that he alone can speak for his cause and demands access to do so.

Obviously, someone must decide and, in broadcasting, the task goes to the Federal Communications Commission. If the agency acts arbitrarily, its decisions may be reviewed by the courts. The FCC is an instrument of the Congress and directly responsible to it. We seem to forget that in modern times. The Congress, therefore, can deal with patterns of tyrannical judgment (if they should occur) either by abolishing the agency or changing the laws under which it functions. Similarly, the President, by his appointments, and the Congress by reviewing those appointments, have a further check on the Commission's possible abuse of power.

As the United States Supreme Court has held, protection of the public right to know must come before safeguarding the absolute power of media owners. The real question before this Senate committee is not who shall make the decisions to insure freedom of speech on the air but what to do about a supine agency which refuses to take the actions with which it has been charged by the Congress.

For more than 40 years, the Federal Communications Commission has resolutely refused to exercise its powers to decide whether or not a broadcast licensee has been acting in the public interest, convenience or necessity sufficiently well to warrant a renewal of its license. Time and again it has refused to regulate on the extraordinary grounds that it has not the facilities, the energy, or the staff to do so. Time and again, the courts have returned cases to the Commission with acerbic instructions to take action.

The Commission has both the staff and the legal authority to regulate the broadcasting industry to insure public access and fairness in broadcasting. What it lacks is the desire to regulate. Again I repeat, the FCC is an instrument of the United States Congress and is directly responsible to it. So I ask how long will Congress allow its own creation to ignore the mandate of the Communications Act?

I wish to touch briefly on the question of access, balance, and fairness in newspapers and the other print media. My view is that the protection of the rights of the public to express itself applies to the print as well as to the electronic media. Although neither ruled directly on this question, both Judge Burger, as he was at the time of the *WLBT* case and Justice White in *Red Lion* seem to support this position.

No matter what the origin of a monopoly, the result is the same. Whether it is from the physical limitations of the broadcast spectrum, or (as in the case of newspapers) from a combination of economic factors, a serious impediment to speech is created. There is danger to free expression when a single individual or corporate conglomerate owns every newspaper of general circulation in a particular city. This problem is a complicated one, I am not prepared to offer a solution today, but I am convinced that one can, and should, be found.

I call upon the Congress to initiate a comprehensive study of the evils caused by communication monopolies and to find remedies which protect and enhance the First Amendment rights of all the people. I do not know what the results of such a study would be, I ask only that the right of the public to know be placed on at least a par with the media to speak.

I thank you for this opportunity to testify.

(The prepared statement of Rev. Everett Parker follows:)

STATEMENT OF REV. DR. EVERETT C. PARKER, NEW YORK CITY, DIRECTOR OF THE OFFICE OF COMMUNICATION, UNITED CHURCH OF CHRIST

My name is Everett C. Parker, I am Director of the Office of Communication of the United Church of Christ. I am also a member of the General Board of the National Council of the Churches of Christ in the U.S.A., which is composed of 32 churches with more than 42 million members, and I am chairman of the Broadcasting and Film Commission of the Council, but I do not speak for the Council here.

The United Church of Christ has a membership of two million. The Church was formed in 1957 through union of two historic Protestant denominations, the Congressional Christian Churches and the Evangelical and Reformed Church. The Office of Communication is charged by the Constitution and bylaws of the United Church to conduct a ministry in mass communication in its own name.

PROGRAMS OF THE OFFICE OF COMMUNICATION

For many years the Office of Communication has conducted programs to encourage freedom of expression in the United States, particularly for those minorities whose ideas and cultures have not received adequate access to the mass media.

We initiated the landmark proceeding which established the right of citizens to participate in broadcasting hearings before the Federal Communications Commission, called *Office of Communication of the United Church of Christ* v. *FCC*. We also participated as an *amicus* in the *Red-Lion* cases and in *United States* v. *Caldwell*.

We have issued a number of publications on citizen rights in broadcasting and more recently on the public interest aspects of cable television development.

We have been called upon by citizen coalitions—primarily representing minorities—in more than 100 cities to assist them to evaluate and improve broadcasting services. We have aided them (1) to gain access to the air; (2) to obtain program service to fulfill their needs, tastes and desires, and (3) to persuade broadcasters to employ minority personnel at all levels of staffing. The Office of Communication initiated the FCC rule making that resulted in Commission regulations requiring nondiscrimination in employment.

Few aspects of American life are as universally revered as the guarantees of freedom of religion, speech and press expressed in the First Amendment. The United States was founded on these guarantees. Virtually all of its democratic processes are based on their existence.

Few Americans would be willing to tamper with the First Amendment. It has, in a manner of speaking, become sacred to us. But like so many other "sacred" symbols, we tend to accept it unthinkingly and without trying to understand its origins or its basic concepts as they pertain to our own time.

The First Amendment, of course, was conceived and adopted in an era when the technology of mass communication was undreamed of. Professor Erik Barnouw has pointed out in *Mass Communication*, that the American people in the 1780's got their news largely by word of mouth. Few could read. The profession of reporting was unknown. The total subscription of the entire national output of the 35 so-called newspapers has been estimated at well under 20,000. Even half a century later, with the huge advances of the Industrial Revolution and the introduction of steam power, the biggest newspaper press could turn out only 200 copies an hour—one side at a time. Any one-man printshop could start a newspaper; with one assistant, the printer moved into the big-time.

Clearly there are major differences in the media today when it is not unusual to reach 50 million persons instantaneously, and such vast investments are required that monopoly ranks equally with regulation as a threat to our basic freedoms. Suppression of news by our economic masters, by giant corporate communication conglomerates, looms as a menace to our freedom equal to suppression by a governmental Big Brother.

Lest I be suspected of some gross heresy, I want hastily to get into the record the fact that there already is substantial support for this view in opinions of the United States Supreme Court. Religious groups in this country have been expressing the view for some time that the guarantee of the First Amendment, especially for broadcasting, is primarily directed toward assuring the public of right of access to information, rather than toward the protection of the media. Most often, of course, the rights of both are intertwined; but when they conflict, it is the right of the public which is paramount.

This was our own argument, as *amicus curiae* in the *Red Lion* case, and Mr. Justice White, speaking for a unanimous Supreme Court, agreed:

> [T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.* It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by Government itself or a private licensee.

Admittedly and obviously, there are differences between the electronic media and the printed word. Equally obviously, under some monopolistic conditions there are parallels. In this brief presentation, however, I shall limit myself to four aspects of First Amendment application: The right of access. The Fairness Doctrine. The regulation of broadcasting by the Federal Communications Commission. Finally, and very briefly, newspapers.

The Supreme Court in concluding the *Red Lion* decision upholding the Fairness Doctrine stated:

> In view of the prevalence of scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold that the regulations and ruling at issue here are both authorized by statute and constitutional.

The Court thus recognized what we believe is the most urgent need in broadcasting today—government protection of the right of holders of minority views to have access to present them.

As a practical matter, the freedom to disseminate and receive information is empty indeed unless it takes place in the media of mass communication. The soapbox orator in Grant Park is no match for the *Chicago Tribune.* All too often, publishers and broadcasters concern themselves only with their own rights to publish or broadcast without giving adequate recognition to the limitations which are imposed upon those who, in a modern technological and economic era, have no practical means of disseminating their own views widely and adequately to a mass audience. There must be a balance.

Most of the work of the Office of Communication has been directed toward bringing about improvements in the area of access to the media for minority views. The mass media pay little attention to the concerns, for example, of the underprivileged until their needs are expressed in forceful protests. Persons holding minority views are finding it necessary to make their demonstrations ever more forceful and more illegal to sustain media interest. No one should have to break the law to be heard. And, as we all know, media coverage of these staged events does not guarantee communication of the underlying issues or problems which gave rise to the demonstrations.

There is no doubt in my mind that some of this inattention is simply an unwitting injury to the underprivileged without malice on the part of the media. Without members of the underprivileged among the directors, or officers, or editors, or, often, of staff, how are they to know or understand the problems of the dispossessed? Even when a broadcaster does cover the problems of the slums and the ghettos, he seldom allows the poor to speak for themselves.

Our interpretation of access is that the media themselves have an obligation to seek out and give voice to all significant viewpoints reflected in the areas of service. These opinions cannot simply be summarized by journalists; to be understood they must be presented by the partisans themselves. A means should be found to allow significant groups in the community to participate in selecting issues for decision. This approach does not involve the government in evaluating program content—always a difficult First Amendment matter—but only in multiplying the voices and ideas which may be heard. The media should also employ minority newsmen and take advantage of their insights to help identify issues of importance to minority groups and develop lines of communication with spokesmen for them.

News and Public Affairs programming represents only a small percentage of the broadcaster's output. National and international news coverage largely is limited to material produced by the three television networks. Even the most important stories are reported in a few sentences. Such cursory treatment lacks depth and diversity. Television's multi-sensory impact increases the influence of every story and, without social or educational distinction, it reaches into every neighborhood and home. These realities make it essential that some means be found for improving access on network as well as local television for minority viewpoints.

THE FAIRNESS DOCTRINE

It is difficult to separate the question of access from a consideration of the Fairness Doctrine because, in many ways, they are intertwined. Perhaps the major reason for the current distinction is the FCC's failure to enforce the Doctrine's positive requirement that broadcasters deal with all significant issues and viewpoints.

The FCC's Fairness Doctrine refers to television and radio as a "medium of freedom of speech and freedom of expression for the people of the Nation as a whole." It calls upon broadcasters to "make sufficient time available for full discussion" and states that "this duty extends to all subjects of substantial importance to the community coming within the scope of free discussion under the First Amendment . . ."

Yet, even today, the FCC routinely refuses to enforce this affirmative obligation to cover all significant issues and viewpoints. Enforcement is limited to insuring that all sides are covered on those selected issues which the station chooses to raise.

The Office of Communication finds nothing wrong with the Fairness Doctrine and sees no need for any changes in it. Stricter enforcement rather than watering down is needed.

Networks long have recognized their special responsibility for fairness. For the most part, however, they have approached this responsibility by attempting to maintain high standards of objectivity rather than by presenting a diversity of viewpoints.

Networks endorse no candidates, take few editorial positions and generally avoid commentary. Many broadcast editorials deal with subjects which already enjoy broad acceptance and rarely concern heated controversy. There are probably more controversial issues and viewpoints presented each day in the Lancaster, Pennsylvania, *Intelligencer Journal*, North Carolina's *Greensboro News*, the *Los Angeles Times* and the *New York Times* than the three networks present in a year. The daily editorial positions of these newspapers are more blunt and forthright than the occasional broadcast documentary like "The Selling of the Pentagon" or "Hunger in America." Such documentaries probably seem more startling to the public because it is so unaccustomed to their presentation. Although viewpoints are often balanced in television documentaries, they represent a narrow range of opinion and many views are unrepresented. Worse yet, the search for objectivity often results in blandness. Small wonder that such programs have low ratings! Audiences want to hear the arguments of the partisans and these spokesmen would like to make their own cases.

Such practices are the antithesis of the Fairness Doctrine, which clearly proclaims the public's "paramount right . . . to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community."

We are not impressed with the cry of some broadcasters that criticism of their programs "chills" their freedom of speech. Broadcast licensees are public trustees and it is appropriate that they be held accountable by the American people. We deem it healthy that citizens—even public officials—speak out when they regard the performance of broadcasters as something less than perfect. We see nothing wrong with political parties or public officials filing fairness complaints.

Broadcast licensees stand astride our most important channels of communication. They control an indispensable instrument of our democratic society. They must be subject to the checks and balances provided by law. A broadcasting station should not be regarded solely as a vehicle of expression for its owner. It is an outlet of expression for the people it is licensed to serve. The responsibility for an accounting is inherent in the licensee's acceptance of his license. He must not "chill" the freedom of expression of the people he has agreed to serve.

When one reads *Broadcasting Magazine* or listens to broadcasting industry lobbyists, one gets the impression that broadcasters are overwhelmed by fairness inquiries. This impression is often "documented" by exaggerated figures of the volume of fairness complaints filed with the FCC.

These figures are irrelevant and misleading. Assuredly, the FCC receives thousands of letters from the general public complaining about one thing or another. But the overwhelming majority of these writers receive a form reply and there the matter ends. The station or network is not even asked to comment. Apparently, the FCC makes no effort even to make a statistical evaluation of these letters to ascertain if the complaints fall into patterns which point to important lapses in broadcast services.

In rare instances a complaint is specific and presents a *prima facie* case. In such cases the station may be asked to respond to the allegations made in the complaint. Even in these cases the matter usually ends with the station's reply. Is is the infrequent exception when a fairness complaint is decided in favor of a public complainant.

In 1966, Robert Lowe made a statistical study of fairness complaints for the Senate Communications Subcommittee. His analysis shows that network documentary, news and panel discussion programs combined accounted for less than three percent of the complaints filed with the FCC from July 1, 1965 to June 30, 1966. These program types ranked 12th, 13th and 14th among program types complained of. On the other hand, syndicated discussion programs such as financed by H. L. Hunt, the Rev. Carl McIntire and the like and open mike shows accounted for over 40 percent of the fairness complaints.[1]

When one compares the dozen or so successful fairness complaints with the over 8,000 licensed stations, the burden on the broadcasting industry is seen in more meaningful perspective.

Before leaving the subject of the Fairness Doctrine, I should like to touch briefly on four points:

1. Among suggestions made recently by persons close to the broadcasting industry is one that the resolution of all fairness complaints be deferred to the end of the license term as part of the review of the overall station performance. This proposal overlooks the fact that most fairness complaints involve the timely discussion of urgent public questions. Fairness after the election is over and the votes are counted is meaningless. Administrative due process requires swift resolution of complaints to protect the complainant, the broadcasters and the public's right to be informed.

2. Regulation of programming is properly directed at increasing diversity of program content, not at censoring or inhibiting it. No one could or should be penalized for broadcasting any idea or opinion. The remedy for unfair utterances is the right to present opposing viewpoints, not the avoidance of debates by prior restraint of the initial statement. No subject matter is "too controversial."

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[1] U. S. Congress, Senate Committee on Commerce, Subcommittee on Communications, *Fairness Doctrine*, 90th Cong., 2nd Sess., 1968, pp. 64–74.

3. Editorial judgment is inevitable when deciding what issues will be discussed. An editor, like a judge, brings subjective values to decision making. We should not tolerate tampering with the philosophy or subjective judgment of either the editor or the judge, but neither should we curb efforts to analyze, criticize or even correct these judgments.

Such evaluation, however, must be open and on the record. Subtle efforts to intimidate through grand jury subpoenas, threats against commercial interests, demands for outtakes, fishing expeditions into confidential records and news sources are not to be tolerated.

4. The FCC must simplify the system for filing fairness complaints and must afford the public access to program records of material already broadcast by television and radio stations.

One of the reasons why it is so difficult for a public complaint to be sustained is the total secrecy of broadcast records. Every station is required to keep program logs for the inspection of the Commission. The logs simply list and classify the programming actually broadcast. Anyone with the time and energy and an accurate clock can himself observe a station and record most of the information in the program logs. With a tape recorder, he could record the actual content. This task is prohibitively expensive and, of course, it cannot be done for time periods which have already past. But the Commission regards the program logs as secret documents. If a member of the public thinks his local station has been one-sided or unfair, he is required by the Commission to meet a very severe burden of proof. He must show that the station presented one viewpoint and did not present the other. The Commission will accept from the licensee its own self-serving summary of its programming and will not ordinarily permit the complainant access even to the program logs much less tapes or transcripts of the program actually broadcast for the purpose of determining the facts. This means that as a practical matter a station can be as onesided as it wants provided it gives a very minimal mention of an opposing view. Making the record of programming already broadcast available for the resolution of complaints would aid greatly in strengthening the Fairness Doctrine.

REGULATION BY THE FEDERAL COMMUNICATIONS COMMISSION

All discussions of freedom of speech and press, access and fairness eventually lead to the question: Who is to decide?

The broadcaster is convinced that he alone must determine what the public will hear or see. The partisan is equally convinced that he alone can speak for his cause and demands access to do so.

Obviously, someone must decide and, in broadcasting, the task goes to the Federal Communications Commission. If the agency acts arbitrarily, its decisions may be reviewed by the courts. The FCC is an instrument of the Congress and directly responsible to it. The Congress, therefore, can deal with patterns of tyrannical judgment (if they should occur) either by abolishing the agency or changing the laws under which it functions. Similarly, the President, by his appointments, and the Congress, by reviewing those appointments, have a further check on the Commission's possible abuse of power.

As the United States Supreme Court has held, protection of the public right to know must come before safeguarding the absolute power of media owners. The real question before this Senate Committee is not who shall make the decisions to insure freedom of speech on the air but what to do about a supine agency which refuses to take the actions with which it has been charged by the Congress.

For more than forty years, the Federal Communications Commission has resolutely refused to exercise its powers to decide whether or not a broadcast licensee has been acting in the public interest, convenience or necessity sufficiently well to warrant a renewal of its license. Time and again it has refused to regulate on the extraordinary grounds that it has not the facilities, the energy or the staff to do so. Time and again, the courts have returned cases to the Commission with acerbic instructions to take action.

The Commission has both the staff and the legal authority to regulate the broadcasting industry to insure public access and fairness in broadcasting. What it lacks is the desire to regulate.

Members of the public and of Congress who are concerned with the Commission's regulation of broadcasting were hardly surprised to hear the Commission's recent (and subsequently rescinded) decision that AT&T is too powerful to be regulated. This same shrug of the shoulders attitude has exemplified the FCC's unwillingness to administer the broadcast spectrum.

In 1969, then Circuit Judge Warren Burger, utterly frustrated by the FCC's refusal to take appropriate action, ordered the Commission to vacate immediately the license of WLBT-TV. Rarely has a court felt the need to deal so summarily with a Federal agency or to order such a drastic remedy.

The FCC is in an instrument of the United States Congress and is directly responsible to it. How long will Congress allow its own creation to ignore the mandate of the Communications Act?

NEWSPAPERS

I wish to touch briefly on the question of access, balance and fairness in newspapers and the other print media. My view is that the protection of the rights of the public to express itself applies to the print as well as to the electronic media. Although neither ruled directly on this question, both Judge Burger in the *WLBT* case and Justice White in *Red Lion* seem to support this position.

No matter what the origin of a monopoly, the result is the same. Whether it is from the physical limitations of the broadcast spectrum, or (as in the case of newspapers) from a combination of economic factors, a serious impediment to speech is created. There is danger to free expression when a single individual or corporate conglomerate owns every newspaper of general circulation in a particular city. This problem is a complicated one. I am not prepared to offer a solution today, but I am convinced that one can, and should, be found.

I call upon the Congress to initiate a comprehensive study of the evils caused by communication monopolies and to find remedies which protect and enhance the First Amendment rights of all the people. I do not know what the results of such a study would be, I ask only that the right of the public to know be placed on at least a par with the media to speak.

Senator ERVIN. You raised some very interesting questions. I am fully cognizant of the problems which the mass media communication, both the printed word and the broadcast word, have.

You expressed the opinion that the printed press could be subjected to the same limitations or regulations which the broadcast media is subject to. I think that raises quite a First Amendment problem itself. Everyone is given the right to freedom of speech, freedom of print, but does that right embrace the right of a person to command that somebody furnish him a media through which to speak?

Reverend PARKER. This is certainly an important issue, which I recognize, and I would like to treat it in a couple of ways. First of all, both in broadcasting and in newspapers, we like to have voluntary recognition of the need of the public. We advise local groups to formulate policies, consult with broadcasters and with newspaper editors about their desire to have their needs covered. And we think that is the best way to do it. But we are very much concerned about the monopoly issue in the places where a single conglomerate will own the television stations, the radio station, and maybe two newspapers. I used to work on the *Chicago Daily News* and I do not think there was ever any better newspaper publisher than Frank Knight. But I do not think it would have been healthy for the *Daily News*, even under him, to own the *Sun Times* as the *News* does today. I understand the economics of it, but something ought to be done about that. I think the Congress needs to take a careful look at this problem. And when we realize that in the top 50 markets in the country, there is not a single locally owned television station—in most of those cases, the newspapers are also owned by conglomerates—you see what a great problem it is for the local neighborhood group that is trying to get something out of the city council and is not covered. So we need to find a way.

I am not an attorney, and I believe you had Jerry Barron here, who is the one, who is the leader in presenting legal issues in this field.

Senator Ervin. Yes; he made a very fine statement on the subject of what he claimed was the right of access even to the printed page.

Reverend Parker. Yes; I think the papers are recognizing this—the better ones. The *New York Times* with its Op-Ed page, and this is copied in many newspapers over the country, and some of the smaller papers like those that I mentioned are really careful about covering everything in their communities. But in the case of the *Intelligencer Journal* in Lancaster, its companion paper, the *New Era*, owned by the same people, does not give access in the way that the *Intelligencer* does.

It is just the editor that makes access possible. I do not think that is the way it ought to be.

Now, I do not go for any further legislation to limit the freedom of the press, but I think by enforcing the antitrust laws—you know, here we are a country that is concerned about a monopoly in the making of pencils or the making of typewriters and we are not concerned about a monopoly over the ideas and the facts that come to the people of the United States.

Senator Ervin. I appreciate these very serious problems, but I have to confess that thus far, I have not been able to devise any remedies for them. I think a very good argument has been made for the proposition that if, for example, I invest my money in a newspaper to compel me to give space to somebody by law would be limiting my right of freedom of speech, because I could not use the space I had to give to the other man.

Now, I have to agree with you, and the publishers claim that they do a pretty good job of regulating themselves by giving access to people with opposing views.

I will have to confess that ordinarily, for anybody who says anything about me, I adopt the theory that you should not explain: Your friends will not require it of you and your enemies will not believe your explanation anyway. But I have on several occasions taken my pen in hand and responded to what an editor has said. I have never had a newspaper refuse to print my reply to their editorial after requesting them to do so.

I wonder if this is not one of the areas concerning the printed word where it is better to leave the regulation to the newspapers? It has been left with them except for in one or two States—I think the State of Florida has a statute that requires a newspaper to publish a reply to one of its editorials or news items and I saw where the court ordered a paper to let the mayor in Daytona Beach reply to something the newspaper said about him.

Reverend **Parker**. I think that we are at a very important watershed in life in this country. The country is in flux. We have been able so far to handle things on a democratic basis and I think we can continue to. But we have never run up against the situation that we have in communication, because in other times when we have come to really serious problems our communication has been close enough to home that the home people could have something to say about it. But leaving out the minority groups like Chicanos and blacks, who claim and quite rightly that they are barred as far as their own thing is concerned—just take the fact of women. You will find all over the country that women can really prove that their views do not get into the newspapers. It really is a news vacuum, all they get is a women's page.

Senator **Ervin**. You can summon me as a witness. Since the Congress reconvened in January I have been trying to point out the legal inequities in a bill to expand the powers of the EEOC. The debate has occupied the entire time of the Senate for all practical intents and purposes since the 17th day of January, and during that time, I do not believe I have seen a news item about any point that has been made more than that long. [Indicating]

Reverend **Parker**. But you see, this is a major issue. You take religion. I am not here as an advocate of religion. But the television networks do not cover religion as hard news. Now, the majority of the people of the United States engage in religious practices in one way or another, the majority of the people still say that they are members of churches. But the television networks say, that is out. That is for the Sunday morning ghetto when we cannot sell time and we do not cover religion unless something big comes out of the Vatican or something of that sort, or there is a tremendous upheaval over a statement of the National Council of Churches.

Now, this is what I am talking about. The moguls that control our access to information have to be persuaded to give us the information. And it gets down to the same thing with the newspapers.

Like yourself, I am afraid of legislation, more than legislation, I am afraid of control. Certainly control before the act is impermissible. But somehow, the people have to have this opportunity to have their voices heard.

You know, you cannot go in and horse whip the editor, as you could in Galesburg, Ill., which happened when my grandfather and another man were running for office there. They did go down and take it out on the editor who ignored their point of view. But you cannot do that to Mr. Newhouse. You cannot find him. And this is important.

Senator **Ervin**. I certainly agree with you 100 percent on that proposition. Our country stakes its very existence as a free society on the First Amendment, and the theory of the First Amendment contemplates that the people shall be permitted to have a great diversity, an expression of all differences of opinions on public questions. And I think it is essential, if our political institutions are to work successfully, that the people do have an opportunity to hear the expressions of opinion by all segments of society as far as public questions are concerned. One of the difficult problems respecting the printed word is to find a remedy which will make that right of the people to have a diversity of voices secure by legal means.

Of course, the Supreme Court held in the *Red Lion* case that Congress acted within the limits of its power when it established the FCC and regulations for the broadcast industry. I take it your position is that as far as the broadcast industry is concerned, when it is giving the news and its own comments on the news, it should have the right to express it in its own way free from Government limitations.

Reverend PARKER. Yes, sir.

Senator ERVIN. But you take the position that Congress was wise in establishing the Fairness Doctrine with a view to getting an expression of contrary opinion—that is, opinion contrary to that being expressed in the broadcast medium. Such a doctrine is essential to the people's right to know.

Reverend PARKER. Yes, sir. I think that is true.

I also think this, Senator, that the problem would probably go away rather quickly if two things would happen.

If the FCC would take minimal steps in investigate Fairness Doctrine complaints and to examine the record in the public interest, convenience and necessity of stations at the time of renewal. Now, you know, they have never even looked into the methods of the Internal Revenue Service, which manages to keep tens of millions of people pretty much in line by making spot investigations. The FCC does not bother to do that. You have only to fine three or four blatant cases of violations for everybody else to shape up and maybe a determined effort to follow the Fairness Doctrine to this letter.

I also think that if the Congress would take an interest in the problem of access to newspapers and conglomerate ownership which keeps the newspapers from being responsive to their readers, there would very quickly be a reaction to that and it would be a good reaction, it would be in response—it would be toward opening up the papers to views that do not get in there very easily. I think you will find if you took an interest that the papers would hire more women as reporters, they would hire more blacks, they would start listening to people who speak in Spanish, I do not think you would ever need legislation, because they know they are doing the wrong thing by not giving access.

Senator ERVIN. Of course, as far as the printed word is concerned, in my younger days virtually every small city in the United States had competing newspapers.

Reverend PARKER. Yes, sir.

Senator ERVIN. And they usually disagreed on a lot of public questions.

Reverend PARKER. Sure.

Senator ERVIN. And they debated pretty well the issues between themselves. But unfortunately, the situation which exists in some sections of the country is like that in my State now: In many places where we used to have two newspapers, now there is only one; or if they still have two papers, the same people own both.

Reverend PARKER. Yes; that is what I am objecting to.

Senator ERVIN. It is an unfortunate situation. From a constitutional standpoint, we say that anybody can go into the newspaper business. However, as a practical matter there is one big restriction—that is, providing that he has the ability to finance it, and today that requires tremendous finances.

Reverend PARKER. Virtually impossible. A group of professors at the college in Lancaster started a paper in competition with the *New Era* and they managed to stay with it for a year before they all went broke. But they just did not have the capital. You know, they had to go to somebody else's printing plant and so forth. It is almost impossible in an urban area to do it without the capital. So we have to work with what we have.

Senator ERVIN. And of course, at the time the First Amendment was written, I think that most people who wanted to could, like Thomas Paine, print the pamphlets very cheaply and circulate them. We have a different situation now, and as a result, we have some very serious problems in this field which you have pointed out in a very lucid manner. I thank you for a very fine statement.

Reverend PARKER. Thank you, sir.

Senator ERVIN. Mr. Baskir?

Mr. BASKIR. Reverend Parker, would it not be better all around, if we are faced with the twin evils of control by conglomerates, as you mentioned, which limit the channels of communication on the one hand, and the only other alternative being more guidance and regulations by Government, to apply the standard old-fashioned antitrust economic weapons to break this up as a monpoly, as you would if the businesses were pencils and typewriters instead of communications media?

Reverend PARKER. Oh, surely, that is what I am saying. You have the antitrust laws. This Nation is scared stiff of competition in restraint of trade—until we have restraint of ideas. Then we seem to say, well, that is all right, these fellows have a right to make as much money as they can make and they do not have to have a good product and they do not have to compete with each other.

Really, what we have in the regulations is protection of a monopoly instead of protection of the public. I think the antitrust laws should be applied and they should be applied vigorously.

I do not believe that there should be this ownership of a television station, a radio station, and a newspaper in a town. The FCC has said that.

But, it has never done anything. I do not believe the FCC should allow conglomerates to sell to other conglomerates. You know, that is the way conglomerates got going.

The law says when a station comes up for license renewal if somebody else wants to try for the license, there should be a hearing. That is really what the law was meant to do so that there could be competition every once in a while. Instead of that, what has happened? The FCC has okayed every sale of a station without any thought about who is getting it.

So, you have the big conglomerates like Annenberg, then Annenberg sells to Capital Cities, all the stations at one time. Nobody asked when Annenberg came into New Haven, Conn., for instance, where I was living at that time, nobody asked whether Annenberg would give the services to New Haven that were needed, and he did not. Nobody asked when Capital Cities came in.

Now you have Time-Life going to sell out all its stations to McGraw-Hill. If the Chicanos of the country had not gotten in and protested, that sale would have gone through without the FCC probably even reading the papers. But as it is, at least, they have to read the petitions to deny licenses that the Chicanos have filed in five cities.

These stations should have been examined when they were first sold. The conglomerates should not have been allowed to come into being.

Mr. **Baskir.** Recently, there has been one development which has begun to ease the situation with respect to monopoly newspapers—that is to say, single or only double channels of communications of print. It is the great development of underground newspapers, some of which are quite successful and have very wide distributions, and from some of our other testimony here, becoming better and better quality journals.

Reverend **Parker.** Yes.

Mr. **Baskir.** There may be—I am not sure, but there may be an equivalent development with respect to broadcasting in the area of cable television. I wonder if you would comment on the potentials of this, as you see them now, for cable television introducing the kind of diversity of access which might make the Fairness Doctrine and other kinds of rules, and probably more Government control, less important.

Reverend **Parker.** Well, we are very much interested in cable. Just the day before yesterday, the Office of Communication published a book by Monroe Price and John Wicklein called "Cable Television—A Guide to Citizen Action." And it is a manual for the public, because we think that cable has a very great potential for public interest.

Now, nobody knows, because no cable operator has really tried to serve the public interest rather than being just an entertainment medium. There is a little bit being done on some of the access channels. But we think the potential is there and it should be tried. We are proposing a cable system in Connecticut which will have 37 channels. We think that those channels can really be opened up for political discussions. For example, in the New York area, there is not anybody who runs for the State Legislature or local council that can have access to the mass media because he cannot afford to buy it. If you are going to run for the Senate, for instance, in New Jersey, which is probably the worst State in the country, you have to buy the whole New York metropolitan area and the whole Philadelphia metropolitan area to talk to New Jersey people. Now, cable will let you abstract out the people in a ward or the people in an assembly direct. We think that is terribly important.

We think that cable should be encouraged and not blocked in its development to protect another technology.

It is very important that cable, instead of just being a business enterprise to make money, be encouraged to be a public enterprise for the public good.

Mr. **Baskir.** Recently, there was an agreement between cable and a broadcaster sited here in Washington, I guess under the auspices of Mr. Whitehead, that some people have been regarding as the "Treaty of Washington." I wonder if you would comment on that agreement and whether you believe that it will help or hinder the development of cable television for the kind of purpose you have been discussing?

Reverend **Parker**. Well, in the first place, the FCC held extensive hearings and everybody had a chance to testify. I testified to the same panel with Jack Valenti, and Irving Kahn. McGeorge Bundy was on that panel, the head of Public Broadcasting Corp., Mr. Macy, so that everybody had a chance to have his views recorded by the FCC. The FCC has the job of regulation here, and to have a backstairs, closed room agreement brought about by anybody on an important public issue of this kind is unconscionable. The FCC had plenty of information from the people that were involved to make its own decision independently; this, sir, is why I remind you that the FCC is an arm of the Congress. It really was set up when Sam Rayburn and Senator Bone fought this out on the floor.

They set it up as an arm of Congress and it should be looked at by the Congress when it makes agreements like this outside the public forum.

So you can see, I am against this kind of agreement in anything. And of course, it will hold back the development of one technology, cable, to protect the other, television.

Now, we cannot throw broadcasting out the window to let cable get a foothold, because we need the broadcasting and we are going to need it for a long time. But there must be some better way to have cable development, and I think there is. At least, we think that we can demonstrate there is.

Senator **Ervin**. I would just like to ask a question. Am I correct in the conclusion that you do not advocate that the FCC refuse to renew a license to a broadcasting station because the FCC might disagree with the views expressed by that broadcasting station; but on the contrary, that the FCC should take into consideration merely the question of whether or not that broadcasting station is giving an opportunity for the expression of contrary views and otherwise rendering services to the community?

Reverend **Parker**. Yes, sir, there are two things. I believe that complaints from the public should be handled promptly, because where there is smoke, there is fire, and the amount of complaining against the broadcasting industry is so great that even the broadcasting industry should start to listen to it. The FCC should have listened to it long ago.

The second thing is the FCC should examine in a judicial manner, the operation of a station at the end of each 3 years. If there was no complaint against a station, I would not say the FCC had to open up a hearing file. But if there are persistent reports from the community that this station is not serving the public interest, then the FCC should look into them and the FCC on its own should look into a sampling of stations to see how they operate, just so the FCC can find out how television and radio are operating. Because they sit here in Washington in a very artificial atmosphere as far as broadcasting is concerned. We sit in New York in a very artificial atmosphere. But when you get out to Cedar Rapids, Iowa, or to Paradise, Calif. or Bakersfield, Calif. you have a very different thing going, and the FCC should go out and find out, make an investigation and make a judicial judgment. That judgment can always be appealed to our courts by either side. So there is constitutional protection. That is my view.

Senator **Ervin**. Nevertheless, the courts would have the power to reverse the decisions of the FCC if they found they were arbitrary?

Reverend **Parker**. Yes, sir, and the courts do. They certainly did in the *WLBT* case where Justice Burger got so upset at the FCC that he revoked the license in his decision.

Senator **Ervin**. Mr. Ebner?

Mr. **Ebner**. Reverend Parker, as I am sure you know, the Federal Trade Commission recently recommended to the Federal Communications Commission that they utilize the Fairness Doctrine to require counter-advertising. I would be interested in knowing whether you see any problems in that, First Amendment or otherwise?

Reverend **Parker**. Yes, there are a lot of problems in it, not the least of which, as we all know, is the problems of clutter. There is enough clutter with the ads without having any more clutter than is necessary. But it is a fact that if there is a substantial viewpoint on the other side, people should not be blocked from presenting it.

For example, I do not think that a man should be blocked from buying an ad simply because it deals with ideas or is counter to other ads. I do not think that people who want to come in and present a viewpoint that is counter to the general run of views in the culture should be prevented from coming on and taking ads. You see, this again is a matter of freedom of access to the media.

Now, when you come down to things where there is a real controversy—the controversy over production at the present time is certainly very acute—you again have to use good judgment, and I would hope that the FCC would. I think they have to follow it on a case law basis. But that is what they are set up for. I am not worried about their overwork load.

You know, you have to make a judgment when you get an ad that says a gasoline is cleaning out the motor and therefore, there is no pollution coming out of the car and somebody who is a scientist says, "Hey, it is the same gasoline as any other."

Now, there are two ways you can look at it. There is the rule of truth in advertising. Advertising is certainly restricted by that, you do have to tell the truth. If you do false advertising, the First Amendment does not apply. Maybe that is the point where you look at it, because I think that is the main thing.

I do not think people really get very much upset about puffery in advertising. I think it is very important that we enforce truthful advertising, just as we want to enforce truth in other things. In fact, the broadcaster is supposed to see that the stuff that goes on the air is truthful.

Does that answer your question?

Mr. **Ebner**. Well, yes, partially at least.

Reverend **Parker**. I would go further on this, but I think it has to be looked at by the FCC and I think there has to be a policy established that people can understand.

Mr. Ebner. So you believe that the Fairness Doctrine would be a good device through which to enforce truthful advertising?

Reverend Parker. No, sir. No, sir, I do not say that. I think truth in advertising is a yes or no fact and there are laws to enforce it. I mean the furniture store that comes along and says, we will give you double the value and you do not have to put any money down and our rates are the lowest in the city, which is done on some stations, especially stations that cater to a black audience—that is in and out truth or falsehood and that is covered by the law and you cannot do it. It is these cases where they are grey, you know, where people are coming along and saying, look, this is pollution, this is a poison. They have a right to state their views as long as the views are substantial.

Now, you know, you cannot just give each person who comes along the opportunity, but you do have to pay attention to substantial groups. And I think that Chief Justice Burger really laid it down in the *WLBT* decision. That is why the Harvard Law Review called it one of the most important in communications law. He defined it as the kind of substantial backing that there had to be for a complainant to be entertained by the FCC. And he really got the FCC off the hook in dealing with people who are making insubstantial complaints.

Senator Ervin. The question about a government agency determining what the truth is, though, is a pretty dangerous thing. The Bible tells us that Pontius Pilate asked the question, what is truth, but he did not pause for an answer. If you are going to have an answer by the FCC in a controversial matter, I would consider that a gross violation of the First Amendment.

Reverend Parker. Well, sir, I would counter that by reminding you that Saint Paul said we all sin and fall short of the glory of God. I have a feeling that the people who control television licenses and certain monopoly newspaper ownerships sin a little more quickly than some of the others of us when there is a lot of money involved.

All I want for the FCC to do is not that they decide what is truth but that they say to me when I come in and I say I have an opposing view and my view is valid, they say, "Yes, sir, you have a right to be heard." That is all I want of them. I do not want them to decide whether my view is valid, just as I do not want the Internal Revenue Service deciding what the practice of religion is. I think we have to keep the Government out of that sort of thing, but we do have to have the Government as a protection for those of us who have no protection against great power.

Senator Ervin. The example I was thinking about involves my home State, which grows tobacco and has a great many manufacturers of tobacco. The FCC has said, we have the complete truth on the matter of smoking and those who disagree with us have none. And a lot of very respectable people disagree with them on it and they cannot be heard.

Reverend Parker. Two things about that. I am troubled by the constitutional implications of the banning of the cigarette advertising. I was not troubled at all at the FCC saying this is a controversial issue and the other side has to have a chance to reply.

I want to say that I am opposed to smoking, I wish I could stop my daughter's smoking, and I have a feeling, too, that if those announcements, which were far more clever than the commercial ones, could have stayed on the air, they would have cut down on smoking. So I have a vested interest, you see.

But seriously, sir, to allow people to reply, to have both views on, is very important. While I might not agree with what the tobacco industry says, I do not want the American people deprived of the views of the tobacco industry. I do not want them deprived of the views of any element in American society. So I would have been happy if it had stayed as a Fairness Doctrine thing.

Now, if cigarettes are poisonous, and I think they are, then the decision is to be made someplace else. If tobacco is really a poison, then it should be proven and the manufacture and distribution should be stopped. If big cars are poisoning the atmosphere so that they are going to kill us, somebody ought to make that decision and there ought to be a law they cannot manufacture cars of a certain kind, but not that you cannot advertise them in one medium.

I do not have much sympathy for broadcasters, but I think in this case I am troubled about the constitutionality.

Senator ERVIN. I do not think you and I are in much disagreement, if any, because I think as long as it is legal to sell a product and the value of that product is in controversy, both sides should have an opportunity to be heard.

Reverend PARKER. Yes, if you tell the truth about the product.

Senator ERVIN. The thing that bothers me is if the Government assumes the right to make a determination about a product which is legal to sell to the general public, it is just one step away from saying that we have the complete possession of the truth in respect to a political question and those who disagree with us have none and can't be heard.

Reverend PARKER. Yes, sir, but nevertheless, the Government does have a right to stop you selling inflammable clothing for children and things of that sort. I am thinking about things where a present danger is proven. Then it ought to be handled under that kind of law.

Senator ERVIN. Yes.

Well, thank you very much. You made a very fine and very interesting statement.

Reverend PARKER. Thank you, sir.

Mr. BASKIR. Mr. Chairman, our next witness this morning is Dean Elie Abel, dean of the Columbia University Graduate School of Journalism, who I think will discuss for the most part problems of public television.

Senator ERVIN. Dean, I want to welcome you to the subcommittee and express our deep appreciation for your willingness to come and testify and give us the benefit of your views in a field in which you are very knowledgeable.

STATEMENT OF DEAN ELIE ABEL, GRADUATE SCHOOL OF JOURNALISM, COLUMBIA UNIVERSITY, NEW YORK

Dean Abel. Thank you, Mr. Chairman. I am grateful for the opportunity to be here.

You have heard a great many witnesses of diverse views and qualifications. It may be relevant to observe, Mr. Chairman, that I was what used to be called a working reporter for a quarter of a century, 16 years on various newspapers, then in television, before becoming dean of the graduate school at Columbia.

It is fair to add also—I think the committee has a right to know this—that I am a member of the Board of the National Public Affairs Center for Television.

The life I have led, Mr. Chairman, has inevitably shaped my views and attitudes. It should surprise no one that I share your passionate concern for the preservation of the First Amendment. I share also your feeling, expressed in these hearings, that public television in America must be preserved and strengthened. I believe that public television has a vital function and that, in your words, we have got to find some way to make it secure in its financing and also to make it secure against government control of the contents of what is broadcast.

The root question before this country in this area, I suppose, is whether it is possible in our society to have public funding of public television without inviting government control or, at least, government influence upon the matter that is broadcast. The answer, I suggest, is that it is possible, even imperative. To suggest that Americans cannot hope to accomplish what has long since been a fact in other countries, notably Britain and the Federal Republic of Germany, seems to me plain defeatism.

Perhaps the time has come for Americans to study this foreign experience by way of learning that there are other ways, perhaps better ways of operating a public broadcast system that is adequately funded and, at the same time, free from government interference or control. I might add that in Britain—as in Germany, Japan, and other countries—public television offers the viewer a balanced diet of programming, quite apart from news and public affairs, that is in my judgment superior to the day-to-day programming available on either commercial or public television in the United States. Most Americans, I would guess, do not know what they are missing.

When Americans think of high-quality programs they surely have in mind among others, certain imports from the BBC which have caused an appreciable stir in this country: "The Forsyte Saga," "Civilization," "The Wives of Henry VIII," "Masterpiece Theater," to name a few recent examples. Anyone who has lived in London, as I did for almost 3 years in the sixties, could expand that list almost indefinitely with dozens of additional programs never seen in this country. Nor were these programs limited, I might say, to costume drama or high cultural offerings, which is what one thinks of. In fact, we found they had some of the most illuminating and some of the toughest documentaries that I have seen anywhere in the world.

Living in London with my family, I discovered that prime-time television could be something more than a cheap way to fill up an idle evening at home with no strain to the intellect. We discovered that television could be absorbing, exciting, occasionally uplifting.

How do the British or the Germans do it? As between the British Broadcasting Corp. and ARD, the standing committee of broadcasting corporation in the Federal Republic of Germany, there are significant structural differences. The German system is far more decentralized, for example, than the BBC. But the crucial distinction is that both are financed out of license fees, rather than appropriated public funds. In short the consumer pays directly for the broadcast service he receives. A German household with both radio and television receivers pays an annual license fee of 84 deutsche marks, slightly more than $25 at the present rate of exchange. For radio alone, the fee is 24 deutsche marks, slightly less than $8. In Britain, the comparable rates are six pounds sterling ($15.60) for black-and-white TV, with an additional charge of 5 pounds ($15.30) for color; 1 pound, 5 shillings ($3.25) for radio only.

In both countries these license fees are collected by the post office, which is entitled to withhold its own collection charges. The greater part of the funds collected in this way cannot be used for any other purpose; they must go to support public broadcasting. In Britain, for example, the Ministry of Posts and Telegraphs turned over to the BBC in 1969–70 (the last year for which I have actual figures) 21 million pounds earmarked for BBC radio and 72 million pounds for BBC television. That is an impressive amount of money, Mr. Chairman, more than $170 million at the current exchange rate for television alone. When you consider that British production costs are substantially lower than in the United States and the geographic area to be covered is a great deal smaller than our own, it becomes clear that we have been treating public television in this country as a poor relation. The administration bill now before the Congress provides all of $45 million to fund the corporation for public broadcasting in the next fiscal year; after that we leave it to the foundations and whatever private contributions the stations can scrape together in their own communities. The administration, moreover, has decided (as Dr. Whitehead informed this committee on February 2) that 1972 is simply not an appropriate time to try to push through this session of Congress a long-range financing plan.

Long term financing has been promised by President Johnson and by President Nixon repeatedly. It seems to me the only realistic alternative to a dedicated tax or to a license fee on the British or German model, if we mean what we say about insulating public broadcasting from political control or pressure. It is saddening to me to recall that the Carnegie Commission on Educational Television specifically recommended a dedicated tax and that the administration of the day, or the Congress, or both, chose to ignore that recommendation. That seemed to me a precious opportunity to set up the kind of television system that you, Mr. Chairman, and I, and millions of Americans, possibly including Dr. Whitehead himself, would like to see. However, the national opportunity was fumbled. I am not here calling for an instant replay.

I have some difficulty, I must confess, trying to reconcile Dr. Whitehead's concern for the First Amendment with the administration's refusal to send the Congress a long-term financing proposal. In my opinion, he cannot have it both ways. If he cares about a free sturdy public broadcasting system in the United States, how does he justify letting one more year go by—a presidential election year at that—without making the effort to secure the long-term financing we have long been promised? Nor is that the only apparent contradiction in what we can learn of the White House attitude. Let me cite several others:

On the one hand, Dr. Whitehead has told this committee that the Federal Government has no business running a broadcast network—a statement with which I wholeheartedly agree. On the other, he tells the Corporation for Public Broadcasting what kinds of programs it ought to put on, what segment of the national audience it ought to be reaching for and what kinds of broadcasters it ought to employ. All this unsolicited advice is reinforced, incidentally, by a fairly direct suggestion that if these matters are not arranged to his satisfaction or to that of his bosses, the system as a whole will be denied the long-term financing it so desperately needs. And all this in the name, Heaven help us, of the First Amendment.

On January 17, 1972, in a special report on National Public Radio, Dr. Whitehead stated that there was in his mind a real question as to whether public television, particularly the national federally funded part of public television, should be carrying public affairs, news commentary, and that kind of thing. His reasons were: (a) that the commercial networks, by and large, do quite a good job in that area and (b) that there is an irreconcilable conflict between government funding and journalistic freedom.

Here again I have some difficulty reconciling Dr. Whitehead's general satisfaction over the good job the commercial networks are doing with Vice President Agnew's complaints to the contrary. Is the administration of two minds on this matter? Does Dr. Whitehead or Mr. Agnew more nearly reflect President Nixon's own thinking? I wish I knew. I have no way of answering these questions but the contradictions seem to me apparent. Perhaps as you jurists say, Mr. Chairman, it is a matter of circumstances altering cases.

Perhaps more important is Dr. Whitehead's contention that there is something inherently improper about a public television system, funded in part by Federal dollars, getting into public affairs programing at all. In making this argument, I would submit that Dr. Whitehead has managed to ignore the letter and the spirit of the Federal Communications Act, the Public Broadcasting Act of 1967, and if I may say so, also the Carnegie Commission Report. This is the same document that he has quoted with solemn approval on other occasions as if it were graven in stone. I need not remind this distinguished committee of the Senate that the Federal Communications Act requires of all broadcasters, whether commercial or noncommercial, that they should present adequate and diverse programming in the area of public affairs, both local and national.

This is not a matter of debate, sir.

Section 307 of the Communications Act requires all broadcasters to operate in the public interest. Section 315(a) of the act further defines this requirement by its stipulation that broadcasters operate in the public interest and must afford reasonable opportunity for the discussion of conflicting views on issues of public importance. In the most recent interpretation, *Red Lion Broadcasting Co.* v. *FCC*, 373 U.S. 367 (1969), the Supreme Court noted that the Communication Act did not merely require broadcasters to present the other side of a public issue, once an initial viewpoint on that issue had been presented; it imposed a broad affirmative responsibility on every broadcaster to present diverse public affairs programing.

The Court stated that the fundamental principle common to the Communications Act and the FCC's Fairness Doctrine was that the public had a right to be informed on the great issues of the day, and to receive suitable access to social, political, aesthetic and other ideas and experiences through the broadcast media.

Further, public television licensees, like commercial broadcasters, when applying for renewal of their broadcast licenses, must specifically list the percentage of time during a typical broadcast week that is devoted to "news", "public affairs," and "other nonentertainment" programs. Each must submit to the FCC a detailed account of the station's public affairs policies and programing during the past license period. As defined in the FCC's renewal application, "public affairs" includes "talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, roundtables, and similar programs primarily concerning local, national and international public affairs." (Emphasis added) Thus, a licensee is expected not only to deal with matters of purely local interest and concern but, as noted in *Red Lion* to deal on a national and international basis with what the judgment describes as matters of great public concern.

As I read the law, Mr. Chairman, there can be nothing improper or illegal about the presentation of national public affairs programs on public television, Dr. Whitehead to the contrary notwithstanding. Instead, I find a positive legal obligation to present such programing. It is theoretically possible, of course, that each of public television's 215-plus stations across the land could somehow fulfill its obligations under the Communications Act by producing its own national and international programing. The trouble with that solution is that it is altogether too theoretical. The resources, human and financial, simply do not exist at station level to comply with the legal obligation imposed by the FCC. Any more than the resources exist in a small to medium-sized local newspaper you were talking about, sir, for staff coverage of national and international affairs; in fact that capacity does not exist in any but a handful of local commercial stations across the country. That is why newspapers subscribe to the Associated Press or the United Press or any number of additional supplementary services. That is why commercial stations, wherever possible, affiliate with one or other of the commercial networks. If public television is to grow and prosper, the stations that make up the system must, in much the same way, be capable of receiving national public affairs programing produced outside their own limited facilities.

There is, however, a more affirmative argument to be made. It comes, eloquently expressed, from a Committee on Broadcasting established by the British Government in 1960 under Sir Harry Pilkington as chairman. The Pilkington report makes the point, eloquently, that:

> By its nature, broadcasting must be in a constant and sensitive relationship with the moral condition of society. Broadcasters are, and must be involved; this gives them a responsibility they cannot evade.

Public broadcasting, even more than its commercial counterpart, must be involved with the people and their concerns. It can shun the people and their concerns, only at the risk of becoming irrelevant. The Carnegie Commission report itself, in which Dr. Whitehead claims to discover some mysterious sanction for the dumping of public affairs, had some cogent things to say about this affirmative responsibility back in 1967.

Chapter 4 of the Carnegie report foresaw a major role for public television in extending public knowledge and understanding of contemporary affairs. "Its programing of the news should grow," the Carnegie Commission held:

> To encompass both facts and meaning, with information and interpretation. It should be historian, in addition to being daily journalist. Its programs should—give perspective and depth to interpretation of the news, in addition to coverage of news day by day."

At another point, the Carnegie report talks of the need for public television to assess the significance of news events whether they happen to involve a strike, a mine disaster, a Supreme Court decision or a new scientific discovery. "The bare reporting of incidents," the report continues:

> Is not sufficient to meet the responsibilities we see for public television. Programs should find ways to show us the context of incidents, the past and present from which they spring, the impact they may make on tomorrow."

Mr. Chairman, I agree with the Carnegie Commission; I fail to see how any of these necessary objectives can be met by barring public television from the field of national public affairs. It seems to me clear beyond question that Dr. Whitehead has no warrant for claiming that his attitude is in line with the Carnegie report.

A public television system that is prohibited by law or administrative edict or plain cowardice in the board room from examining the people's concerns is a system without brains or heart. That kind of system is not worth a single dollar of public money. I would rather see it abolished.

Finally, let us look briefly at the Public Broadcasting Act of 1967 and the intent of Congress in passing it. It was this piece of legislation that established the Corporation for Public Broadcasting. Far from declaring public affairs programing to be off limits, the report of the Senate Committee on Commerce, with Senator Pastore as chairman, said:

> Although the aims of noncommercial broadcasting should be directed toward cultural and information programs ,it should not be so highly specialized, however, that it caters only to the most esoteric tastes. Particularly in the area of public affairs, your committee feels that noncommercial broadcasting is uniquely fitted to offer in-depth coverage and analysis which will lead to a better informed and enlightened public.

The committee indeed was so firmly persuaded that public television must play a major role in public affairs programing that it felt constrained to warn commercial broadcasters not to use the passage of the act and this new element as an excuse for doing less of this kind of programing on their own. So much for legislative history.

Mr. Chairman, let this committee not be misled by those who portray this issue as an either or choice between local and national programing. That is a very clear device being used by the administration. The truth is, and the administration knows it, that we need both strong, well-financed and creative local stations together with strong, well-financed and creative national program services. It is wrong-headed, in my judgment, and demagogic, to exploit the manifest poverty of most noncommercial stations by raising the specter of some shadowy fourth network that must necessarily gobble up the available funds.

I am reminded that the late President Kennedy, while in the Senate, resolved a remarkably similar false dilemma by breaking step with his own Massachusetts delegation to vote for the St. Lawrence Seaway. He was bitterly accused of betraying his home port of Boston, which was supposed to shrivel and die the moment ocean-going ships could unload directly in Toledo, Detroit, or Milwaukee. "The rising tide," Senator Kennedy said, "will float all the boats."

Just as the false dilemma between the Atlantic seaboard and the Great Lakes was resolved by at last building the Seaway, so also does it lie within the power of this Congress to resolve the false dilemma between local and national needs in public television. The answer is that rising tide; the answer is more money for the whole system, as provided in the legislation proposed by Congressman Torbert MacDonald now being considered in the House, or as you might recall it, the other place.

I would remind you that bill does carry a specific earmarking, a provision earmarking 30 percent of the revenue for local stations.

I happen to believe that a well-financed public television system, properly insulated from the kinds of political pressure now being brought to bear upon the Corporation for Public Broadcasting, is a national necessity. I happen to believe in competition, Mr. Chairman; competition of ideas as well as business, and I am persuaded that the best way to raise standards in commercial broadcasting is to offer the viewers an alternative; that seems to me a wiser course than to place our hope in tougher and ever tougher FCC regulation. I happen to believe that a competing public television system such as I have sketched here will do a great deal to raise the prevailing standards of public-affairs programing at CBS, NBC, and ABC.

For those among you who may be inclined to doubt the potential influence of this puny public system upon the giant networks, let me cite a few examples: It was, to begin with, the success of public television with the "Forsyte Saga" and other BBC imports that led first CBS ("The Wives Of Henry VIII") and than NBC to turn to the same program source. The less graphic are two examples, one a program on NBC called "Chronolog" (formerly "First Tuesday"), and one on CBS called "Sixty Minutes."

Both seem to me lineal descendants of the Public Broadcast Laboratory in terms of approach, technique and to a degree also of format. Thus if PBL has to be accounted a failure, if we must do that, sir, I would ask you to remember that it was probably one of the most influential failures of our time. I say we need more of them.

I thank you, Mr. Chairman.

Senator ERVIN. We have attempted in conducting this hearing to obtain the expressions of all kinds of viewpoints in respect to all different media of communications.

Dean ABEL. Yes, sir.

Senator ERVIN. And I think we have done a fairly good job in that respect. You have made a most significant contribution. I think we have here in Washington an exceedingly fine public broadcasting station, WETA. I have to confess that it has gotten to be perhaps my favorite station.

Dean ABEL. I am delighted to hear that.

Senator ERVIN. They have many programs which are most informative and have a tendency to expand our intellectual horizons.

Dean ABEL. Exactly.

Senator ERVIN. We also have an excellent public broadcasting station at the University of North Carolina at Chapel Hill. It carries great programs that you never get on the commercial stations.

Dean ABEL. Right.

Senator ERVIN. I am much concerned about the Congress' understanding of the Public Broadcasting. I am very much impressed with your reference to the experiences in Germany and England of financing these by fees paid voluntarily by the people. I have also felt there is a danger of depending upon appropriations by Congress, because while our Constitution has many virtues, some of the virtues may handicap things. For example, the idea, and it is quite a good idea in the longrun, that one Congress can't tie the hands of a succeeding Congress by insuring long range public financing out of appropriated funds. It does seem to me, though, that the approaches you have pointed out as having been taken in Britain and Germany are approaches which are quite feasible.

Also, I agree with you thoroughly in the idea that you would destroy a large part of the value of public broadcasting if you excluded from public broadcasting the presentations of programs dealing with public questions.

Dean ABEL. Right.

Senator ERVIN. I saw on WETA sometime ago a program which was under the charge of Bill Moyers which dealt certainly with a public question. In my State there is quite a controversy between the local people and local government in northwestern North Carolina and the Federal Power Communication as to how the New River shall be developed, which method of development will be best in the public interest. Mr. Moyers prepared a magnificent program and I would think that a public broadcasting station in a situation like that could, if anybody wanted to present a counter program, present it and let the people concerned make the choice between the conclusions of the two programs.

Dean ABEL. I do not happen to know the details surrounding that particular program, but I am reasonably confident that if there was a reasonably impressive case to be made on the other side or if there were enough protests, of course, the time would be made available.

Senator ERVIN. I would think so if it were presented dispassionately by a broadcasting station which had no interest whatever in the problem beyond merely presenting the problem in a fair and objective manner. I also agree with you on the idea that we have to avoid at all costs letting the Government dominate the contents of the programs on public broadcasting, as well as programs of other commercial broadcastings where they are merely expressing their own views. I think the First Amendment would certainly be thwarted if Government exercised a control and influence over what any media of communications should say.

Dean ABEL. Right.

Senator ERVIN. Mr. Baskir?

Mr. BASKIR. I have just one question, Mr. Chairman.

As I understand it, part of the administration's proposal for the financing of public broadcasting would not only involve giving a large portion of the funds to local stations, but would allocate that money through instrumentality of the Department of Health, Education, and Welfare. Without discussing the problem of the balance between central and local financing, I wonder what your view is to using HEW as the medium of allocating these funds and whether that would increase the independence of local stations?

Dean ABEL. No, sir. I have to tell you in all honesty that I have the impression that HEW has already become the largest bureaucracy in this country and in the nature of that kind of bureaucratic machinery, more and more people duplicating and triplicating more and more other people's work, I think it would be bizarre, it would be unthinkable, to add all that confusion of responsibility for parceling out money as between one local station and another.

The Corporation for Public Broadcasting exists. It was created by this Congress and it is quite capable of doing that job if Congress will vote whatever monies are required according to whatever formula Congress decides. I do not know why we have to be back into the Federal Government to distribute this money. That seems to me a most unwise provision.

Senator ERVIN. It would seem to me if the problem is that of Government control and we are worried about long term as opposed to short-term financing, and short-term financing increases Government control, the worst of any conceivable possible worlds is to have that money doled out by the executive branch, be it HEW or any other part of it.

Dean ABEL. I am bound to agree with that. I would oppose any part of the executive branch getting into the business of doling out money. But I thought it was worth mentioning that HEW is already a fairly large bureaucracy which is having a fairly difficult time, I think, getting its job done.

Mr. EBNER. I have just one question.

Dean Abel, during Dr. Whitehead's testimony before the subcommittee, he expressed concern at what he said was an increasing tendency on the part of public broadcasting to concentrate on those areas of programing in which he felt the public objection, I take it to establishment-type programing, was the strongest. He thought there was a danger in this of provoking control through the political process.

Simply stated, he felt that this type of establishment programing would irritate members of the public who would therefore express their concern to their elected public officials, who would in turn be motivated to take some action with regard to public broadcasting. Do you see any merit in this view?

Dean ABEL. I suppose one ought to be very grateful to Dr. Whitehead for trying to warn us of all these dangers ahead. But in the processes, I would suggest that Dr. Whitehead is not hesitating to tell the Public Broadcasting System in the name of the White House what it ought to do and how it ought to do it and that, in any judgment, is not what he is there for.

I have a very serious question in my mind, and it came up earlier in Dr. Parker's testimony. Why do we have a FCC at all? This office of Dr. Whitehead's was, I gather, as recently as the last administration, a matter of one elderly general and a secretary who were concerned only with the allocations of frequencies for the use of our armed services within the broadcasting spectrum. Mr. Whitehead now has a staff of 80 people, I am told. It is a nice question in my mind, by what authority that kind of operation has grown as quickly as it has and whether he has any proper business in this at all.

He is entitled to his opinion as one citizen, but I must say I must take exceptions to his coming down here and going around the country saying, I love the First Amendment so deeply that I do not want to see it hurt. Therefore, I will now interfere with your freedom to make editorial decisions. Because that is what he is doing.

Senator ERVIN. I take it your answer to the question, then, the short answer, is no, you do not share his feelings on that particular point?

Dean ABEL. I do not. I am grateful for his solicitude, but I think he is going about it the wrong way.

Senator ERVIN. I think you have put your finger on a very peculiar development in Government of recent years, in which Presidents of both political parties have a tendency to set up in the White House duplicate departments and agencies of the Federal Government. For example, we have almost a little State Department at the White House—it may be a petty good system. The questions involving broadcasting operate in the field of the FCC, to a certain extent, and it causes us in the Congress a lot of confusion when you really do not know where the real power lies.

Dean ABEL. That is right.

Senator ERVIN. And HEW has gotten so large that I do not think anybody knows what all its functions are.

Dean ABEL. Right.

Senator ERVIN. Well, you have made a most helpful contribution and I am much impressed with this idea of voluntary fees made by the people who want to see public broadcasting. That would certainly divorce it from Government financing and insure its independence.

Of course, I will have to say there also is danger of politicians doing something that is unwise, but I was very much encouraged in this field of the First Amendment by the fact that the House did not back up the idea of one of its committees that the committee should have the unpublished records assembled by CBS in "The Selling of the Pentagon." I think the committee was actually trying to point out to the people that CBS had not exercised its First Amendment privileges in a manner satisfactory to the committee and the committee thought they should be exercised. However, I certainly am opposed to letting any governmental agency, even a congressional one, pass on the way in which citizens, the broadcast media or the print media, exercise their first amendment rights.

Thank you very much for your appearance.

Dean Abel. Thank you, sir.

Senator **Ervin.** The subcommittee stands adjourned. We will hold the record open for about 2 weeks for any additional statement.

(Whereupon, at 11:35 a.m. the subcommittee adjourned,)

STATEMENTS SUBMITTED FOR THE RECORD

STATEMENT OF JAMES Q. WILSON BEFORE THE SENATE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

(James Q. Wilson is Professor of Government and Chairman of the Department of Government at Harvard University. He was formerly Director of the Joint Center for Urban Studies of MIT and Harvard. He served as a member of the Sloan Commission on Cable Communications. The views expressed in this statement are entirely his own and do not necessarily reflect the views of any of the above organizations.)

We are seeing in this country the emergence of two different communications media, one free and the other not, one protected by the First Amendment and the other subject to the growing regulatory attentions of courts and commissions. The free medium is that of the printed page; the unfree medium that of the broadcast message. There is no Federal Book Commission and no Federal Newspaper Commission, and any proposal to create such bodies and empower them to license publishers and regulate the content of their publications would be quickly and rightly denounced. But there is a Federal Communications Commission that has such licensing powers and is requiring such regulatory powers; moreover, we are hearing on every side growing demands for it to be more vigorous in the use of those powers. Ironically, those who would be most appalled by efforts to regulate the print medium seem most in favor of efforts to control the broadcast one.

There are four justifications for regulation of the broadcast medium. Three of these have, in my view, no validity at all and the fourth is partially valid only under certain limited (and changeable) circumstances. The first is that space on the electromatic spectrum is scarce and signal interference will result without regulation. This, indeed, was the reason for the passage of the Communications Act. But the prevention of interference is a technical problem of frequency allocation that need not entail any regulatory controls at all or even a license-renewal process. Furthermore, it is not even clear that there is a "shortage." The average resident of a metropolitan area is exposed to far more radio and television stations than to newspapers and the number of such stations is growing at a time when the number of metropolitan newspapers has been static or declining. Finally, there are in almost every area substantial numbers of unused frequencies, including television frequencies, particularly on the UHF band.

The second argument is that the "airwaves are public property and should therefore be used in the public interest." It is far from clear, however, in what sense the public "owns" the airwaves, or how such ownership as exists conveys any regulatory rights. The public also "owns" the streets on which newspapers are sold and delivered and owns some of the forests from which trees are taken to make newsprint, but no one is proposing that newspapers operate "in the public interest." And most importantly, I had supposed that the reason for the passage of the First Amendment to the Constitution was that Americans were not prepared to trust any agency of government to determine what constituted the public interest in the field of information and ideas.

Third, broadcast messages should be regulated, it is claimed, because they have no extraordinary, even hypnotic, impact on the listening and viewing audience. Even if the impact is as great as alleged, this is tantamount to saying that ideas should be subject to a regulatory constraint when they are powerful. This is not the premise that animated those men who spoke out against laws aimed at controlling certain religions because their ideas were powerful, nor the premise that kept us from the political control of motion pictures when they were supposedly exerting "hypnotic" effects. But the impact of the broadcast message is not well-known. For example, there have been repeated efforts to measure scientifically the effect of television violence on children, including a major new effort commissioned by the Surgeon General, and the results are at best equivocal—depending on the many other factors and on what measure of "violence" is used, there may or may not be a media effect on behavior.

The final reason for some degree of regulation has some plausibility. Commercial broadcasters, especially television broadcasters, must show programs that attract as large a listening or viewing audience as possible. To act otherwise is to sacrifice advertiser revenue. While from time to time, partly in order to satisfy their own desire to do good, networks and stations will show programs with low audience ratings, the general and inevitable thrust of their programming is based on the assumption, which I believe is quite correct, that they are in the mass entertainment business. This means that programs that are offensive to any significant number of viewers or which have only a limited and specialized appeal will rarely be shown. An important consequence of this is that the access that indivduals with specialized or controversal interests have to the broadcast media is much less than their access to the print media. Speciality magazines catering to political or cultural minorities need not compete with each other or with the mass circulation magazines and newspapers; they can accumulate their own audience, often a quite profitable one. And even in the mass circulation publications, controversy and special interests can be printed because the reader can easily skip over what he does not like and read what he does like, all the while noting, for whatever value it may have, the advertisements interspersed among the articles.

Many critics of broadcasting recognize the consequences of making a mass appeal but fail to understand its causes. To them, especially to many writers and other creative persons, the consequences result from the wickedness or commercial corruption of the network and station owners. While I would be the last to claim these executives have any more virtue than the rest of us, I see no reason to believe they have any less. They are responding in the only way they can to the reward system that exists in an industry which competes for mass audiences by the presentation of sequential entertainment images which perish the instant they are produced. It is easy to understand, however, why the advocates of greater control over broadcasting can justify their demands by the argument that such control already is exercised by network and station executives responsible only to themselves, their pocketbooks, and their advertising clients.

The regulatory framework that has developed around broadcasting—the license-renewal process, the right-to-reply rule, the fairness doctrine, the limitations placed on network programming during prime time—is based on an effort to regulate cultural variety and political diversity into a medium the very structure and indeed existence of which depends on the maintenace of relatively homogenous mass entertainment. Such efforts are bound to fail, or at best to lead to unexpected and probably undesirable consequences. Public policy is rarely effective when it seeks to use regulatory sanctions in opposition to the interests and preferences of a large segment of the population. Public policy is more effective when it seeks ways of harnessing self-interest to serve larger objectives.

Consider the history of the effort to tell broadcasters what the "public interest" requires. In 1940 a Boston radio station had its license renewed only after it promised that it would cease broadcasting editorials and cease expressing views on controversial questions. By 1946 the FCC had decided that "public service" required that stations offer programs that cater to minority views, some of which, presumably, would be controversial. By 1949 it had changed its mind about editorializing provided that it met the criterion of "overall fairness." "Fairness" has meant in theory that a broadcaster has "an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues." In practice this means that there is a tax on controversy—if a station broadcasts a program, even a sponsored one, favoring fair employment practices, opposing pay television, attacking fluoridation, or favoring nuclear disarmament, free time must be given to those who have different points of view. Indeed, the most recent formulations of the doctrine hold that the station must actively seek out opponents and give them a chance to reply. These are all costs to the broadaster.

In general, when we tax something, we are raising the price of it. How vigorously would the *National Review*, the *New Republic*, the *New York Review* *of Books*, or *Human Events* press their own views on the pages of their magazines if they also had to pay a "controversy tav"—namely, seek out opponents and offer them, free of charge if necessary, equivalent space on their pages?

Recent court decisions have held that advertising may also be subject to the same considerations of fairness. Ecologists may claim, as a matter of right, the chance to broadcast, free if necessary, advertisements attacking pollution if stations broadcast advertisements selling automobiles or gasoline.

No one is opposed to fairness—that is what makes it so difficult to think clearly about the problems created by government and court pressures to change the content of broadcasting. We think it is fair for the people to hear both sides of an issue, and therefore we conclude that it is only fair that broadcasters be required to tell both sides of an issue. But that is not the way serious debate is conducted. Debate is most vigorous when people can behave as partisans, and partisanship is not enhanced when those who manage the forum in which partisanship will occur know that if they don't put on the right mix of viewpoints their right to do business will be challenged before a government agency.

Indeed, the fairness doctrine imples a curious, and I think unsatisfactory, theory of argument in a democratic society. It does not say that it is public policy to insure the presentation of all points of view on important subjects, but only that *if* a broadcaster offers one point of view, he must offer a chance to some opponent to present another point of view. In short, the media may be as bland as it wishes, but should it say something controversial, it must add the phrase, 'but on the other hand . . ." What we really desire, I suggest, is an institutional structure that makes it easy for partisans of many causes to make partisan statements about those causes. We need, not a fairness doctrine, but a diversity doctrine.

The current challenges to broadcasters in the name of fairness or public-service programming may serve the cause of fairness, but they are not likely to serve the cause of diversity. The powers that have always lay dormant in the Federal Communications Act have been discovered, not just—or even primarily—by the FCC, but by various interest groups all over the country. Many of them are using the courts or the license-renewal process to activate those regulatory powers. The message in each case is the same—"do it *my* way, or don't do it at all." Broadcast what *I* want to hear, or I will try to prevent you from broadcasting at all. What these groups want ranges all the way from more classical music to more rock music, from fewer Italians in crime programs to more Mexican-Americans in non-crime programs.

In the short run, the effect of these challenges is not likely to be thought ominous—in part because the changes will be slow in coming and in part because the changes are principally being sought by the same groups normally thought to be defenders of free speech, namely, liberals. But the regulatory powers conferred on the FCC by the decision in the *Red Lion* case and the license-renewal powers the FCC already has are not the exclusive property of liberals: they can be used by all points of the political spectrum. And in time they will be. I have heard few liberals protesting the fact that a small radio station broadcasting anti-black propaganda was forced off the air; we will wait and see what their views are if a small black-owned station is challenged for broadcasting anti-white propaganda.

Diversity of opinion and variety in culture will not be achieved by efforts to regulate these things into a commercial structure designed for mass entertainment. What is more likely to happen is that regulation will insure that while we will have editorials, they will be banal ones; that while we will have a mix of ethnic groups portrayed, each will be portrayed as inoffensively, which is to say, as unrealistically, as possible; that while we will have public service programming and community interest features, they will be ones that few viewers will be tempted to watch.

Diversity of opinion and variety in culture will become available in broadcasting, especially in television, only when the structure of that medium is altered in such a way as to make it economically and technically feasible to serve specialized and partisan audiences with specialized and partisan programming. There are at least two ways of achieving this.

The first is by abandoning, except perhaps as a last-resort method for dealing with the most blatant abuses, the fairness doctrine and the renewal hearing process as devices for improving the quality of broadcasting. They have not significantly improved things in the past, they are not likely to in the future, and the costs (in litigation, in hearings, in record-keeping, and in the exercise of inhibiting constraints) will be burdensome for everyone but the lawyers whose fees are enhanced by such trials by ordeal. In the place of these regulatory devices, I would substitute some form of statutory right of access to broadcast facilities for any and all groups who would pay a nondiscriminatory fee on a first-come, first-served basis. Any legal advertisement would be accepted. Some part of television broadcasting might also become a genuine Town Hall or an oral letters-to-the-editor column. To a great extent, this has already happened, without legislative stimulus, on radio in the form of the talk shows. The broadcaster would have to be absolved of liability for the use to which this access is put.

The second is to end the barriers to the development of cable television in such a way that enables it to compete fairly, and without real or hidden subsidies, with over-the-air broadcasting. Cable, as you all know, holds the promise of ending channel scarcity and of making possible a realistic test of pay television. It also holds the promise of substantially reducing programming costs for certain forms of communication and of permitting the national linkage of specialized audiences so that groups with specialized interests and views could be simultaneously reached available. A guaranteed right of access will initially mean a few commercials, plus some talk shows, against the war in Viet Nam and in favor of ecology. Even a cable system or a right of access with high acceptance in the prime markets, such as New York, will mean in the near future only better reception, additional syndicated re-runs and movies, and a greater variety of athletic events.

But I would argue that such a prediction, however realistic, is not an argument against the strategy. What we are concerned about, after all, is access for specialized, unpopular, or controversial broadcast material. By definition there is no large market for that: if there were, if would be found on NBC or CBS at 9 p.m. on Wednesday evenings. There is no large market for the opinions to be found in the *National Review* or the *New Republic*, at least compared to the market for the *Readers' Digest*, yet the more sectarian views are there for those who wish to consume them. And those who want them have no trouble finding them. They may complain that their views do not attract as wide an audience as does Flip Wilson, but they have no right to insist that their presentations should pre-empt the time or channel allotted to Mr. Wilson.

It would be foolish to claim too much for a strategy of unregulated, diverse channels of communications. The best that can be said for it is that it has none of the costs, and more of the benefits, of the present strategy of regulating a few scarce channels. Should the new strategy be adopted, we will not find ourselves suddenly transported into the world of vigorous television debate. Nor, I suspect, is that the world most people really want. The prospect recalls to mind Oscar Wilde's observation that the problem with socialism is that it takes too many of one's evenings.

THE DETROIT NEWS,
DETROIT, MICH., *October 4, 1971.*

Senator SAM J. ERVIN,
Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, Washington, D.C.

DEAR SENATOR ERVIN: In response to your September 15 letter, and after talking with Mr. Pursley of your staff, I submit the following statement. Needless to say, if the Committee should have any questions I would be glad to answer them either in writing or in person.

First I should point out that I speak only as the Editor of *The Detroit News*, not as a representative of the profession as a hole. As a matter of fact, I know that some of my colleagues in the profession will disagree in part with my approach.

PROTECTION OF CONFIDENCES

Your letter asks for my opinion of S1311.

Let me say as a generalization that I and my newspaper have long taken the position that we would prefer to have legislative bodies stay out of the newspaper business. Certainly we want no new laws restricting present operation of the free American press and, in consistency's name, we carry that to the point of wariness about any legislation which would give special privilege to newspapers.

Along this line we see some inconsistency in the more extreme positions of some of our colleagues who, while on the one hand defending a national "right to know" which would make everyone else divulge information, seemingly would exempt "responsible"editors and broadcasters from any required contribution to that public "right."

The one very limited exception we would make is in the case of a newsman with a legitimate need to protect a confidential news source.

Having read S1311 I, as a newspaper editor, see no objection to it. I would have to qualify that by adding that I am not an attorney and that someone more trained in the law might point out some "fishhook" not apparent to me from a reading of the Bill.

I favor a spelled-out and reasonably qualified legal statement of a newspaperman's privilege to protect confidential information. I note in this respect that Solicitor General Erwin N. Griswold, speaking recently to the Supreme Court, said:

"The news media have functioned effectively and efficiently in this country for almost 200 years without a reporter's privilege. Since the early days of the Republic, the news-gathering profession has depended in large part on information given reporters in confidence. Despite the fact that American informants have always been faced with the possibility that some day before some grand jury investigating criminal activity the reporter might be called upon to devulge his sources, the flow of governmental information has increased significantly over the years."

No editor could deny the basic truth of Mr. Griswold's statement. It appears however to leave out certain facts:

First, various states, 17 I believe, have legislation protecting a reporter's right to maintain confidence. A similar privilege should, I believe, be extended to the federal system. Second, Mr. Griswold's statement takes no account of the fact of an increasing number of legislative committees, both state and federal, inquiring into matters where the purposes of their investigation might be helped by forcing newspapermen to reveal their confidences.

Still more basic and left out of Mr. Griswold's statement is the history of *how* newspapermen since the early days of our Republic have protected confidences. Generations of reporters and editors have ducked, stalled, dodged, sometimes committed perjury, and frequently gone to jail, in defense of their conviction that protection of sources of confidential information is both a moral obligation and a practical necessity if newspapers are to make an investigative contribution to a better and more honest society. I want to reemphasize that my support is solely for legislation which would protect a reporter's "confidential information." Here I reluctantly disagree with some of my editorial colleagues who seemingly would demand for the communications media a privilege going far beyond that now accorded to lawyers, ministers and doctors.

A minister for instance, who from his pulpit sees a crime committed in the midst of his congregation could not refuse to testify on the basis of the privilege surrounding information given to him in the confessional. A doctor on a house call who witnessees a crime cannot claim a physician-patient relationship in refusing to testify; the same apparently applies to a lawyer who might witness a crime not directly connected with any information given him in confidence by a client.

Similar limits, it seems to me, logically apply to a newspaper reporter. Sent out on a straight news assignment, he can hardly claim professional privilege of refusal to testify as to what he sees. Again however I would support legislation that would protect the reporter against the necessity of later testifying as to information given him following his assurance that it would be kept confidential.

SUBPOENAS IN GENERAL

Your Committee asks my views concerning the general effect of governmental subpoenas on newsmen's ability to do their job. Like every metropolitan editor I have found that subpoenas, both by prosecutors and defense counsel and by contending lawyers in civil cases, can be both burdensome and disruptive. Chiefly, this comes about when lawyers or legislative investigators essentially are on fishing expeditions trying to find in newspaper offices data which might help their presentations. Usually, it would seem to me this matter can and should be controlled by the judge or legislative committee chairman who issues the subpoena; the big exception, I repeat, is in the case of a subpoena calling on a newspaperman to reveal confidential information.

PENTAGON PAPERS

On the matter of the release by newspapers of classified information and the goverment's effort to enjoin such publication, I attach herewith a copy of a June 27, 1971, editorial which I wrote and had published on the front page of *The Detroit News*. It expressed our disagreement with the inference by *New York Times* attorneys that they were speaking for the whole press when they defended before the Supreme Court their publication of the so-called Pentagon Papers.

We still stand by this editorial and I would add several thoughts to the argument set forth in it.

First, from my own experience of ten years as a Washington correspondent, I think I can speak with some authority on the working of our present system, a system which has resulted in the American people being better informed than any other nation of people, present or past. Unquestionably too much information is classified by various governmental agencies and too much classified material is kept in secret files long after there is any need for its protection as confidential information. Like every other newspaperman, I would like to see this situation corrected. But, having said that, I would point out from my own experience that very little remains secret indefinitely in Washington. Consistently, there is at work an amorphous sort of system under which various people—presidents, cabinet members, civil and military officials and members of Congress—give out key bits and pieces of secret information. Admittedly such releases usually are for the self-service of the official releasing them, or are released in furtherance of what such officials believe to be the public welfare.

But, regardless of the motivation, the "secrets" do come out. And it should be noted that this rule applied to virtually all of the factual "revelations" of the Pentagon Papers.

Certainly any regular newspaper reader or listener to broadcast news was informed that President Johnson ultimately espoused programs he had attacked when Senator Goldwater suggested them during his presidential campaign; no reader or listener could have failed to know that many advisers of the President opposed his limitations on combat action; the Kennedy administration support of the overthrow of the Diem regime was reported and commented on. The list goes on to cover other "facts" as differentiated from the interesting detail of personal memoranda, etc.

My fear is that if the argument propounded by The *New York Times* attorneys is carried to its logical conclusion there will be other publication of secret documents the release of which will lack the public support accorded in the Pentagon Papers incident; then I fear a publicly supported congressional reaction in the form of legislation which would close the present avenues of information.

For example, there are some men in official positions who disagree with the traditional friendliness of our government to the State of Israel. Assume a hypothetical case under which a State Department employee, so motivated, decided to remove from the files all governmental information on present Middle East negotiations and to deliver to a sympathetic editor those portions best calculated to support his theory that we were headed into a new war. The informant and the editor both might argue that the national good required this breach of security regulations in order to prevent a war which was about to begin. But I would submit that, if a majority of Congress and of the people disagreed, there would be an immediate call for legislation to prohibit any such further violation of security and to punish anyone, either informant or editor, responsible for such a breach. The result well could be the passage by our Congress of an Official Secrets Act modeled after Britain's which really would close the flow of information without doing anything about the admitted evil of overclassification of information.

In this respect I would note that a careful reading of the individual decisions of the Supreme Court justices in the *New York Times* case indicates that several justices who ruled with the *Times* felt they could not support the government's injunction because Congress had not chosen to pass legislation permitting such an injunction of a newspaper to prevent publication of classified documents. The implication was clear that, if there had been such legislation, an injunction would have been upheld by a court majority; indeed a reading of the decisions would seem to indicate that some of the justices almost invited passage of such restrictive legislation.

The many of my colleagues who disagree with me argue that the issue in the Pentagon Papers case involved the novelty of a pre-publication injunction against a newspaper. I cannot argue that such prior restraint would not have been precedent making; neither, however, can I recall another case in which the government knew in advance that secret documents were going to be published and thereby had a chance to seek such an injunction.

I would also point out that various "prior restraints" already exist, affecting newspaper editorial decisions, and unquestionably could be used as precedents for an injunction provision in an official secrecy act.

For example, under libel law a man knowing that a newspaper is about to publish information harmful to him can seek an injunction: in a recent case, the publisher of Lyndon Johnson's autobiography threatened injunctive action to prevent publication by a newspaper of excerpts of that autobiography which had come into the hands of the paper's editor. More specifically every editor knows of the prior restraint now surrounding the records and activity of a grand jury. It is true that, if an editor had delivered to him the transcript of a secret grand jury investigating organized crime, he could go ahead and publish it but he would know that, if he did, he would automatically go to jail for contempt of court.

REARDON COMMISSION

In conclusion I would like to suggest that your Committee might want to take a look at another matter potentially affecting First Amendment freedoms which is not covered in your letter to me. That has to do with the American Bar Association's adoption of certain Reardon Commission rules drafted to correct an alleged conflict between the basic American doctrines of "fair trial" and "free press."

Going in, I do not agree with the Bar and the Reardon Commisssion that any such basic conflict exists. In the tragic aftermath of the assassination of President Kennedy this issue came to the forefront as a nation trying to rationalize the horror of that event was presented with the question as to whether either Lee Harvey Oswald, or Jack Ruby, "ever could have gotten a fair trial."

Certainly if a fair trial requires that a defendant face a jury with no advance knowledge of any of the basic facts, then we would have to conclude that no presidential assassin could be tried fairly and therefore presumably must be let go. The same would apply to a murderer—like Jack Ruby—who chose to commit his crime before national television cameras and a couple of hundred newspaper reporters.

But I think most accept the logic that no practical lawyer can insist on total advance ignorance of all facts as a requirement if jurors are to rule fairly.

Still the Reardon Commission, and later the American Bar seemed to take this position. Under the rules passed by the Bar (and fortunately ignored by most state supreme courts), all discussion of a crime would be kept out of newspapers from the time of an arrest until after the last appellate consideration of the case. It would seem to me that every lawyer, and every citizen, should join editors in opposing this approach.

Existing in the past, such a policy would have barred the public debate between Clarence Darrow and William Jennings Bryan which, while not affecting the Scopes case verdict, did so much to educate Americans on the importance of free academic thought.

A Reardon rule would have required the disbarment of Felix Frankfurter who, as an associate counsel working on the Sacco-Vanzetti appeal, spoke out as he did against prosecution based on political ideology.

Under the Bar Association's amended Canon 20, newspapers would be cut off from facts indicative of corrupt handling of a trial or prosecution until after the final appeal: naturally, if the corruption was sufficient to prevent a trial, there never would be any appeal.

Granted, the Reardon Commission was careful not to specify any action to be taken against newspapers or newspapermen; instead they sought simply to close the sources of information which might permit a newspaperman to get a story.

Perhaps this censorship by indirection might seem to be beyond the jurisdiction of a subcommittee primarily interested in the direct right to print and broadcast news. I submit however that, if information is choked off, the right to print is meaningless. I would hope therefore that your Committee might find it proper to speak out in support of the great majority of judges who have chosen to ignore the American Bar recommendations on this subject.

Sincerely,

MARTIN S. HAYDEN.

[From The Detroit News, June 27, 1971]

AN EDITORIAL: "OUR COLLEAGUES ERR ON WAR SECRETS ISSUE"

The Detroit News does not agree with those of our press colleagues contending that national interest—and the cause of a free press—are served by the current battle over publication of secret Pentagon papers.

As the U.S. Supreme Court considers a case which could produce a new interpretation of the rights and responsibilities of the press in a democracy, this newspaper wants to emphasize that though we will be affected and bound by the decision, the newspaper lawyers in the court are not speaking for The Detroit News.

We do not believe the New York Times and other involved newspapers acted responsibly and in the public interest when—without even trying to use established procedures for declassification of secret papers—they chose to publish an edited version of what it now appears was an incomplete account of our involvement in the Vietnam war.

Despite our devotion to, and dependence upon, the basic rights guaranteed under the First Amendment, we do not accept the premise that the doctrine of a free press is an unrestricted license to print any secret document, the publication of which, in an individual editor's opinion, would be in the national interest.

Finally, we consider as unfactual the current contention by some newspapers that there never before has been any prepublication restriction on what newspapers decide to print.

Our brief includes several points:

First, carried to its logical conclusion, the Times theory would permit publication of any government secret—the design of a Polaris missile, contingency war plans, intelligence reports on enemy war preparations—provided only that the editor believed such publication would be in the national interest.

Such a conclusion, we believe, would result in a disastrous (for the press) collision between press freedom and the manifest democratic need for orderly government.

Granted, the bureaucratic tendency to cover mistakes with a "top secret" stamp is a problem. It always has been and newspapers have an obligation to fight it. But the solution does not lie in a grant to an individual—be he editor, scientist or public official—of power to substitute his personal definition of national interest as a basis for declassification.

To argue otherwise would be to accept the thesis of defenders of Dr. Klaus Fuchs that his betrayal of Anglo-American atomic secrets was justified by his sincere conviction that a better world would result from their delivery by him to the Soviet Union.

Newspapers which have published the Vietnam war papers protest that, in stopping them by court action, the Justice Department sought to establish a precedent of prior restraint upon newspaper publication.

Is that true? Forgetting the national defense field, is it not accepted that both state and federal judges use "prior restraint" to protect their own secrets? Would any of the judges to whom the Times appealed last week have listened for a minute to a contention that a newspaper which acquired a transcript of a grand jury investigation of organized crime had a right to publish it on the ground that Mafia operations constitute a national problem concerning which the public has a "right to know"?

We and the New York Times know the offending editor would be jailed for contempt of long-recognized prepublication restraints.

It is argued now that an informed public has a right to know right now what individual diplomats and military men recommended over the years of our Vietnam war escalation. But the Times itself has not always followed this theory, as is reported in the current Newsweek magazine by Columnist Stewart Alsop.

Alsop recalls the Cuban missile crisis and an article which he co-authored describing deliberations of National Security Council members. The Times then reacted with outrage to what Alsop calls his "attempt to present the American public a history—admittedly incomplete—of decision-making at the highest levels of government."

In an editorial captioned "Breach of Security," the Times fumed then that: "The secrecy of one of the highest organs of the United States has been seriously breached."

"What kind of advice can the President expect to get under such circumstances?" asked the Times. "How can there be any real freedom of discussion or dissent; how can anyone be expected to advance positions that may be politically unpopular or unprofitable? Does no one in Washington recall the McCarthy era and the McCarthy technique?"

What the Times asked then we'd repeat today. If it was wrong for McCarthy retroactively to crucify diplomats for alleged wrong decisions and recommendations when China was falling to communism, is it proper to assail military and State Department men in 1971 for reports they wrote a decade ago when our Vietnam effort had general support?

As the Times (and The Detroit News) said during the McCarthy era the President will get no sincere recommendations if his subordinates suspect that they will be publicly pilloried for them a few years later, and in the context of different times.

And were the newspapers which published the documents motivated solely by a search for the whole truth? Current revelation as to the sources of the misappropriated documents raises questions.

First, the 40-odd volumes of secret papers went to the Times, which studied them for several weeks and then, without bothering to apply for declassification, began publication, the busy peddlers of the documents hurried them to other papers, each—like the Times—an advocate of immediate Vietnam withdrawal.

Simultaneously the papers were peddled to anti-war congressmen then preparing their effort to use the draft extension bill as a new vehicle to force adoption, without enemy reciprocation, of a firm withdrawal date for all U.S. forces in Indochina.

Manifestly the newspapers were used by the peace movement to get over a propaganda point. Obviously there is reason to wonder if they would have responded with such alacrity to an effort to publicize documentation supporting an opposite views of the Vietnam problem.

But, it is contended, publication did not harm national security. Is that true?

Included in the published material were verbatim and dated translations of coded messages. Given the translation, cryptographers have a major tool for code-breaking. Granted, most of the codes have been changed but ability to decipher now our secret transmissions of the 1960's (which other nations have recorded) opens all our messages of that era to any country wishing to use them for diplomatic mischief.

Secretary of State William Rogers has noted other serious diplomatic problems:

What government is going to freely and frankly exchange views with us if it suspects the correspondence shortly will be published worldwide?

What head of state allied with Washington is going to be comfortable in the relationship when he reads the published recommendation of Assistant Secretary of State Roger Hilsman (now a leading resident of the dovecote) that military plotters who later murdered President Diem be given a free hand in disposing of the head of government with whom we had a fighting alliance?

Even if the papers publishing them did not so intend, the prospects are that the already obdurate Hanoi negotiators may feel that revelation of the alleged "immorality" of every U.S. president since Harry S. Truman will so stir American protest as to force President Nixon to surrender now. Certainly if a negotiated peace is in the American interest, none of the events of the last two weeks have helped our bargainers get one.

In summary, The Detroit News does not want the freedom of press so important to our existence stretched to justify this type of irresponsibility.

We do not defend the proposition that any government employe with access to classified material has a right to leak it for publication in the name of national interest.

We repeat that a contrary contention can lead only to a confrontation which the public will decide in a manner destructive to freedom of the press.

THE AUTHORS LEAGUE OF AMERICA, INC.,
NEW YORK, N.Y., *October 18, 1971.*

Hon. SAM J. ERVIN, JR.,
Chairman Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: I appreciate your invitation to submit a statement in connection with your Subcommittee's hearings on the First Amendment and the Press; and accordingly, I respectfully request that this letter be included in the record. As you have said, the Subcommittee is "seeking to create a better appreciation of the First Amendment's purposes and its crucial importance to a free society." This understanding is much needed.

Freedom of speech and press are essential to creative work and are naturally prized by writers and dramatists. But the Authors League realizes that the rights safeguarded by the First Amendment are "for the benefit of all of us" and "assure the maintenace of our political system and an open society." (*Time, Inc.* v *Hill*, 385 U.S. 374). The League also recognizes that freedom of expression requires protection of each step in the process of communication, not only writing and publishing. The distribution of books, their circulation in schools and libraries, the gathering of information—these vital steps must also be protected. Otherwise, the rights to write and publish could be reduced to empty formalities. Consequently, the Authors League has worked to defend the rights of booksellers, distributors, librarians and teachers—as well as authors and newsmen. And, recognizing the First Amendment rights in all media are threatened by restrictions imposed in any medium, it has given support in briefs, statements and testimony to the rights of broadcasters, motion picture producers and newspaper publishers—as well as the rights of authors and book publishers.

In many of these controversies, broadcasters and newspaper publishers—whose representatives are now testifying before the Subcommittee—have been conspicuous by their absence. It is therefore encouraging to see some of them joining in some First Amendment controversies, e.g., the *Caldwell* appeal and the SELLING OF THE PENTAGON dispute. Let us hope that they will also participate in less well known and "respectable" battles where First Amendment principles are under fire. And let us hope that they will also devote themselves more actively to helping create that "better appreciation of the First Amendment's purpose and its crucial importance", which the Subcommittee is seeking to develop.

An understanding of that purpose and importance requires more than occasional "lip service" to "free speech". It requires thorough reporting of threats and restraints on free speech. In this respect, most television news reporting, and much press coverage, leaves a great deal to be desired. Even controversies as publicized as the *Caldwell* and other recent newsmen-subpoena cases received scant attention from television news reporters. Furthermore, an appreciation of the purposes and importance of the First Amendment requires effective explanation of its basic principles, the benefits it secures, the abuses that may result, the reasons they must be tolerated to achieve meaningful protection, and dynamics of suppression. Lack of this understanding leads many to reject the basic principles of the First Amendment. In large part, this reflects a regrettable failure of our educational system. But it also reflects a failure by television, our most effective medium of communication, to do anything to increase its audience's understanding of the "First Amendment's purpose and its crucial importance to a free society."

Of course, the solution to this problem does not lie in any legislative compulsion on broadcasters or the press. But freedom of speech and press would be strengthened if television journalists were permitted by stations and networks to report and comment on First Amendment controversies.

Effective protection of First Amendment freedoms does require legislative assistance in other areas. In broadcasting, for example, it is essential that the Congress make certain that the "fairness doctrine" should not be gutted under the pretext of preserving "freedom of speech". As the Supreme Court unanimously held in the *Red Lion* case, the fairness doctrine protects free speech in the broadcast media. It enforces the public's

". . . collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." (395 U.S. 390)

The *Red Lion* opinion also focuses attention on another critical First Amendment problem in the broadcast media, the concentration and perpetuation of control over the limited number of television and radio broadcast channels. It would be catastrophic if permanent control of television stations were frozen into the hands of present licensees, who were intended by Congress to receive only limited licenses subject to reveal if they effectively served the public interest. Rather than consider perpetuating these licenses, the Congress would do well to consider the alternative suggested by the Supreme Court in the *Red Lion* case:

"Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of these who wish to use it, each being assigned a portion of the broadcast day or the broadcast week." (395 U.S. 390, 391)

Concentration of control poses a serious threat to free speech in all media of communication—broadcasting, newspaper and book publication. If three or four book publishers are merged into the control of one corporate owner, then one editorial viewpoint is substituted for three or four. While book publishing has not yet reached the dangerous dimensions of newspaper monopolies or oligopolies in major metropolitan areas, it has moved much too far down the path, without any inhibition. Several major publishing firms have lost their separate identities. Some of the largest have been acquired by television networks or other large corporations engaged in other fields of communication, resulting in concentration of multimedia in fewer and fewer hands.

This trend is especially dangerous for book publishing which has enjoyed considerable indepenence in the past because of individual ownership and freedom from pressure by advertisers or other outside interests. As publishing houses come into the hands of broadcasters and conglomerates, they are increasingly exposed to that kind of pressure, to resulting self-censorship and, finally to the suppression of books and obstruction of the flow of information and opinion to the public. As the Supreme Court has warned repeatedly, the most effective form of restraint is often that which induces self-censorship. The wave of mergers and acquisitions in book publishing and other media have vastly increased the possibility of such restraint.

The destruction of independent publishers will be accelerated by the unfortunate escalation of second class postal rates. The death of LOOK magazine is a grim harbinger of things to come. If LOOK's publishers could not afford to continue publishing, faced with a 142% rise of postal costs from $4 million a year to $10 million a year, then obviously smaller magazines will not be able to survive the high cost of using a public medium of communication.

Congress should recognize that the second class mail is an essential, indispensable channel of communication, no less so than the airways. A substantial increase of postal costs will suppress periodicals as effectively as a law prohibiting them from being published. Millions of readers will be denied access to periodicals of every political persuasion; to scientific, educational and technical journals; to publications serving the public interest in countless areas of interest. The country can afford to maintain reasonable postal rates for the second and fourth class mails. It subsidizes many activities, at greater cost, which are of far less use or benefit.

The subpoenaing of journalists is a serious threat to First Amendment rights. Our views on the issues presented in the *Caldwell* case are set forth in the *amicus* brief filed by the Authors League in the Supreme Court, a copy of which is enclosed. We would appreciate the opportunity to comment separately on *S. 1311*, the "newsmen's privilege" bill, although we might note—as we have in our *Caldwell* brief—that what is at stake is not the protection of a privilege for reporters, but the protection of a First Amendment right for the benefit of the public and the press at large.

We also suggest that the Subcommittee consider these First Amendment problems:

1. Grass roots censorship—i.e. pressures from public officials or private groups to remove books, periodcals and newspapers from public libraries and schools.
2. Congressional "blacklisting" of persons for expressing controversial views; e.g. the blacklist issued last Spring by the House Internal Security Committee.
3. Attempts by public officials to effect the content of television news and special events programs, to induce producers to invite spokesmen of official positions to appear on these programs or to bar opponents. An example: programs on the SST debate.
4. Access to government information by authors and publishers.
5. Methods for insuring greater independence of television, as a medium of communication, from the direct or inherent influence of advertisers.
6. Methods for providing more freedom of access to television and cable television in light of the Supreme Court's suggestions in the *Red Lion* case.

Respectfully yours,

IRWIN KARP,
Counsel.

OCTOBER 6, 1971.

The Honorable SAM J. ERVIN JR.,
Chairman, Subcommittee on Constitutional Rights,
Committee on the Judiciary, The U.S. Senate

The Associated Press Managing Editors Association appreciates the invitation and opportunity to express to the Senate Subcommittee on Constitutional Rights the views of its members on the current state of freedom of the press in the United States.

The free press of America from Colonial days and the tribulations of John Peter Zenger has been the target of those who would throttle it, subvert it, sway it, seduce it, intimidate it or in various other ways prevent it from fulfilling its responsibility to the citizens of the nation.

So it is not new when manifestations of these same things become evident today. But they are no less dangerous than when the great Philadelphia lawyer, Andrew Hamilton, told the jurymen that, in freeing Zenger, they would "have laid a noble foundation for securing to ourselves, our posterity and our neighbors that to which nature and the laws of our country have gvien us a right, the liberty both of exposing and opposing arbitrary power ... by speaking and writing truth."

Misuse of the subpoena power, prior prevention of publication by injunction, public business conducted in secrecy, denial of access to public records have a bigger import than the mere handicapping of a newsman trying to perform his work. They are a direct infringement upon the rights of the citizens of the United States. They deny to him the information essential to the performance of his democratic responsibility, that of choosing his governors.

In their wisdom the drafters of the Bill of Rights saw this truth. They wrote a guarantee that the citizen would have the right to a free press. The press itself was not the recipient of that guarantee. The distinction is important. It is one the attackers of America's free press too often ignore.

The subpoena is a vital tool in the nation's judicial process. It too bulwarks a constitutional guarantee, that to the accused. But wrongfully, even if mistakenly, employed it can and does threaten to destroy the keystone of a free press, the right to protect confidential information and confidential informers. Without that protection, information sources will dry up. The citizen will lose his necessary opportunity to learn facts he must know.

In the last two years this threat has assumed epidemic proportions. From an original highly-publicized attempt by the U.S. Justice Department to obtain information by this method, it has spread like wildfire to courts throughout the land, to law enforcement agencies, even to such diverse public bodies as boards of education and state boards of personnel review.

Editors from coast to coast have hastened to the barricades in alarm, summoning their own legal counsel to throw up a protecting screen. Court decisions are pending. It is of the utmost importance that the citizens of the United States realize what is at stake. Unfortunately, they are hearing, and perhaps in dismaying degree heeding, the self serving attackers (I do not label them merely critics) of the nation's news media.

By prior prevention of publication of information deemed by editors to be essential to their readers, we take the road of the tyrannies which made censorship and then press seizure their first steps to dictatorship.

It makes no difference whether it is one hour, one day, one week or one year. It is suppression of information to which the citizen has a right. If the First Amendment specifically directs the Congress to "make no law . . . abridging the freedom of speech or of the press . . ." it would appear that the prohibition must have equal force in application to acts by other branches of government.

The United States Supreme Court, we are reminded, recently rendered a decision in this particular area of concern. The court dissolved restraining orders which had probhited the New York Times and the Washington Post from further publication of the so-called "Pentagon Papers."

While this was a victory of sorts for a free press, some reactions should be noted:

The Washington Post editorial on the decision said: "There is not much comfort, let alone clear cut law, to be found in yesterday's outcome."

U.S. Solicitor General Erwin N. Griswold said (threateningly as far as editors are concerned): "Maybe the newspapers will show a little more restraint in the future."

Justice Brennan, in his opinion, said: "The error which has pervaded these cases from the outset was the granting of any injunctive relief whatsoever."

Judge Gerhardt Gessell, as pointed out in an article in *Quill Magazine* written by Jack C. Landau, took only eight hours in refusing to enjoin the Post and emphasized that time was of the essence and that the right to publish was so precious that no one can "measure the effects of even a momentary delay."

In the light of this action by the government, and the Supreme Court's decision, it is surely pertinent that the Congress examine carefully what is occurring today in the matter of constitutional guarantees to the citizens of this nation.

Two other areas of major concern to editors in carrying out their responsibilities to their readers are those of open meetings and open records. A principal contributor to the problem has been Congress. The accelerating trend toward closed Congressional committee hearings, plus the mounting tendency in administrative departments to refuse reporters ready access to information, where considered the main contributing factors to passage in 1968 of the United States Freedom of Information Act.

That this did not solve the problem completely is indicated by the results of a survey taken by the Associated Press Managing Editors Association this year. John R. Finnegan, executive editor of the St. Paul Dispatch and Pioneer Press, found that 40.6% of the 123 editors surveyed indicated they had encountered difficulties in varying degree in eliciting information from federal agencies in their home communities.

Most of the 50 editors encountering difficulties cited the Justice Department, particularly the FBI, as the most difficult agency with which to deal. Federal courts and building were rated the second major problem area.

Other problem areas cited by editors: Post Office Department; Defense Department; Immigration and Naturalization Service; Federal Housing Administration; Social Security; U.S. Corps of Engineers; Housing and Urban Development; Selective Service; Atomic Energy Commission; General Accounting Office; U.S. Geology Survey; Natural Academy of Sciences; NASA; Economic Development Administration; Security and Exchange Commission; Labor Department; and the U.S. Bureau of Census.

This report is but a brief summation of the major threats menancing the news media of the United States. It focuses merely on the tip of the iceberg. Unless the media itself, and those in government who believe in and support it, are successful in its defense, deep trouble for the nation lies ahead.

The 1971 report of the Freedom of Information Committee of the Associated Press Managing Editors Association in one disturbing paragraph emphasizes the insidious growth of the cancer spreading because of stimulation by the enemies of America's free press:

"The general population, despite probably the most consistently responsible newspaper performance in history, still appears to take on a growing antagonism toward news media."

The APME, made up of 525 working editors and chief news executives of newspapers who are members of the Associated Press, is dedicated to this freedoms battle.

It was a major persuader in the American Bar Association's decision two years ago not to implement a report calling for stringent new controls on enforcement agencies and the media in coverage of pre-trial news.

It supported newsmen resisting unwarranted use of subpoenas directed at them.

It protested the dangerous employment of a search warrant to invade the offices of a university student daily newspaper.

It has joined with the New York Times and others in a friend-of-the-court action in support of Times reporter Earl Caldwell in his case now before the United States Supreme Court, on appeal from a lower court decision which reversed a contempt of court ruling for refusing to appear under subpoena before a grand jury.

And it protested strongly to the Attorney General of the United States in the government's action in seeking and obtaining injunctions blocking publication in several newspapers of portions of the so-called "Pentagon Papers."

The APME fully intends to continue this battle.

It hopes it will find allies in the halls of Congress.

WILLIAM M. WARE,
Chairman, Freedom of Information Committee,
Associated Press Managing Editors Association.

STATEMENT SUBMITTED TO THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS, SENATE COMMITTEE ON THE JUDICIARY

(By Thomas Powell, President, The Associated Press Boardcasters Association)

Though the First Amendment explicitly protects the purveyors of news against official interference, the public, we believe, was the intended chief beneficiary.

A flow of news unimpeded by the statutes and untinctured by the governors was, we think regarded by the authors of the Bill of Rights as an essential condition of freedom.

Yet, viewed in that light, the First Amendment has been stripped of its meaning and stands today as little more than an empty shell.

Government's heavy hand bears down on radio and television which supply a growing majority of the citizens with their basic informational needs.

The full protective cover of the First Amendment has receded to the point where it is enjoyed only by those citizens who receive all their news from printed pages.

That cover would vanish altogether with the adoption of electronic techniques to transmit newspapers into the home.

Government's pervasive presence in contemporary journalism is a consequence of its regulation of broadcast transmissions on a technical level. No one questions the need for policing the electronic pathways used by broadcasters in the same sense that there is no objection to applying rules of the terrestial road to newspaper delivery trucks.

But government has gone far beyond the role of establishing order in the broadcast spectrum and has intruded deeply into the news role of radio and television through the Fairness Doctrine of the Federal Communications Comission.

There is scarcely an area of journalistic endeavor that has not been the subject of a Fairness Doctrine and a subsequent decision. This ever-enlarging web of rulings cannot help but have dampened dedication to journalistic inquiry and to the ventilation of controversitl matters.

It is now obvious that broadcastng erred in accepting the promulgation of the Doctrine with passivity. Many broadcasters felt it was benign enough, merely reflecting their own policies of treating public issues fairly. We know now that it has deepened the wedge driven by expanding government control between broadcast news and the First Amendment.

It is supremely ironic that broadcasting should be inhibited in its news function while it has been validating to a degree that could not have been foreseen the free press theory underlying the First Amendment. The addition of thousands of radio and television stations to the nation's journalistic enterprices has produced what is certainly an almost optimal condition of diversity in which truth can combat error. Yet, instead of a concomitant decline in agitation for government regulation, we have witnessed the reverse.

Only the courage and professionalism of thousands of broadcast journalists have enabled our media to meet the high responsibilities of public service we sense to be ours.

But the integrity of broadcast news canot be forever preserved in the absence of affirmation of our First Amendment rights.

This Subcommittee can provide no greater service than in achieving its announced intention of "seeking to create a better appreciation of the First Amendment's purpose and its crucial importance to a free society."

We would hope this would lead to a serious re-examination of the propriety both of the Fairness Doctrine and of any news-related considerations in the license renewal procedures of the Commission.

These grave issues of public policy have regrettably been overshadowed recently by the rather spectacular exchanges which have taken place between the broadcast media and some highly-placed critics. We perceive no imminent peril to freedom in the critical assessment of press performance by public figures, no matter how highly placed. In fact, we would associate ourselves with the remarks of the Chairman made at the outset of this inquiry and quoted by the Associated Press:

"It is my belief that robust criticism of government by the press and the consequent skepticism of the press on the part of government are the necessary ingredients of the relationship between the press and government in a truly free society."

Little wonder, however, that the motives of critics are viewed with suspicion and doubt by some broacasters when we are faced with expansionary rule-making, Congressional probing into editorial judgements and the awesome power of government to terminate franchises.

The use of government force for the stated objective of assuring fairness has paradoxically corrupted the important role of criticism, both external and internal, in sharpening press performance in a free society.

It is not necessary to go into horror stories associated with attempts at legislated fairness to say that self-correcting procedures and public judgement constitute an infinitely preferable alternative.

We believe the hour is late. If recent developments have not shown the compelling need to give the broadcast press its freedom, then a course toward abolition of the First Amendment through erosion has been irretrievably set.

STATEMENT OF THE CENSORSHIP COMMITTEE, WRITERS GUILD OF AMERICA, EAST, INC., for the SENATE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

In their statements before your Sub-Committee, writers from Writers Guild of America, West hardly touched upon one area of the Communications Media which has enormous and continuing influence on the thoughts and attitudes of its audience: TV and Radio journalism. Journalists have always been aware that they are in a position to influence public thought, while at the same time accepting a responsibility for impartial and unprejudiced reportage so that thinking individuals can form independent judgments. It is a complex area and TV and Radio News and documentary writers are very aware of their responsibilities to keep airwaves free of bias, and to tell the truth. But how does anyone know if he is telling the whole, unbiased truth; and if he does know, can he; and if he can, should he? Who decides, and how.

The Censorship Committee of the Writers Guild of America, East, believes that of all the forms of censorship currently threatening the freedom of television and radio news, documentaries and public affairs, self-censorship is both the most pervasive and most dangerous.

There have been instances of overt censorship of news. But, on the whole, they have been both rare and difficult to document. Where, for instance, do newspeople draw the difficult line between censorship and fair journalistic judgment? If management does on occasion make news decisions based on judgments other than journalistic, there are seldom ways of tracing those decisions back to their sources once they have filtered down through the various executive levels. We cannot come up with a single case of a writer or reporter being ordered to change vital facts on a story—but it is not rare for controversial facts to be omitted or glossed over, especially when contained in film reports.

The greatest danger lies in self-censorship.

Self-censorship is the end result of hiring practices over the years which have valued corporate loyalty over journalistic skepticism; conformity over individuality; safety over risk-taking. Self-censorship is the end result of a news system which would like to make a financial profit out of news. It is the result of the urgent need not to antagonize the Congress, the Federal Communications Commissions, various other governmental agencies and numerous pressure groups including advertisers.

Part of self-censorship in television and radio news is the continued absence of minority group representation from the decision-making levels of the two media. It is only recently that Blacks, Puerto Ricans and women have been hired in lower-level writing and reportorial positions and this came about only after considerable pressure from sources both within and outside the media.

The three major television and radio networks are major offenders in this regard. Our figures show that only some small percentage of network newspeople are of any minority group and that there is virtually no minority representation in network administrative and executive ranks.

On March 25, 1971, the Joint Equality Committee (made up of the Writers Guild of America, East: the American Federation of Television and Radio Artists, New York local; Directors Guild of America, East, and the Screen Actors Guild, New York branch) issued a public statement deploring the fact that "the faces seen on television news programs, the voices heard on radio news programs and the minds producing these programs do not adequately reflect the multi-racial makeup of our society."

Twenty-seven major network television and radio correspondents supported the statement, as did the Full Opportunity Committee of the National Academy of Television Arts and Sciences, New York Chapter.

Among the individual supporters were Walter Cronkite (CBS News), Edwin Newman (NBC News), Dan Rather (CBS News), Frank Reynolds (ABC News), Douglas Edwards (CBS News), Edward P. Morgan (ABC News), Tom Jarriel (ABC News), Dallas Townsend (CBS News) and Barbara Walters (NBC News).

They and 18 other network news correspondents agreed that "it is LONG PAST the time that ethnic minority groups were properly represented in the television and radio news departments of the networks."

There has been little change since that statement was issued.

Freedom of information is also threatened by the current climate of governmental pressure on news organizations, including issuance or threats of issuance of subpoenaes to reporters.

The Reporters Committee for Freedom of the Press released a study on February 11, 1972 detailing the impact that the subpoenaing of newsmen is having upon the free flow of information to the public.

One of its findings was: "Newsmen have reported that the possibility of being subpoenaed either clearly has, or may have, adversely affected their news coverage in the last eighteen months in the following categories.

"Trial coverage (37% of reporters); investigative reporting (27%); radical-militant groups (34%); minority groups (28%); police reporting (30%); and financial reporting (20%)."

We believe that ultimately local and network television and radio news need believability to survive. Believability is their single most important asset.

And, unless there are drastic and far-reaching changes made; unless television and radio news documentaries and public affairs programs open their closed doors to influences, ideas, and values from outside their small circles; unless journalistic integrity is substituted for corporate loyalty, local and network television and radio will lose much of the believability it needs to maintain public confidence in this influential area of mass communications.

Writers are also concerned about a more subtle form of censorship which affects those of us working in the purely entertainment side of television, particularly on dramatic shows.

Since the beginning of television, writers have been harassed by artificial and arbitrary requirements to avoid situations, sentiments and characters which certain authorities fear will be disturbing to powerful forces, either in or out of government. Up to a few years ago, for example, the use of ethnic minority characters in stories was rare and discouraged. Various strategems and disguises were forced on writers to avoid "controversial" stories. Negroes could be disguised as less dangerous Mexicans or Indians. Jews turned up metamorphosed into Italians because, at that time, it was a less sensitive minority. More recently, responding to changing times and public pressure, ethnic minority characters became more acceptable and television writers were allowed by their employers to flirt with stories touching on political and social issues, generally as long as the approach or the moral drawn did not conflict with safe consensus opinion.

As a residue of this period, there is now a much higher visibility of minority characters in dramatic shows. However, a gain in our industry is generally balanced by a more profound loss. The shift in emphasis on the type of dramatic program from anthology drama or issue-oriented series to action adventure and situation comedy has simply relieved anyone of the necessity of censoring dangerous thought by removing completely the forum for any thought at all.

The disastrous disappearance of "original drama" from American television is more than an aesthetic loss, it also deprives the American people of an effective platform for the exchange of ideas in the form of popular storytelling, a skill which American commercial television had developed to a high artistic and still popular point.

The form which has become the main substitute, and which its apostates claim is comparable to the original anthology, is the so-called "movie for television." However, the almost universal blandness of content provides little stimulation other than the artificial titilation of horror, suspense and occasional mawkish sentimentality. There "television movies" largely duplicate the B pictures of our childhood double features. The depressed standards and the absolute artistic control exercised by network executives on these "television movies" with but a few praiseworthy exceptions which point up the barrenness of the rest, have filled the evening air with a sort of dramatic cold oatmeal and have deprived both the viewer and the writer of any real stimulation.

Writers wishing to tackle important controversial subjects and immediate social problems that are not very popular or cannot be dramatized into simplicity are forced to tuck them into the weekly and most popular form for drama today; the episodic series: MOD Squad, Ironside, Bonanza, Marcus Welby . . . Doctor, Lawyer, Indian, Thief . . . But the very form of the episodic series negates controversy and startling revelation, it's basically a weekly visit with familiar and trustworthy friends. The leading characters must survive for the next week, the leading characters are the goodies, the audience is guaranteed it will all work out.

While bemoaning this "guaranteed-to-please" kind of drama which is glutting prime time we must, in fairness, pause to pay tribute to what was called the "year of relevance." Two seasons ago, several shows were put on the air, in the form of episodic series, where an attempt was made to be realistic, to tackle serious social problems, to do it without the usual sugar-coating, to write and cast and film with intelligence. The result? Low ratings and the cancellation of relevance. In its stead? Irrelevance and high ratings. The audience censored relevance by not watching, just as it censors documentaries and forces them to be relegated to expected poor rating times when they are not removed from the schedules completely. We mention this to remind ourselves of the inherent problem of a medium which must combine popularity with integrity, commercialism with creativity, money with freedom of expression. So far it has been an impossible marriage, but somehow a medium committed to capital profit must also be able to commit itself to artistic and intellectual and idealogical goals without being penalized.

Thus, while the journalistic side of television is still struggling, fighting its own censorship battles against government, executives and self, the entertainment or dramatic side lies a victim of a successful lobotomy, perpetrated by bookkeepers and audience. The result is no trouble, no scuffles, and not much worth writing . . . or watching.

STATEMENT ON SENATE BILL 1311, A "NEWSMEN'S PRIVILEGE" BILL, BY SIX OFFICERS OF THE ASSOCIATION FOR EDUCATION IN JOURNALISM (AEJ)

To: Senator Sam J. Ervin, Jr., Chairman, and the Subcommittee on Constitutional Rights, U.S. Senate.

From: Prof. Hillier Krieghbaum, New York University, President, Association for Education in Journalism (AEJ); Prof. R. Neale Copple, University of Nebraska, President-Elect, AEJ; Prof. Wayne A. Danielson, University of Texas, Past President, AEJ; Prof. J. Eward Gerald, University of Minnesota, Past resident, AEJ, and Member, AEJ Committee on Professional Freedom and Responsibility; Prof. Dwight L. Teeter, Jr., University of Wisconsin, Chairman, AEJ Committee on Professional Freedom and Responsibility; and Prof. Harold L. Nelson, University of Wisconsin, Past President, AEJ.

As officers of the Association for Education in Journalism (AEJ), an organization of more than 1,000 journalism educators, we wish to commend the Subcommittee on Constitutional Rights for undertaking its important study of the state of freedom of the press.

We join the Subcommittee in recognizing that there are many areas affecting freedom of the communications media which need extensive study. (A copy of a letter written to Senator Ervin on August 2, 1971, by Professor J. Edward Gerald of the University of Minnesota and setting out many areas which need study, is appended to this statement.) This statement by six AEJ officers, however, will be confined to one issue: concern over the subpoenaing of newsmen as reflected in a "Newsman's Privilege" bill, Senate Bill 1311.

We support the newsmen's privilege against disclosure of confidential sources or information. The ability of reporters to continue as effective news gatherers would be damaged if not destroyed if reporters betrayed their confidential news sources or disclosed confidential information by testifying.

Because of our support of newsmen's privilege, our basic reaction to Senate Bill 1311 is one of caution. We fear that the language of the bill, should it become law, might deter future court decisions from granting as useful a constitutional privilege as has been granted, for example, by the Court of Appeals for the Ninth Circuit in the case of *Caldwell v. United States of America*.[1] We wish to discuss the *Caldwell* case, and also a 1969 Minnesota newsmen's privilege case, *Thompson v. Minnesota and Donald John Giese*.[2] It is our view that cases such as *Caldwell* and *Thompson* suggest that courts are able to undertake more subtle balancing of interests, in view of the individual fact situations in each privilege case, than is possible in legislation such as that proposed by Senate Bill 1311.

In the *Minnesota* case, T. Eugene Thompson, serving a sentence after having been convicted of first-degree murder, brought a post-conviction action. Thompson sought to have newspaper reporter Donald John Giese reveal the sources for his news stories about the *Thompson* case. Giese was called as a witness, evidently to testify concerning the claim that Thompson " 'was denied his Constitutional right to a fair and impartial trial because the prosecutor, police and their agents stimulated some of the adverse publicity, which contaminated the jurors, by releasing information and making prejudicial statements to the news media that were improper, unethical, and calculated to persuade those exposed to such statements of the prisoner's guilt.' "[3]

Giese was asked by Thompson's attorney: " 'And who were the sources of your information for the news articles that you wrote in connection with the murder of Carol Thompson?' " Giese refused to answer, citing (among other things) the right to keep his sources confidential. Giese said:[4]

"I think that this deprives me of my right to confidential news sources and my right to keep these confidential news sources; and two, it tends to violate the basic ethics of the journalism profession . . ."

Giese was found in contempt and sentenced to 90 days in the county jail.

The Supreme Court of Minnesota, however, reversed the judgment of contempt. Justice William P. Murphy bypassed the pleas of reporter Giese, but instead agreed with a statement in the amicus curiae brief of the Newspaper Guild of the Twin Cities. The Guild had argued that[5]

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[1] 434 F.2d 1081 (CA. 9th Cir., Nov. 16. 1970).
[2] 170 N.W.2d 101, 284 Minn. 274 (1969).
[3] 170 N.W. 2d 101, 102, 284 Minn. 274 (1969).
[4] 170 N.W. 2d 101, 102-103, 284 Minn. 274 (1969).
[5] 170 N.W. 2d 101, 103, 284 Minn. 274 (1969). Emphasis added.

". . . it is not apparent from the "scattergun" question [which reporter Giese had refused to answer] whether the information sought was either *relevant, material* or involved with identification of individuals whose identity might not have already been known * * * *or could have easily been identified in another way.*"

We would expand on the statement by Justice Murphy of the Minnesota Supreme Court, and we have italicized his key points for emphasis. That is, we believe that reporters should not be subjected to judicial or legislative "fishing expeditions" as to the identity of their sources or into their notes and records. It is our conviction that reporters should not be questioned as to the identity of their confidential sources when the material is available from other sources, or when the material is not crucial to the matter under consideration.

As James Hoge, an editor of the Chicago *Sun-Times*, said on a television panel last summer, it is exceedingly rare when courts or grand juries really need to question a reporter to ascertain the source of anything printed in a newspaper. "More times than not," said Mr. Hoge, "lawyers do attempt to use newspaper men to make their jobs easier." Mr. Hoge's views are quoted and seconded by a leading authority on newsmen's privilege, Professor A. David Gordon of the Medill School of Journalism, Northwestern University. Professor Gordon has said: [6]

"In only four of some 80 cases in and out of the law reports have newsmen eventually revealed the identity of a confidential source . . .

"More telling even is the failure of judges to repeat contempt sentences once the first one ends with the source still undisclosed. If the name of the source were really essential to justice or even to orderly judicial procedure, the process should be repeated until the name is revealed.

"Yet judges have almost without exception imposed one fine or jail sentence for contempt and then let the matter drop. This leads to a strong suspicion that part of the legalistic antagonism to newsmen's privilege stems from a perceived affront to the judicial process . . ."

Professor Gordon also said that he sees a trend in recent cases for allowing newsmen to refuse on various grounds to disclose their sources. He declared that ". . . courts in California [in a state case in addition to the *Caldwell* case], Illinois, Louisiana, and New York have ruled in the past two years that reporters need not reveal their confidential sources . . ." [7]

The *Caldwell* case, of course, is far better known than the *Thompson* case from Minnesota. Earl Caldwell, a black reporter for the New York *Times*, had become a specialist in reporting news concerning the Black Panther Party. A Federal Grand Jury had subpoenaed Caldwell, in order to pursue a general investigation of the Black Panthers and the possibilities that the Panthers were engaged in criminal activities contrary to federal law. Caldwell won this "protective order" from the United States District Court for the Northern District of California: [8]

"(1) That * * * he [Caldwell] shall not be required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination to the public through the press or other news media.

"(2) That specifically, without limiting paragraph (1), Mr. Caldwell shall not be required to answer questions concerning statements made to him or information given to him by members of the Black Panther Party unless such statements or information were given to him for publication or public disclosure."

Thus the District Court recognized, in that particular fact situation, a competition of public interests between a newsmen's privilege to keep sources confidential (resting upon the First Amendment) and society's stake in having Grand Juries able to gather testimony from witnesses. Although the District Court told Caldwell that he would not have to give testimony, he would nevertheless have to obey the subpoena and appear before the Grand Jury.[9]

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[6] Based upon Professor A. David Gordon's unpublished manuscript, in the November-December, 1971, issue of *Columbia Journalism Review*. See also Gordon's "Protection of News Sources: The History and Legal Status of the Newsman's Privilege," unpublished Ph.D. dissertation, University of Wisconsin, 1970. 925 pp.

[7] Gordon, manuscript for *Columbia Journalism Review*.

[8] Quoted in *Caldwell v. United States*, 434 F.2d 1081, 1082–1083 (CA, 9th Cir., 1970).

[9] *Ibid.*, 1083. See also *Garland v. Torre*, 259 F.2d 545, at 548 (2d Cir., 1958), cer. den. 358 U.S. 910, 79 S.Ct. 273 (1958), involving a journalist cited for contempt for

Despite being told that he did not have to testify, Caldwell refused to appear at all before the Grand Jury, on grounds that the confidence he had won from the Black Panthers would vanish were he to go behind closed doors to appear before the Grand Jury. Narrowly confining itself to the specific facts of the case at hand, the Court of Appeals ruled that Caldwell did not have to appear before the Grand Jury.[10]

"If any competing public interest is ever to arise in a case such as this (where First Amendment liberties are threatened by mere appearance at a Grand Jury investigation) it will be on an occasion in which the witness, armed with his privilege, can still serve a useful purpose before the Grand Jury. Considering the scope of the privilege embodied in the protective order, these occasions would seem to be unusual. It is not asking too much of the government to show that such an occasion is presented here.

"In light of these considerations, we hold that where it has been shown that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand Jury interrogation, the Government must respond by demonstrating a compelling need for the witness's presence before judicial process properly can issue to require attendance."

Thus, the Court of Appeals for the Ninth Circuit cautiously—and we believe, wisely—tailored its decision to the *Caldwell* case. As Judge Charles M. Merrill there noted, "courts can learn much about the problems in this area as they gain more experience in dealing with them." [11] The *Caldwell* case, along with two other newsmen's privilege cases, is at this writing before the Supreme Court of the United States.[12] We suggest that no action be taken on the bill until the Supreme Court rules on the cases before it.

After expressing misgivings about Senate Bill No. 1311—mainly that it might remove some judicial flexibility in adjusting to the particular fact situations of newsmen's privilege cases—we wish to suggest two amendments which we believe would strengthen the bill.

First, we suggest amending the preamble of Senate Bill 1311 in this fashion, with italics indicating an added phrase:

> "To provide certain privileges against disclosure of confidential information and the sources of information obtained by newsmen, *in protection of the freedom of the press guaranteed by the First Amendment.*"

Second, we would add to the very end of the bill, substituting a comma for the period, and adding the italicized phrase:

> "The order shall be granted if the court, after hearing the parties, determines that there is substantial evidence that disclosure of the information is required to prevent a threat to human life, espionage, or foreign aggression, *and that the information is necessary and of central relevance to the proceeding and not obtainable from another source.*"

This suggested change at the end of Senate Bill 1311 would provide the standards emphasized in the *Torre* case by Judge [now Mr. Justice] Potter Stewart in regard to the centrality of the requested information to the proceeding and its unavailability from any source other than the newsman.[13]

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refusing to testify in a libel trial. In that case, Judge (now Mr. Justice) Potter Stewart wrote for the court in affirming the contempt citation. But in so doing, he noted that "compulsory disclosure of confidential sources of information may entail an abridgement of press freedom. . ." In *Torre*, Judge Stewart declared that the test was "whether the interest to be served by compelling testimony of the witness in the present case justifies some impairment of this First Amendment freedom." Because the information sought from the witness was relevant and central to the plaintiff's libel suit, an over-riding need for the specific testimony was shown in those circumstances.

[10] *Ibid.*, p. 1089.

[11] *Ibid.*

[12] Other cases before the Supreme Court are *Branzburg v. Meigs*, No. 2-29-71 (Ky., Jan. 22, 1971), *cert. granted sub. nom. Branzburg v. Hayes*, 39 U.S.L.W. 3478 (May 4, 1971) (No. 1381), and *In re Pappas*, 266 N.E. 2d 297 (1971). *Branzburg* involved a Louisville *Courier-Journal* reporter who watched two men convert marijuana to hashish and then wrote a story about it. In *Pappas*, a Massachusetts television newsman refused to tell a grand jury what he had seen and heard at a Black Panther headquarters during civil disturbances in New Bedford. The Kentucky Court of Appeals greatly restricted the scope of the state shield statute and the Massachusetts court flatly denied any constitutional protection. Note, however, that the fact situations in *Branzbug* and *Pappas* are appreciably different from those in *Caldwell*. See Harold L. Nelson, "The Newsman's Privilege Against Disclosure of Confidential Sources and Information," *Vanderbilt Law Review* 24:4 (May, 1971) pp. 667-669.

[13] See Note 9,

To conclude, we quote Circuit Judge Merrill, who in finding for reporter Earl Caldwell and for the *New York Times* spoke eloquently not only for the news media but also for the public's interest in being informed. Judge Merrill wrote:[14]

> To convert news gatherers into Department of Justice investigators is to invade the autonomy of the press by imposing a governmental function upon them. To do so where the result is to diminish their future capacity of news gatherers is destructive of their public function. To accomplish this where it has not been shown to be essential to the Grand Jury inquiry simply cannot be justified in the public interest.
>
> Further, it is not unreasonable to expect journalists everywhere to temper their reporting so as to reduce the probability that they will be required to submit to interrogation. The First Amendment guards against governmental action that induces self-censorship.

STATEMENT OF FRANCIS G. WILSON, PRESIDENT, ACCURACY IN MEDIA, INC. FOR THE CONSTITUTIONAL RIGHTS SUBCOMMITTEE OF THE JUDICIARY COMMITTEE OF THE U.S. SENATE

Accuracy in Media, Inc. a nonprofit, nonpartisan citizens' organization devoted to improving the accuracy of news reporting, requested the privilege of testifying in the hearings being held by the Constitutional Rights Subcommittee on the question of the freedom of the press. Although this request was made well before the hearings begain, AIM was not afforded this privilege. We are therefore submitting this statement for inclusion in the record, since we believe that the information and the ideas which we wanted to bring to the attention of the Committee are highly relevant to its deliberations and have not been adequately brought out in the testimony heard by the Committee.

The testimony presented to the Committee has focused largely on the right of the news media to print or broadcast any material whatsoever without the imposition of any legal restraint. The Committee's investigation was prompted in large measure by concern that certain acts of the Administration and Congress constituted a threat to the untrammeled right of free publication and broadcasting. Among other matters, the Committee wished to explore the implications of the Administration's effort to prevent the publication by two major newspapers of stolen secret documents and the efforts of a Congressional subcommittee to investigate allegations of unethical and misleading editing in the CBS documentary, "The Selling of the Pentagon." In both cases, it has been alleged that the actions taken by the Administration and the congressional committee infringed upon "the people's right to know."

Accuracy in Media has taken no position on the case of the Pentagon papers, but we have taken a forthright public stand on the investigation of "The Selling of the Pentagon." We defended the people's right to know—the right to know the truth about how this documentary was edited and how the distortions that misinformed the television viewers were incorporated into the CBS documentary.

We believe that this is a clear case of the conflict of rights. One is the right claimed by the broadcaster to use the airwaves to say anything that he pleases, regardless of consioerations of accuracy or public interest. The other is the right of the public to accurate information on matters of public importance, the right of the people to know.

The broadcaster, in effect, claims that his right to use the airwaves to say whatever he pleases is paramount. Moreover, it is the contention of CBS that if this right results in the dissemination of false and misleading information to the public, neither the executive branch nor Congress should seek to uphold the right of the people to know the truth. The argument is that an exposure by Congressional investigation that shows how the people have been deceived by the broadcaster would have a chilling effect on his exercise of his right to say anything he pleased in the future.

This argument, incredible though it may seem, has been supported by a large segment of the print and the broadcast media—the very same people who have been most vociferous in their proclamations of devotion to the "people's right to know." As the Pentagon Papers case showed, leading figures in the news media refused to draw the line on the right of the people to know at the preservation of the right of the government to keep certain information secret in order to safeguard the security of the nation. Top secret information illegally purloined from the files of the government had to be divulged to the world in order to satisfy the right of the people to know.

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[14] *Caldwell v. United States*, 434 U.S. 1081, 1086 (2d Cir., 1970).

But when it is not the government, but a television network, that wishes to keep information of interest to the public secret, the right of the people to know is sacrificed without a qualm. The people, according to this line of thinking, have absolutely no right to know how a monopolizer of the public airwaves has used its power to deceive its audience and manipulate their thought processes.

I say this because of the wide support the media gave to CBS in its refusal to cooperate fully in the investigation that was undertaken by the Special Subcommittee on Investigations of the House Interstate and Foreign Commerce Committee earlier this year. The CBS position was that it had an absolute right under the First Amendment to refuse to answer questions or provide subpoenaed material dealing with the editing of "The Selling of the Pentagon". This meant that the network was claiming the absolute right to conceal evidence that might reveal the existence of deceptive practices in the processing of its news programs and documentaries. If fully accepted, this claim would deprive the public of its right to use the powers of government to find out whether or not those licensed to use the public airwaves, at great pecuniary profit to themselves, are abusing the public trust placed in them to present the news honestly, accurately and fairly.

The courts have long recognized that the government has the right and the duty to regulate private firms upon whom it bestows monopoly powers. It has an obligation to see that these firms carry out their responsibilities in a way that serves the public interest. This has been the theory underlying the regulation of the railroads, the airlines and the public utilities. The courts have consistently recognized that this same governmental right and responsibility applies in broadcasting. The Supreme Court made this clear in 1943 in the case of *National Broadcasting Co.* v. *United States* (319 U.S. 190) in which it said:

"Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation."

In 1969, the Supreme Court again rejected the contention that government regulation of broadcasting deprives the broadcasters of their rights under the First Amendment. In a unanimous opinion in the case of *Red Lion Broadcasting Co.* v. *F.C.C.* (395 U.S. 367), the court said:

"The broadcasters challenge the fairness doctrine, and its specific manifestations in the personal attack and political editorial rules, on conventional first amendment grounds, alleging that the rules abridge their freedom of speech and press . . . Although broadcasting is clearly a medium affected by a first amendment interest . . . differences in the characteristics of news media justify differences in the first amendment standards applied to them. . . This is not to say that the first amendment is irrelevant to public broadcasting . . . But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the first amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."

This is an important reaffirmation by the Supreme Court that the rights of the people are superior to the rights of a particular vested interest equipped with monopoly powers, when two rights come in conflict.

It is clear that CBS, knowing the weight of legal predent against its claim that its first amendment rights was superior to the rights of the people to have the public airwaves used in a fair and responsible manner, did not wish to test its contention in court. It mounted a very intensive lobbying effort to defeat the contempt citation on the floor of the House of Representatives. Using the great power that its control over an important part of the airwaves gives it, CBS was able to defeat the contempt citation and frustrate any definitive solution of the constitutional question it had raised through obtaining a ruling from the Supreme Court. Obviously, the network understood very well that while it could twist the arms of legislators who had to run for office and who could be severely hurt by hostile broadcasters, it could not hope to exercise comparable influence over the justices of the Supreme Court.

It is particularly ironic that in this dispute the private company, CBS, actually portrayed itself as the defender of the rights of the people against the alleged oppressiveness of the people's elected representatives. CBS, which is a purely private and highly profitable business enterprise, was doing nothing more than trying to protect itself from the embarrassment of having its dirty linen exposed to public view. The contention that "outtakes" were equivalent to confidential notes taken by newspaper reporters was novel. No such contention had been made on any previous occasion when congressional committees or special commissions had asked to see television outtakes. Great quantitites of television tapes and films and inter-office communications had been supplied to the House Special Investigations Subcommittee for its inquiry into the aborted CBS documentary, "Project Nassau." The staff of this same committee had been shown outtakes from coverage of the Chicago Democratic National Convention of 1968 by all the networks without even a supoena being issued. The National Commission on the Causes and Prevention of Violence had also been shown network outtakes in connection with its studies. Why were the outtakes of "The Selling of the Pentagon" so jealously guarded by CBS?

This remains a mystery to this day. If the editing was perfectly straightforward and honest, as CBS has contended, the reputation of CBS would have been enhanced and the charges made against the network could have been exposed as false by merely making the outtakes available to the Congressional Committee or any other group or individual that cared to see and judge them. The contention by CBS was that it had nothing to fear from a study of its editing of the documentary but as a matter of principle it would not cooperate with a Congressional investigation. It merely wanted to uphold its sacred rights under the first amendment.

Soon after the contempt citation was rejected by the House of Representatives, Accuracy in Media put this claim by CBS to a very practical test. We sent the following letter, by certified mail, to Dr. Frank Stanton, President of CBS:

"JULY 17, 1971.

"DEAR DR. STANTON: As you know, some four months ago Accuracy in Media sent a letter to Mr. Richard S. Salant in which we asked a number of questions about "The Selling of the Pentagon." No substantive reply to that letter has been received. We understood that you were delaying any reply until after the matter of the subpoena issued by the Interstate and Foreign Commerce Subcommittee was settled. Now that that is out of the way, may we assume that a prompt reply will be made to our letter of March 20, 1971?

"We noted that in the June 24th hearings before the subcommittee you did not dispute the contention that CBS, like other broadcast licensees, is a trustee for the public. We understand that it was your contention that you would not permit the Congressional subcommittee to have access to the "Selling of the Pentagon" outtakes only because of your concern for the first amendment, not because of any desire to abridge the right of the public to know the facts about this documentary and the way in which it was edited.

"In view of this, Accuracy in Media, Inc., as a nonprofit corporation which serves as a representative of consumer interests in the news media field, requests that its representatives be permitted to examine the original film or video tapes shot by CBS of the following interviews or scenes shown in part in "The Selling of the Pentagon."

"1. Roger Mudd interview with Daniel Z. Henkin.
"2. Speech given in Peoria, Ill. by Col. John MacNeil.
"3. Scene of children playing with tanks at Fort Jackson, N.C.
"4. Scene of Green Beret karate demonstration and imitation by children.
"5. Interviews with Dr. Richard Chamberlain, David O'Connor, Robert Greenhill, Mr. Dove and Dr. Olav Sola.
"6. Jerry Friedheim's news conference.
"7. Interview with Jack Tolbert.
"8. Interview with George Wilson.
"9. Interview ith Thomas Demitor.
"10. Daily press briefing in Saigon.

"Accuracy in Media wishes to study these outtakes and compare them with the material selected for use in the finished documentary to determine whether or not artifice in the form of misleading editing or staging was employed to mislead the viewing audience. We also wish to ascertain, if possible, whether or not all of the interviews were spontaneous, or whether there was any prearrangement of the questions asked and the answers supplied. We believe that if the editing was done in accordance with the highest journalistic standards and if there was no staging, CBS will benefit from publication of an AIM report to this effect. If there were serious flaws in the editing, as has been charged, the public will benefit.

"Since AIM is a purely private organization with no coercive power or government backing, CBS clearly has no reason to refuse to supply the requested material on the ground that this infringes first amendment rights. We recognize that CBS may plead that it has a right to keep its affairs private, but we are sure that you would not want to do this, since you are known as a foremost advocate of the people's right to know. You have been quoted as defending the right of the people to access to the Pentagon papers in spite of the "top secret" classification put upon them by the government. It would seem evident that if the people have the right to access to secret government documents of this type, in your view, you would not deny their right of access to outtakes in CBS files merely because this might, in some way, be embarrassing to the network. You would agree, I think, that matters of public interest ought not to be kept secret merely because their exposure might cause embarrassment.

"I understand that you have argued that public exposure of the outtakes might have a "chilling" effect on CBS reporters. I can appreciate that this might be true if the reporters and producers were engaging in practices that were in violation of journalistic ethics, the Television Code and the Operating Standards of CBS. However, it would seem clear that a producer who has observed all of the guidelines should welcome the kind of examination that AIM proposes to make of the outtakes. I can assure you that AIM will examine the material only with the object of preparing an accurate and objective report to determine whether or not the charges of distortion are true or false.

"It would be most convenient for us to examine the outtakes in your Washington studies. We would appreciate being informed if you agree to this request and when the examination might take place.

"Sincerely yours,

"ABRAHAM H. KALISH.
"Secretary."

Accuracy in Media has not yet received any reply to this letter from Dr Stanton or any other official of CBS. Nor have we received the long-promised reply to the questions we raised about "The Selling of the Pentagon" in our letter to Richard S. Salant, President of CBS News of March 23, 1971.

The failure of CBS to show the outtakes of "The Selling of the Pentagon" to Accuracy in Media, a purely private citizens' group, does not bear out the contention that these outtakes were withheld from the Congressional Committee merely because CBS wanted to defend its first amendment rights. If there is nothing in the outtakes that could justify criticism of the editing of "The Selling of the Pentagon," why does CBS not make these outtakes available for inspection by AIM or any other similar private group? Why does not CBS reply to AIM's request explaining why the outtakes are not being made available? Why does CBS not answer the many questions about "The Selling of the Pentagon" that AIM and others asked over six months ago?

Americans want a free press, but a democracy also needs a responsible press. The voter is called upon to make weighty decisions that can vitally affect his personal interests and the future of his family and fellow citizens. It is important that he be equipped with accurate information that will enable him to understand the important issues of the day. Unfortuantely, the news media have lost the confidence of a substantial part of our citizenry. This has been noted by both of our leading poll takers, Lou Harris and George Gallup. Mr. Gallup said this last year:

"Never in my time has journalism of all types—book publishing, television, radio, newspapers, magazines, movies—been held in such low esteem.

After Vice President Agnew made his Des Moines speech criticizing network television on November 13, 1969, CBS received a flood of nearly 70,000 letters, telegrams and telephone calls. Seventy per cent supported the Vice President's criticisms. NBC received 45,500 letters and telegrams, and about 85 per cent supported the Vice President. The Vice President had clearly struck a responsive chord. It is not enough to delpore this loss of confidence in the news media. Those concerned with the question of the future of our free press must ask what can be done to build public confidence in the media. This requires serious examination of the criticisms and consideration of what can be done to correct the defects which are the source of public loss of confidence.

As with many other consumer complaints, the chief criticism is that the product being delivered by the news media is defective. The news media profess to serve their customers with reports of the events of the day that are selected and presented in a fair, objective and accurate manner. The New York Times, for example, has stated that objectivity in its news columns is its "number one, bedrock principle." The Times defines objectivity as follows:

"Objectivity is the determination to write and edit with the elimination of as much personal bias as humanly possible, to present facts and situations as close to reality as possible, to avoid our own pejorative phrases or comments, to give accused people or institutions the right of immediate reply, to present all shadings of opinion and counter-argument, and most of all, to keep examining ourselves day by day and story by story to see if we are being as objective as we can.(New York Times, March 20, 1970, p. 41)"

This is a standard that all the news media that are not frankly partisan and ideological might well strive to attain. It is obvious that many of them fall far short of it, at least in the minds of a large proportion of the consumers of the product. A Gallup poll published January 8, 1970, showed that only 40 per cent of those questioned believed that TV networks dealt fairly with all sides in presenting the news dealing with political and social issues. Only 37 per cent of those queried felt that the newspapers dealt fairly with all sides. If we assume that the public wants newspapers and television to present news in a manner that deals fairly with all sides, we may conclude that the news media do a poorer job of giving the customers what they want than do most producers of consumer goods. The important reason why they can do this and still survive is probably relative absence of competition among the news media and the fact that the dissatisfied public has yet to find an effective way of registering its dissatisfaction with those who control the media.

The startling fact is that according to the latest figures there are only three large cities in the United States in which the customer has a choice of two or more morning newspapers. These are New York, Boston, and Chicago. There are only a dozen cities in the United States in which the customer can choose among two or more evening newspapers. There are only three cities in the United States, New York, Washington and Boston, in which three separate companies are publishing metropolitan dailies. There are only 33 cities in the country where there is true newspaper competition in the sense that there is more than one daily paper without joint operating agreements. There are no doubt many people throughout the country who are upset by the way in which their morning or evening paper treats the news, but who nevertheless continue to subscribe because they have no real choice.

With respect to television news, the viewer has a choice among three network programs at most. The choice is widened, of course, by programs put on by local television stations. But with network television alone, there appears to be little significane to the choice that is avalable in terms of the degree and direction of the bias in the presentation of the news. Bias in TV network news has been analyzed by Edith Efron in her book, "The News Twisters." Miss Efron recorded the prime time network news programs over a seven-week period during the 1968 presidential campign. She isolated statements made on these programs that could be classified as pro or con that pertained to 13 key subjects. She then measured the number of words devoted to the pro and con sides of each of these issues. Her object was to reveal the pattern of opinion selectivity used by network news reporters. The results revealed a much greater degree of one-sidedness in the presentation of the news than even Vice President Agnew's criticisms suggested. For example, Miss Efron found that during this campaign period the networks aired only about one-tenth as much pro-Nixon as anti-Nixon opinion. However, pro-Humphrey opinion outran anti-Humphrey opinion on two of the three networks. All three networks aired far more opinion opposing U.S. policies in Vietnam than opinion favoring those policies. Opinion favoring black militants swamped opinion criticial of black militants. Opinion favorable to the white middle class was nonexistent on two of the three networks, but considerable opinion critical of the white middle class was aired.

Miss Efron's figures appear to fully confirm the criticisms of Vice President Agnew and the perception of some two-fifths of the public (according to the Gallup Poll) that TV network news is one-sided.

The answer to this is not to attack the critics as individuals intent on undermining the freedom of the press. The answer is not to accuse the public of harboring resentments against those who report the news because the news happens to be bad. The answer is to undertake to secure wider adherence to that standard of objectivity which the New York Times claims to strive for. This means attainment not only of greater accuracy in reporting what is reported, but attaining a better pattern of news selection so that certain expressions of opinion or certain events are not systematically excluded because they are not pleasing to those who determine what is news.

Media self-criticism of the type The New York Times says it engages in day-by-day is desirable, but it seems clear that self-criticism is not going to be enough to effect the reforms in the media that are needed to restore public confidence. This conclusion emerges from the experience of Accuracy in Media over the past two years. AIM began with the idea that it could be of service simply by calling factual errors observed in the mews media to the attention of the editors or publishers responsible. It was assumed that journalists were dedicated to factual accuracy and that they would be quick to correct any errors that were brought to their attention. However, AIM has discovered that this is not the case.

More frequently than not, AIM has found that the news media have failed to correct the serious errors that it has called to their attention, even in those cases where the errors were conceded. Rather than showing appreciation for the efforts AIM has made to assist them in improving the accuracy of reporting, the media have frequently responded with pique and hostility. This has been particularly true of the broadcast media, but it applies to some of the print media as well.

I would like to cite two examples from the files of AIM, one involving the broadcast media and another involving one of the country's leading newspapers. On May 18, 1971, a report was carried over a CBS radio network evening news program which charged that the FBI was recruiting boy scouts as informers. This report was based on a false interpretation of a circular that had been distributed to boy scouts in Rochester, N.Y. asking them to be alert to various indicators of possible trouble such as fires or crimes. The circular had been endorsed by the police, the fire department and a number of other organizations in Rochester, including the FBI. A copy of the circular had found its way into the FBI files in Media, Pa., from which it was later stolen along with many other documents. The thieves sent copies of the Rochester Boy Scout flyer to various news media, apparently with the suggestion that it showed that the FBI was recruiting boy scouts as informers. This was promptly denied by officials of The Boy Scouts of America, who on May 18, 1971, issued a press release explaining the true nature of this innocuous circular. The denial and explanation was carried by the wire services and was available to CBS prior to the time the evening radio broadcast was aired, carrying the original false story but not the denial. AIM called this to the attention of CBS and asked that the false impression created by the CBS radio broadcast be corrected. CBS has admitted that it would have been better had the original report taken cognizance of the official denial and explanaton by the Boy Scouts of America, but despite repeated efforts by AIM, CBS has obdurately refused to act to undo the damage that its misleading report did to the reputations of both the Boy Scouts and the FBI.

The second example involves the failure by the Washington Post to carry a story that was treated as important news by the wire services and newspapers throughout the country on July 28–29, 1971. This was the announcement by twelve prominent conservatives, including Mr. William F. Buckley, Jr., that they were suspending their support of President Nixon. The failure of the Washington Post to carry a political story of this nature was most surprising. Upon inquiring as to the reasons, AIM was informed that the Washington Post did not intend to publish anything emanating from individuals connected with William F. Buckley's magazine, The National Review. The reason given was that these people had lost their credibility as a result of the hoax they perpetrated pertaining to the Pentagon papers. The Post had been one of the newspapers taken in by the hoax, and it was clear that this had generated feelings of hostility toward Mr. Buckley. AIM called this matter to the attention of the publisher of the Washington Post, pointing out that it was unprofessional to permit feelings of hostility or pique toward certain individuals to interfere with the reporting of the legitimate newsworthy activities of those individuals. The validity of this point was recognized by the publisher, and the omitted news was subsequently reported by the Post, but the Editors of the Post obviously resented AIM's criticism. This has resulted in a blackout of AIm activities, newsreleases and letters by the Post.

It is our conclusion that the news media as a rule do not respond favorably to criticism, even when it is temperate and well-documented. While a few newspapers have experimented with the appointment of in-house critics to provide the kind of self-criticism recommended by The Times, our feeling is that these men will either have to pull their punches or find themselves uncomfortably at war with their own colleagues. We believe that honest and effective criticism must come from the outside.

The average newspaper reader or TV viewer is not equipped to detect most of the errors of omission and commission that find their way into the media. Even if he senses that something is wrong, he probably does not know how to present his criticism in the most effective manner. A certain amount of time, effort and talent is required to do this. What the consumer of the news media product needs is the services of specialists who can make the necessary investigations and file the complaints in the prover quarters.

The desirability of having a professional body equipped to do this has been debated for many years. The Commission on the Freedom of the Press concluded in 1947 that such a body should be created to report regularly on the performance of the media. This body was not to have any official power to censor or penalize the media. It was to have the power to praise, to criticize, to expose and to exhort. The proposal was denounced by the press, but many people, inluding a few prominent journalists, have recognized that the credibility and the performance of the news media could be improved if they were subject to systematic professional criticism. Great Britain has creaed such a body. It is known as the British Press Council, and it has been operative for twenty years. It has won acceptance in the profession as a useful tool. Sweden established its press council as long ago as 1916. It was reorganized in 1969, and it has recently been given the power to impose small fines on newspapers that violate the rules of good journalism. To assist it, an Ombudsman for the press was appointed. All complaints involving newspapers and magazines are now made to the Press Ombudsman. He investigates, and he may refer the case to the Press Court if he cannot negotiate a settlement otherwise. In his first eight months in office, the Ombudsman handled some 200 complaints.

The American press has long been hostile to the press council idea, but it is encouraging to note that the newspapers in the State of Minnesota recently announced the organization of their own press council. This is a welcome sign that our press is becoming increasingly aware that serious efforts must be made to re-establish press credibility.

I believe that the acceptance by the news media of the outside critics, whether they be press councils or ombudsmen or citizens' organizations like Accuracy in Media, is an important step toward the solution of the dilemma that John Adams described in 1815, when he said:

"If there is ever to be an amerioration of the condition of mankind, philosophers, theologians, legislators politicans, and moralists will find that the regulation of the press is the most difficult, dangerous, and important problem they have to resolve. Mankind cannot now be governed without it, nor at present with it."

APPENDIX

SUBPENAING OF NEWSMEN

[Reprinted by permission of the Yale Law Journal and Fred B. Rothman & Co. from the Yale Law Journal, vol. 80, December 1970]

NOTES: REPORTERS AND THEIR SOURCES, THE CONSTITUTIONAL RIGHT TO A CONFIDENTIAL RELATIONSHIP

During the past year, federal and state prosecutors across the country have issued subpoenas to newsmen and their employers in order to gain access to confidential information obtained in the process of gathering news about highly controversial topics.[1] This use of the subpoena power has substantially increased the likelihood of a conflict between the administration of justice and the public's First Amendment interest in a free flow of information.[2] Government officials have justified their actions by pointing to the dangerous activities about which newsmen may have knowledge.[3] In response, the press has argued that informers, fearing disclosure of their identities or their off-the-record communications, will be deterred from talking with newsmen and that this loss of information will critically limit news available for dissemination to the public.[4]

In the past, courts have found that the interest in compulsory disclosure in the circumstances before them outweighed the potential impairment of the news flow to the public; they accordingly have interpreted both the common law [5] and the Constitution [6] to deny the press the right to withhold information in the face of a compulsory disclosure requirement. Within the last year, however, both federal and state courts have found that, in some circumstances, a newsman's right to protect his source is guaranteed by the First Amendment.[7] Yes, that right has not yet been affirmed by the Supreme Court nor is its nature clear.[8]

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[1] Federal grand juries have subpoenaed the unedited files and unused pictures of *Time*, *Life*, and *Newsweek* magazines relating to the Weathermen faction of Students for a Democratic Society. Files relating to disturbances at the 1968 Democratic Convention have been subpoenaed from four Chicago newspapers by a federal grand jury. The Antitrust Division has issued a subpoena to *Fortune* magazine demanding all interview notes, tape recordings, documents, and successive drafts of an article appearing in the magazine concerning an alleged violator of the antitrust laws. A federal grand jury has subpoenaed tapes and non-televised films of a program on the Black Panthers from the Columbia Broadcasting System. Earl Caldwell, a San Francisco correspondent for the *New York Times* has been summoned before a federal grand jury investigating activities of the Black Panther Party. The issuance of these subpoenas, which seems to represent a divergence from previous Justice Department policy, are discussed in *New York Times* articles on Feb. 1, 1970 at 24, col. 1; Feb. 3, 1970 at 20, col. 1; Feb. 4, 1970 at 1, col. 1; Feb. 5, 1970 at 1, col. 5; Feb. 6, 1970 at 1, col. 7.

This practice has also been used by state prosecutors. A Wisconsin grand jury has subpoenaed a reporter to testify about a bombing on the University of Wisconsin campus. State v. Knops, No. 146 (Wis. Sup. Ct. Feb. 2, 1971). A Massachusetts grand jury has subpoenaed a reporter to testify about activities witnessed by him in the local black panther headquarters during a time of civil disorder. *In re* Pappas, No. 14,690 (Mass. Sup. Ct. Jan. 29, 1971). In Kentucky, a prosecutor has sought disclosure of the identities of those persons whom a reporter observed manufacturing hashish. Branzburg v. Pound, 39 U.S.L.W. 1088 (Ky. Ct. App. Nov. 27, 1970).

[2] This conflict has been analyzed by previous commentators. *See* Comment, *Constitutional Protection For the Newsman's Work Product*, 6 HARV. CIV. RIGHTS-CIV. LIB L. REV. 119 (1970); D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. LEGIS. 307 (1969); Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18 (1969); 82 HARV. L. REV. 1384 (1969); Beaver, *The Newsman's Code, the Claim of Privilege and Everyman's Right to Evidence*, 47 ORE. L. REV. 243 (1968); *Note, Privileged Communications—News Media—A "Shield Statute" for Oregon*, 46 ORE. L. REV. 99 (1966); 61 MICH. L. REV. 184 (1962); Carter, *The Journalist, His Informant and Testimonal Privilege*, 35 N.Y.U. L. REV. 1111 (1960); Note, *Journalist's Testimonial Privilege,* 9 CLEV.-MAR. L. REV. 311 (1960); 11 STAN. L. REV. 541 (1959); 8 BUFFALO L. REV. 294 (1959); *Note, The Journalist and His Confidential Informants—Should They Be Privileged from Compulsory Disclosure?* 32 TEMP L.Q. 432 (1959); Note, *The Journalist and His Confidential Source: Should a Testimonal Privilege Be Allowed?* 35 NEB. L. REV. 562 (1956); Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information,* 36 VA. L. REV. 61 (1950); Note, 45 YALE L.J. 357 (1935).

[3] *See* Statement of Attorney General Mitchell, New York Times, Feb. 6, 1970 at 40, col. 4.

[4] *See, e.g.,* Frankel, *Mitchell and Press Problems,* New York Times, Feb. 6, 1970 at 40, col. 4, discussing the threat to reporting posed by the subpoena.

This Note will argue that, subject to carefully delineated exceptions applicable to criminal trials and certain libel actions, the First Amendment should guarantee a broad right to keep communications and the identities of informants confidential when news gatherers are summoned before courts, grand juries, and legislative committees. An evaluation of the conflicting positions will suggest that the First Amendment interest of the newsman and his source in knowing with *certainty* when the confidentiality of their relationship will be respected (and when it will not) should be accorded substantially greater weight than the government's claim for a roving commission to gain access to communications arising from this relationship. This evaluation also provides guidance in deciding the scope of protection, who may claim the right of nondisclosure, what types of information the right protects, and when the right may be invoked.

I. CURRENT APPROACHES TO THE RIGHT TO A PROTECTED RELATIONSHIP

A. Competing Interests

The duty to testify at judicial proceedings is a venerable instrument of justice which was recognized early in the development of English law [9] and has been clearly acknowledged by the Supreme Court.[10] A necessary function of the judicial process in both civil and criminal litigation is to provide a forum where all facts relevant to the controversy at issue may be presented. The theory of the adversary method of conflict resolution demands that each party have the fullest opportunity to acquire and present those facts which advance its interests.

Disclosure requirements are also important to grand jury proceedings; they provide the means for investigating possible criminal conduct and thereby protect society by facilitating the administration of the prosecutorial system.[11]

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[5] For a discussion of cases denying the newsman a common law right of nondisclosure, see Annot. 7 A.L.R. 3d 591, 592–96 (1966).

[6] Garland v. Torre, 295 F.2d 545 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958); State v. Knops, No. 146 (Wis. Sup. Ct. Feb. 2, 1971); *In re* Pappas, No. 14,690 (Mass. Sup. Ct. Jan. 29, 1971); Adams v. Associated Press, 46 F.R.D. 439 (S.D. Tex. 1969); State v. Buchanan, 250 Ore. 244, 436 P.2d 729, *cert. denied,* 392 U.S. 905 (1968); *In re* Taylor, 412 Pa. 32, 193, A.2d 181 (1963); *In re* Goodfader, 45 Hawaii 317, P.2d 472 (1961); Murphy v. Colorado, unreported, *cert. denied,* 365 U.S. 843 (1961). Dicta in the *Torre, Knops, Adams,* and *Goodfader* decisions indicate that a constitutional right of nondisclosure might be found in other circumstances.

[7] *In re* Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970), *petition for cert. filed sub nom.* U.S. v. Caldwell, 3905 U.S.L.W. 3273 (U.S. Dec. 16, 1970) (No. 1114), Air Transport Ass'n v. Professional Air Traffic Controllers Organization, Crim. Nos. 70–C–400, 410 (E.D.N.Y. 1970) (transcript of April 6, 1970 at 21, 38–39, 149–50); Alioto v. Cowles Communications, Inc. C.A. 52150 (N.D. Cal. 1969) (unreported hearing, Dec. 4, 1969, Tr. 165–67); People v. Dohrn, Crim. No. 69–3808 (Cir. Ct. Cook Cty., Ill. May 20, 1970); People v. Rios, No. 75129 (Super. Ct. San Francisco Cty. 1970).

[8] The Supreme Court has denied certiorari three times: State v. Buchanan, 250 Ore. 244, 436 P.2d 729, *cert. denied,* 392 U.S. 905 (1968); Murphy v. Colorado, unreported, *cert. denied,* 364 U.S. 843 (1961); Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958). The government has recently filed a petition for certiorari in *In re* Caldwll, No. 26,025 (9th Cir. Nov. 16, 1970), *petition for cert. filed sub nom.* U.S. v. Caldwell, 3905 U.S. L.W. 3273 (U.S. Dec. 16, 1970) (No. 1114). The Supreme Court has granted stays in two recent cases concerning this issue, an indication that it might grant certiorari. *In re* Pappas, No. 14,690 (Mass. Sup. Ct. Jan. 29, 1971), *stay granted sub nom.* Pappas v. Smith by Mr. Justice Brennan (Feb. 4, 1971); Branzburg v. Pound, 39 U.S.L.W. 1088 (Ky. Ct. App. Nov. 27, 1970), *stay granted sub nom.* Branzburg v. Hayes by Mr. Justice Stewart (Jan. 26, 1971).

[9] *See* 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW, 325–26 (7th ed. 1966); 5 W. HOLDSWORTH A HISTORY OF ENGLISH LAW, 192–93 (7th ed. 1966).

[10] "It is also beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned." Blackmer v. United Staes, 284 U.S. 421, 438 (1932); for a history of the duty to testify, see Blair v. United States, 250 U.S. 273, 279–80 (1919).

[11] The grand jury serves two important functions: "to examine into the commission of crimes" and "to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will." Hale v. Henkel, 201 U.S. 43, 59 (1906). Compulsory disclosure is important to both of these functions.

The testimony of newsmen, especially those supported by the financial resources of the larger press institutions, is particularly useful to a public prosecutor, since reporters' independent investigative activities often overlap areas under official scrutiny. Because the possession of information by newsmen is easily recognized through published work, prosecutors may turn to reporters as the most immediate sources from which to obtain disclosure of material necessary for indictments and arrests.

A slightly different rationale explains the duty to testify at legislative hearings. Article I of the Constitution invests Congress with "all legislative powers" granted to the United States and with power "to make all laws which shall be necessary and proper" for carrying into execution these powers and "all other powers" vested by the Constitution in the United States or in any officer. The Supreme Court has held that the power to secure needed information is an attribute of the power to legislate.[12] The requirement of compulsory disclosure facilitates the passage of effective laws by providing Congress with access to a full range of relevant fact and opinion. The power to compel testimony is also needed by state legislatures in order that they may secure information necessary for informed lawmaking at that level of government.[13]

From the press's perspective, however, the unrestrained use of subpoenas issued to newsmen impairs the flow of news to the public, because compulsory testimony poses dilemmas for both news sources and news gatherers which prevent establishment of the confidential relationships necessary for obtaining information. The potential informant must speculate as to whether his identity or other off-the-record aspects of his communications with a reporter will be subject to official scrutiny through the subpoena process. The potential source is therefore forced to choose either to give information, thus risking exposure to official investigatory efforts, or to avoid the risk by remaining silent. The reporter must speculate as to whether publication of certain material will lead to a subpoena. If a subpoena is issued, the newsman must then either disclose confidential information, which could impair his reputation and resourcefulness as a reporter, or receive a contempt citation for his refusal to testify.

B. Attempted Resolutions

Current state and federal law resolves the conflict between the public's interest in compelled disclosure and its interest in a free flow of information in a variety of ways.

No Privilege. The common law requires a reporter to testify concerning information received in confidence and to disclose the identity of informants, for it does not recognize that communication between news gatherer and informant merits special protection.[14]

Statutory Privilege for Informant's Identity. Sixteen states have made the legislative determination that protection of the *identities* of newsmen's informants from disclosure before judicial and legislative proceedings is necessary to maintain a flow of information to the public and will not unduly hamper the judicial and legislative processes.[15] In twelve of these states, the newsman may refuse to disclose the identity of his informant regardless of the importance of disclsoure to the particular subject of inquiry.[16] However, in half of these twelve states, the communication with an informer must be published before a reporter may claim the nondisclosure right regarding the source of information.[17] Only three of the state statutes protecting the identities of news sources from disclosure also protect *confidential communications* received from informants.[18] The other state statutes require that confidential communications be disclosed even though the identity of the source may be protected.

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[12] McGrain v. Daugherty, 273 U.S. 135, 175 (1927):

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information are often unavailing, and also that information which is volunteered is not always accurate or complete; so that some means of compulsion are essential to obtain what is needed.

[13] *See* Annot, 50 A.L.R. 21 (1927); Annot. 65 A.L.R. 1518 (1930). Administrative agencies may also be granted subpoena power by statute in order to perform effectively their functions. *See, e.g.,* 26 U.S.C. 7608(a)(2) (1964).

[14] 8 J. WIGMORE, EVIDENCE § 2286 (McNaughton ed. 1961). *See* 11 STAN L. REV. 541 (1959); Comment, *Compulsory Disclosure of a Newsman's Source: A Compromise Proposal*, 54 NW. U.L. REV. 243 (1959); Galleys, *Further Consideration of a Privilege for Newsmen*, 14 ALBANY L. REV. 16 (1950); Note, 45 YALE L.J. 357 (1935).

[15] Ala. Code tit. 7, § 370 (1960); Alas. Compl. Laws Ann. §§ 09.25.150, 160 (Supp. 1970); Ariz. Rev. Stat. Ann. § 12-2237 (Supp. 1970); Ark. Stat. Ann. § 43-917 (1964); Cal. Evid. Code § 1070 (1966); Ind. Stat. Ann. § 2-1733 (1968); Ky. Rev. Stat. Ann. § 421.100 (1960); La. Rev. Stat. tit. 45 §§ 1451-53 (Supp. 1970); Md. Code Ann. art. 35 § 2 (1965); Mich. C.L. 767.5a (1968); Mont. R. Code Ann. tit. 93 §§ 601-03 (1947); N.J. Rev. Stat. § 2A:84A-21 (Supp. 1970); N.M. Stat. Ann. § 20-1-12.1 (Supp. 1970); N.Y. Civil Rights Law § 79-h (1970); Ohio Rev. Code Ann. § 2739.12 (1953); Pa. Stat. Ann. titl. 28 § 330 (1958). For a general discussion of these statutes, see D'Alemberte, *supra* note 2.

A number of federal statutes shielding the newsman from compulsory disclosure have been proposed in an effort to achieve uniform standards of protection for news gathering.[19] In the past, these proposals have been limited to protecting the identities of news informants from disclosure.[20] However, in 1970, legislation was proposed which protects both the identities of informants and confidential communications received from them, unless disclosure is required in the interests of national security.[21]

Reasonable Likelihood Test. One state court has suggested that compulsory revelation of informants or confidential information might raise First Amendment problems, but it proceeded to hold that disclosure of a nwsman's information and sources is constitutional when there is a "reasonable likelihood" that the desired information will be relevant to the judicial subject of inquiry.[22] This test aims to eliminate groundless "fishing expeditions" and to restrict disclosure to situations in which there is reason to believe the disclosed information will aid the administration of justice.[23]

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[16] *See* statutory provisions, *supra* note 15, for Ala., Ariz., Cal., Ind., Ky., Md., Mich., Mont., N.J., N.Y., Ohio, and Pa. These statutes indicate a legislative determination that any protection short of this broad right to maintain the secrecy of informants' identities would significantly impair the newsgatherer-informer relationship because of the uncertainties attending a qualified right.

Four states having a qualified newsman's right of nondisclosure. *See* statutory provisions, *supra* note 15, for Alaska, Ark., La., and N.M. In Alaska disclosure may be required if the withholding of testimony would result in a "miscarriage of justice" or is "contrary to the public interest." The Arkansas statute requires disclosure if it can be shown that an article containing information from a confidential source was published "in bad faith, with malice, and not in the interest of public welfare." The Louisiana statute requires disclosure when "essential to the public interest." In New Mexico, disclosure is required when "essential to prevent injustice."

[17] *See* statutory provisions, *supra* note 15, for Ala., Ariz. Cal., Ky., Md., and N.J. Publication is required in order to assure that the right of nondisclosure is only granted when the public has had the opportunity to benefit from the informer's communication.

[18] *See* statutory provisions, *supra* note 15, for Mich., N.Y., and Pa. The Michigan statute protects from disclosure all "communications" between reporters and informants. The New York statute provides for nondisclosure of "any news or the source of any such news." This statute was passed in May, 1970, subsequent to the issuance of a number of Justice Department subpoenas to newsmen requiring disclosure of information communicated in confidence. *See* p. 317 and note 1 *supra*. The Pennsylvania Supreme Court has construed the word "source" in the Pennsylvania statute to include confidential information, as well as the identities of sources. *In re* Taylor, 412 Pa. 32, 40, 193 A.2d 181, 184–85 (1963).

[19] *See, e.g.*, S. 1851, 88th Cong., 1st Sess. (1963) ; H.R. 8519, 88th Cong., 1st Sess. 1963) ; S. 965, 86th Cong. 1st Sess. (1959) ; H.R. 355, 86th Cong., 1st Sess. (1959). For an analysis of proposed Congressional legislation, see Staff of Senate Comm. on the Judiciary, 89th Cong., 2d Sess., The Newsman's Privilege (Comm. Print 1966).

[20] A typical proposal reads: A witness who is employed by a newspaper, news service, newspaper syndicate, periodical, or radio or television station or network, as a writer, reporter, correspondent, or commentator or in any other capacity directly involved in the gathering or presentation of news, shall not be required in any court of the United States to disclose the source of any information obtained in such capacity unless in the opinion of the court such disclosure is necessary in the interest of national security.

[21] S. 3552, 91st Cong., 2d Sess. (1970) ; H.R. 16328, 91st Cong., 2d Sess. (1970) ; H.R. 16704, 91st Cong., 2d Sess. (1970).

[22] In a case before the Hawaiian Supreme Court, *In re* Goodfader, 45 Hawaii 317, 367 P.2d 472 (1961), a plaintiff was suing for reinstatement on the Civil Service Commission, claiming that her dismissal was the result of prior conspiracy among the Commission members. She sought disclosure of the source from whom a reporter had received advance warning of her dismissal. The court recognized that disclosure would create some deterent effect but held that disclosure could be constitutionally allowed because the reporter's source might have knowledge as to the cause of her dismissal and aid her claim. It reasoned: "There, of course, can be no assurance that if the plaintiff is permitted to pursue her inquiry, she will obtain from deponent's answers the identity of anyone who can substantiate the basic point of her alleged case. . . . [W]e can only say that it is our best judgment that the inquiry desired to be made by the plaintiff in this case could be considered likely enough to lead to discovery of sufficiently important admissible evidence to warrant the trial court's permitting her to pursue it . . . ." *Id.* at 338, 367 P.2d at 484–85.

[23] Presumably this standard, determined in a trial context, could also apply to grand jury and legislative investigations; disclosure could be required if there were reason to believe that the desired information would aid the investigation.

Heart of the Matter Test. The Second Circuit's opinion in *Garland* v. *Torre* can be read to require that the constitutionality of compulsory disclosure of a newsman's confidential sources be determined by whether the information sought by subpoena goes "to the heart of the . . . claim." [24] In this case, Judy Garland had sued the Columbia Broadcasting System for libel because of an allegedly defamatory comment published in a newspaper column, but attributed to an unnamed C.B.S. executive. The identity of the author of the comment was crucial to her claim, for only if he were proven to be a C.B.S. executive would she have grounds for action against the broadcasting network. The court reasoned that because the action would be defeated if the informer's identity were not revealed, "the paramount public interest in the fair administration of justice" outweighed the potential injury to the free flow of news.[25] It indicated that in other situations, as "where the identity of the news source is of doubtful relevance or materiality," the source might not be constitutionally compelled to testify.[26] This is perhaps a stricter test than the demand for "reasonable likelihood." The *Torre* rationale suggests that disclosure should not be compelled unless the information possessed by the reporter appears important to the resolution of the judicial controversy.

A variant of the "heart of the matter" test has been proposed by recent Justice Department guidelines for the issuance of federal investigatory subpoenas.[27] As with the "heart of the matter" test, the theory of this proposal is that testimony should not be compelled before governmental bodies unless the desired information appears necessary to the inquiry. These guidelines state that "[t]here should be sufficient reason to believe that the information sought is essential to a successful investigation"; they explicitly recognize that "[t]he subpoena should not be used to obtain peripheral, nonessential or speculative information." [28] The Attorney General's permission is required for issuance of a subpoena to a reporter, and the guidelines further recommend that, before issuance of such a subpoena, "reasonable " attempts should be made to obtain the desired information from nonpress sources or to persuade the reporter to convey voluntarily the desired material.[29]

Miscarriage of Justice. A constitutional test requiring disclosure by a newsman only when a miscarriage of justice would otherwise result appears to be a somewhat stricter standard than a determination whether the information goes "to the heart of the matter." An Illinois court recently adopted this test in *People v. Dohrn.*[30] The court held that the Illinois subpoena statutes violated the First Amendment rights of newsmen by requiring them to appear before judicial bodies regardless of the importance of the testimony desired from them. The court reasoned that because of the "inherently" inhibiting effect of subpoenas on reporters, the party desiring such a subpoena must show substantial cause for compelling the reporter's testimony. It then quashed subpoenas which had been served on newsmen by the defendants in a criminal suit and held that no such orders may be issued without a preliminary hearing at which the party desiring to compel the reporter's testimony must prove: (1) there is probable cause to believe that the reporter has information relevant to the subject of investigation; (2) the subpoena is the only method by which the evidence may be obtained; and (3) a "miscarriage of justice" would result if the information sought were not provided.[31]

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[24] 259 F.2d 545. 550 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). The Wisconsin Supreme Court interpreted the *Torre* decision in this manner. State v. Knops, No. 146 (Wis. Sup. Ct. Feb. 2, 1971).

[25] *Id.* at 549.

[26] *Id.* at 549–50.

[27] Address by Attorney General John N. Mitchell, A.B.A. House of Delegates, Aug. 10, 1970, in 7 CRIM. L. REP. 2461 (Sept. 2, 1970). Previously there were no express guidelines, although it was Justice Department policy to negotiate with the publisher prior to the issuance of a subpoena. *See* Statement of Attorney General Mitchell, New York Times, Feb. 6, 1970 at 40, col. 4.

[28] Address by Attorney General John N. Mitchell, *supra*, note 27.

[29] *Id.* These guidelines would be applicable for the issuance of subpoenas by all Justice Department officials whether in a trial or grand jury context. However, neither Congress, state legislatures, state prosecutors, nor individual litigants would be bound by the guidelines.

[30] People v. Dohrn, Crim. No. 69–3808 (Cir. Ct. Cook Cty., Ill. May 20, 1970).

[31] *Id.* This standard entails judicial enforcement of an "alternative means" test suggested by the Justice Department guidelines; disclosure may be required only when the confidential information appears necessary to a non-frivolous claim or investigation and the desired information cannot be obtained in an alternative fashion. It is applicable to both the government and private parties, and presumably applies in both a judicial and legislative setting; however, it is difficult to determine how the "alternative means" test will function in a criminal trial in those circumstances in which there is need for cumulative evidence.

Compelling Need. The Ninth Circuit recently adopted a somewhat similar constitutional test as a prerequisite for compelling a journalist to appear before a grand jury.[32] The district court had held that *New York Times* reporter Earl Caldwell must appear before the grand jury investigating the Black Panther Party, but it had granted him a protective order stating that he was not required to *testify about matters transmitted to him in confidence* until such time as a "compelling and overriding national interest which cannot be alternatively served has been established to the satisfaction of the court." [33] The Court of Appeals agreed with the district court that "compelled disclosure of information received by a journalist within the scope of such confidential relationships jeopardizes those relationships and thereby impairs the journalist's ability to gather, analyze, and publish the news." [34] However, because of the potential deterrence created by Caldwell's mere appearance before a secret investigatory body, the court of appeals held that the First Amendment provided Caldwell with a right not to *appear* before a grand jury until the state had demonstrated a "compelling need" for his testimony.[35] While the court did not set guidelines as to what would constitute such a showing, it referred to those standards formulated in *People v. Dohrn* as possible criteria for a state showing of "compelling need." [36] The Ninth Circuit did not indicate whether "compelling need" had a meaning different from the phrase, a "compelling and overriding national interest." although the concurring opinion suggested that no distinction was intended.[37]

II. FIRST AMENDMENT PROTECTION FOR THE REPORTER-INFORMANT RELATIONSHIP

The newsman's right to protect his sources and their communications flows from the freedom of the press clause of the First Amendment.[38] However, those cases [39] which have found constitutional protection for the newsman-informer relationship have not, in construing the free press clause, enunciated a coherent set of principles which justify the right of nondisclosure. Nor have they provided much guidance for future decisions, since they are usually based on an ad hoc balance of interests. For example, in the recent *Caldwell* case, the court of appeals held that a reporter did not have to appear before a grand jury because the political group he covered was extremely sensitive to the possibility of disclosure of certain information the reporter had obtained.[40]

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[32] *In re* Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970).

[33] Application of Caldwell, 311 F. Supp. 358, 360 (N.D. Cal., 1970).

[34] *In re* Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970) (quoting district court opinion).

[35] The Ninth Circuit reasoned:

> [W]e find guidance in the Supreme Court decisions regarding conflicts between First Amendment interests and legislative investigatory needs; the Court has required the sacrifice of First Amendment freedoms only where a compelling need for the particular testimony in question is demonstrated.

Id. (footnotes omitted).

[36] *See* p. 324 *supra*.

[37] Judge Jameson, concurring, stated: "In my opinion the order of the district court could properly be affirmed, and this would accord with the customary procedure of requiring a witness to seek a protective order after appearing before the grand jury. I have concluded however, that Judge Merrill's opinion properly holds that the same result may be achieved by requiring the Government to demonstrate the compelling need for the witnesses's presence prior to the issuance of a subpoena and in this manner avoid any unnecessary impingement of the First Amendment rights." *In re* Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970) (concurring opinion).

[38] The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." The First Amendment is not only applicable to legislative action, but also to action by the federal executive and judiciary, including the issuance of subpoenas in connection with federal investigations and proceedings. *See e.g.*, Watkins v. United States, 354 U.S. 178, 187–88 (1957). The First Amendment applies to state government by reason of the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

[39] *See* note 7 *supra*.

[40] The court reasoned: "Finally we wish to emphasize what must already be clear: the rule of this case is a narrow one. It is not every news source that is as sensitive as the Black Panther Party has been shown to be respecting the performance of the "establisment" press or the extent to which that performance is open to view. It is not every reporter who so uniquely enjoys the trust and confidence of his sensitive news source." *In re* Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970). Uncertainty as to the use of this test in other newsman-informer relationships is exemplified by a comparison of recent decisions by the supreme courts of Massachusetts and Wisconsin. The Massachusetts court rejected the test altogether, arguing that "there exists no constitutional

The court recognized that, because of the potential deterrence of informers in that particular situation and because the government had not shown a "compelling need" for his testimony, the First Amendment provided the reporter with a right of nondisclosure. However, uncertainty still surrounds the newsman-informer relationship, since the court offered no guidelines to measure the requisite potential deterence or the quantum of need to be demonstrated by the government. In light of the divergent approaches adopted by lower courts and the stunted rationales of those decisions which have given constitutional protection to the informer-reporter relationship, a coherent First Amendment argument for the constitutional right to a confidential relationship must be developed before the proper reconciliation of the competing interests can be determined.

A. *"Freedom of the Press" Implies the Right To Gather News*

Democratic society is premised on the idea of individual autonomy and requires that citizens make informed decisions of a political, social, and economic nature. This conception of personal development and participation in societal processes, which is a core tenet of democratic theory, is based, in turn, on a presumption that the fullest range of information should be available to individuals so that they will be adequately equipped to make both personal and political decisions.[41] Such access to opinion and fact may only be provided if there is a flow of information to the public, unconstrained (insofar as possible) by either public or private forces. A free press plays a crucial role in preserving this information flow, for in a large and complex society where face-to-face communication is often impossible on a meaningful scale, information must usually be disseminated through the press.[42] In giving meaning to the First Amendment's mandate for a free press, the Supreme Court has, therefore, defined freedom to print as a right basic to the existence of a democratic society.[43]

The Court has also delineated a set of corollary rights to "freedom to print" which must be protected in order to ensure the continued vitality of the information flow to the public. A basic freedom is the *right to publish without prior governmental approval.*[44] The Court has recognized, however, that government action less drastic than prior censorship may curtail the dissemination of news to the public. In *Grosjean v. American Press Co.*, the Court found it necessary to recognize explicitly a *right of circulation* in order to ensure the preservation of an "untrammeled press as a vital source of public information." [45] Other Supreme Court decisions have recognized the *right to*

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newsman's privilege either qualified or absolute, to refuse to appear and testify before a court or grand jury." *In re* Pappas, No. 14,690 (Mass Sup. Ct. Jan. 29, 1971). The Wisconsin court, acknowledging the test, held that a newsman could be required to disclose before a grand jury the identities of those who had allegedly bombed a building because the "administration of criminal justice itself is a sufficient substantial interest of the state." This interpretation of the "compelling need" test suggests that disclosure could always be compelled during an investigation into possible criminal conduct. State v. Knops, No. 146 (Wis. Sup. Ct. Feb. 2, 1971).

[41] *See* T. Emerson, Toward a General Theory of the First Amendment 3–15 (1963). Emerson states four reasons for maintaining a system of free expression: (1) to issure individual self-fulfillment; (2) to attain the truth; (3) to secure the participation of the members of society in social decision-making; and (4) to maintain a balance between stability and change in society. *Id* at 3. *See generally* A. Meikeljohn, Free Speech and Its Relation to Self-Government (1948).

[42] The First Amendment freedom of the press provision applies to radio and television broadcasting as well as to publications. *See, e.g.,* Red Lion Broadcasting Co. v. F.C.C. 395 U.S. 367 (1969).

[43] *See. e.g.,* Grosjean v. American Press Co., 297 U.S. 233, 250 (1936); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[44] Near v. Minnesota, 283 U.S. 697 (1931).

[45] 297 U.S. 233, 250 (1936). A special license tax applicable only to newspapers with circulation in excess of 20,000 copies per week was held unconstitutional as a restraint upon both publication and circulation. The Court recognized that the tax would deter circulation in excess of 20,000 and therefore limit the flow of news to the public.

distribute literature freely[46] and the *right to receive* printed matter without state restrictions which might impair the free flow of information.[47]

The right to gather news is as basic to a free press as the right to distribute and receive printed materials, because without freedom to gather information the right to print would be severely diminished in value. The general principle that news must not be unnecessarily cut off at its source is fundamental to the concept of a free flow of information to the public. The framers of the Bill of Rights recognized that the right to gather news was implicit in the First Amendment. Madison wrote:

"A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both."[48]

Modern commentators have also emphasized the fundamental importance of the news gathering function of the press:

"If the public opinion which directs conduct of governmental affairs is to have any validity and if the people are to be capable of real self-rule, access to all relevant facts upon which rational judgments may be based must be provoked."[49]

The right to gather material for publication has never been explicitly recognized by the Supreme Court. However, the Court, in recognizing specific exceptions to a right of access in the interests of national security, has implicitly acknowledged the existence of a general right to gather information.[50] The existence of some right to gather news (whatever its exact dimensions) is thus derived both from the central position a free press occupies in democratic theory and from its relation to other rights established by the existing cases interpreting the freedom of the press clause.[51]

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[46] *See, e.g.,* Marsh v. Alabama, 326 U.S. 501 (1946); Martin v. City of Struthers, 319 U.S. 141 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Schneider v. State, 308 U.S. 147 (1939).

For example, in *Martin v. City of Struthers, supra,* the Court held unconstitutional an ordinance which forbade door-to-door distribution of handbills because those accustomed to circulating material in this manner would be restrained in their activities, and, as a consequence, the public would be the recipient of less information. The ordinance was passed for substantial reasons, *viz.* prevention of crime and protection of privacy in an industrial community where many worked night shifts. However, the Court determined that the reasons advanced to support the statute were insufficient to justify such a limitation on the means of distribution.

[47] Lamont v. Postmaster General, 381 U.S. 301 (1965). The case involved a challenge to legislation which required the Postmaster General to detain unsealed foreign mailings of "communist political propaganda" and deliver only upon the addressee's request. The statute was held to violate the addressee's First Amendment right to receive information because it imposed upon him an affirmative obligation of requesting delivery, and he might be deterred from performing the necessary steps in order to receive the information. Mr. Justice Brennan concurring, reasoned that the First Amendment protected dissemination of ideas and that "such dissemination can accomplish nothing if otherwise willing addressees are not free to receive and consider them." 381 U.S. at 308.

[48] 6 WRITINGS OF JAMES MADISON 398 (Hunt ed. 1906).

[49] Note, *Access to Official Information: A Neglected Constitutional Right,* 27 IND. L.J. 209, 211 (1952).

[50] *See* Zemel v. Rusk, 381 U.S. 1 (1965). The Supreme Court held that the Secretary of State's denial of a passport for travel to Cuba did not violate a citizen's First Amendment right to acquire information concerning that country. The Court recognized that the Secretary's refusal to validate passports for Cuba rendered less than wholly free the flow of information concerning that country; however, it reasoned that the Secretary's refusal was a restraint of action, and that under certain circumstances actions were subject to regulation. Implicitly recognizing some right to gather information, the Court concluded that the "right to speak and publish does not carry with it the *unrestrained* right to gather information," and that "the weightiest considerations of national security" necessitated this particular restraint. *Id.* at 17, 16 (emphasis added).

See also Associated Press v. United States, 326 U.S. 1 (1945). In this case, certain by-laws of the Associated Press were held to be in violation of the Sherman Act because they prevented non-member newspapers from publishing news from the Associated Press or its publisher members and thus curtailed publication of competitive newspapers. The Court noted, however, that the First Amendment provided a substantial argument in support of the application of the antitrust laws because the by-laws denied non-member newspapers access to news: "That amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, and that a free press is a condition of a free society. Surely a command that the government itself shall not impede the flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom."
Id. at 20.

[51] The right to gather information raises a number of complex issues such as an individual's right to travel, discussed in Zemel v. Rusk, 381 U.S. 1 (1965), and an individual's right of access to government information. However, discussion in this Note is limited to the right to confidential informer-reporter relationships as derived from the right to gather information.

B. The Right To Gather News Implies the Right To Protect News Sources

The right to confidential informer-reporter. relationships follows logically from the right to gather news when four factual assumptions are accepted: (1) Newsmen require informants to gather news; (2) confidentiality (the promise that names and certain aspects of communications will be kept off-the-record) is essential to the establishment of a relationship with many informers; (3) the use of an unbridled subpoena power will deter potential sources from divulging information; and (4) the use of an unbridled subpoena power will deter reporters from gathering or publishing information which might lead to a demand for complete compulsory disclosure. If these factual assumptions are correct, the press will be less effective in uncovering criminal activity, corruption, government mismanagement, and other matters of public interest unless a right to protect the confidentiality of news sources is created. Much discussion will be stifled concerning socially controversial activites, such as illegal abortion and drug usage, for individuals will avoid the possibility of public identification with illegal conduct.[52] Some persons will be reluctant to voice their opinions without assurances of anonymity for fear of harassment and reprisal.[53]

It is obvious that the first assumption is valid. However, courts that have denied the constitutional right to confidential informer-reporter relationships have often not accepted the validity of either the second, third, or fourth assumptions from which the right is logically derived.[54] Yet, available data suggests that those who deny *any* vaidity to these three assumptions are wrong to do so.

Surveys of the press indicate that a substantial number of newspaper stories are based on information which could only be secured through confidential informer-reporter relationships.[55] Erwin D. Canham, editor-in-chief of the *Christian Science Monitor,* estimates that from 33% to 50% of that newspaper's major stories involve confidential sources, and the *Wall Street Journal* states that 15% of its articles are based on information from confidential informants.[56] The managing editor of the *San Francisco Chronicle* writes that "an absolutely staggering number of stories, political and non-political, arise from information received in confidence."[57] "Systematic" empirical evidence has not been developed, in part because reporters and editors do not keep records of the confidential nature of sources and therefore must make educated guesses as to the incidence of confidentiality. But it is still clear from available data that some leading newsmen regard confidentiality as essential for development of many news stories.

The issuance of subpoenas to news gatherers also appears to silence potential informants who fear that their identity of their off-the-record communications may have to be revealed by the newsman. Even some courts that have denied the constitutional right to a confidential relationship have taken judicial notice that compulsory disclosure of information will deter informers and limit sources available to newsmen.[58] Recognizing that a broad guarantee of confidentiality is essential to the maintenance of informer-reporter relationships, the American Newspaper Guild has adopted the following rule as part of the newsman's code of ethics: "Newspaper men shall refuse to reveal confidence or disclose sources of confidential information in court or before other judicial or investigative bodies." [59]

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[52] *See, e.g.,* State v. Buchanan 250 Ore. 244, 436 P.2d 729, *cert. denied,* 392 U.S. 905 (1968), which required disclosure of several informants who, under an express promise that their identities would not be revealed, had provided information to a reporter relating to the use of marijuana on a university campus.

[53] The Supreme Court has recognized the importance of guarantees of anonymity to assure free expression. In *Talley v. California,* a statute prhibiting distribution of anonymous handbills was held void on its face because "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." 362 U.S. 60, 65 (1960).

[54] *See* note 6 *supra.* In the Massachusetts case, *In re* Pappas, No. 14,690 (Mass. Sup. Ct. Jan. 29, 1971), the court stated: "Any effect on the free dissemination of news is indirect, theoretical, and uncertain, and relates at most to the future gathering of news."

[55] For the most extensive survey to date, see the Appendix to Guest & Stantzler, *supra* note 2, at 57–61. In Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970), eighteen affidavits by such prominent newsmen as Walter Cronkite and Eric Sevareid were submitted with the Caldwell and amicus briefs stressing the importance of informer-reporter relationships in the gathering of news and the necessity of guaranteeing confidentiality for the maintenance of these relationships. The Court of Appeals relied heavily on these affidavits: "The fact that subpoenas would have a chilling effect on First Amendment freedoms was impressively asserted in affidavits of newsmen of recognized stature, to a considerable extent based upon recited experience." *In re* Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970).

[56] Guest & Stanzer, *supra* note 2, at 43–44, 61.

[57] *Id.* at 60.

[58] Garland v. Torre, 259 F.2d 545, 548 (2d Cir.;, *cert. denied,* 358 U.S. 910 (1958); *In re* Taylor, 412 Pa. 32, 41, 193 A.2d 181, 185 (1963).

Although again no "systematic" empirical evidence of a deterrent effect is available, the inhibiting effect of subpoenas to newsmen on the willingness of informants to talk to newsmen has been demonstrated by the reaction of militant groups to the recent increase in subpoenas issued by federal grand juries. The Oakland Black Caucus, an organization representing major black groups in the Oakland area, refused to co-operate with the American Broadcasting Company in the filming of a documentary on the Black Panthers when A.B.C. admitted it was unable to provide an assurance that its newsmen would remain silent in the face of possible government subpoenas.[60] In this and other cases,[61] fear generated by the issuance of a subpoena to *New York Times* reporter Earl Caldwell was expressly stated as the reason for the informants' unwillingness to co-operate with newsmen. The impediment to news gathering caused by a reporter's testimony under subpoena before a legislative committee has also been recently demonstrated. When a *New York Times* reporter was required to testify before the House Committee on Internal Security investigating militant activities, militant groups thereafter refused to talk with either him or other *Times* reporters, asserting that those newsmen could not be trusted with confidential information.[62]

The silencing effect caused by the increase in government subpoenas has not been confined to militant groups. A *Newsweek* reporter's affidavit submitted in the *Caldwell* trial asserts:

> "Particularly disturbing to me has been a marked increase recently, in the reticence of my confidential sources in government itself. These sources, some of whom have in the past been instrumental in exposing instances of governmental abuse or corruption, now tell me that, because of the increasingly widespread use of subpoenas to obtain names and other confidential information from reporters, they are fearful of reprisals and loss of jobs if they are identified by their superiors as sources of information for newsmen." [63]

It also appears likely that some reporters will be deterred from seeking and publishing information that could lead to a subpoena which would force them to disclose confidential information or to receive a contempt citation. Again, it is difficult to reach any precise conclusions as to the extent of this deterrence, but the acceptance of contempt citations by newsmen in the past indicates an unwillingness to place themselves in a position of losing their reputation through disclosure of information intended to be kept confidential.[64] It is not unreasonable to assume that some reporters, especially those who cannot count on the support of their editors or publishers or who cannot otherwise command resources for legal defense, will be reluctant to print stories likely to lead to subpoenas and possible contempt citations.[65]

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[59] G. Bird and F. Mervin, The Newspaper and Society 567 (1942).

[60] Affidavits of Gilbert E. Noble and Timothy C. Knight accompanying Petitioner's Brief, Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970).

[61] A Los Angeles *Newsweek* correspondent who had previously maintained good relations with the Panthers was refused an interview until *Newsweek* agreed to contest judicially any subpoenas the correspondent received, but by the time this agreement was secured, the subject of the interview had left Los Angeles. Affidavit of Nicholas C. Proffitt, accompanying Brief for *Newsweek* as Amicus Curiae, Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970). In New York, a *New York Times* reporter found previous news sources unwilling to discuss Black Panther activities. Affidavit of David Burnham, accompanying Petitioner's Brief, Application of Caldwell, *supra.* In Massachusetts, a former source of information on black militant groups was highly reluctant to cooperate with a *Newsweek* Bureau Chief. Affidavit of Frank Morgan, accompanying Brief for *Newsweek* as Amicus Curiae. Application of Caldwell, *supra.*

[62] Affidavits of Anthony Ripley, John Kifner, Thomas A. Johnson, Earl Caldwell & Gerald Fraser, accompanying Petitioner's Brief, Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970).

[63] Affidavit of Jon Lewell, accompanying Brief for *Newsweek* as Amicus Curiae. Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970). *See also* affidavits of Walter Cronite and Mike Wallace, accompanying Brief for C.B.S. as Amicus Curiae, Application of Caldwell, *supra*, for examples of the importance of confidential informers in gathering news concerning government activities. In his affidavit, Cronkite cites five recent examples of important stories he could have secured only through confidential informants: A member of the staff of a United States Senator advised me, far in advance of the announcement, that his employer did not plan to run for re-election. Another person in a similar position tipped me to his employer's intention to seek higher office. An officer high in Pentagon circles recently offered evidence of pressure high in the military command structure to get the President to cut back on his Viet Nam withdrawal commitments. A bartender told me of fraud in restaurant inspection in New York City. A scientist asserted that the Atomic Energy Commission's safety standards for atomic energy installations were not adequate. None of these persons would have volunteered this information if they thought they would be exposed as the source of this information."

Nonetheless, the validity of the factual assumptions has not been established "conclusively," in part because of the inherent ambiguity, in this context, of the concept of "conclusiveness," a word which necessarily has reference to values as well as to facts. For example, what would it mean to show "conclusively" that Assumption #2—confidentiality is essential to the establishment of many reporter-informer relationships—was valid for "constitutional purposes"? First, it would require a difficult factual inquiry to determine what percentage of all reporter-informer relationships are confidential. But, even assuming it were possible to find a methodologically satisfying answer to that question, when would the finding be "conclusive enough" to require that the right to a confidential relationship be given constitutional protection: when 10% are confidential, 50%, "some," "many"? Obviously, the second question can only be answered with reference to value choices.

Similarly, determining the validity for constitutional purposes of Assumption #3 or #4—the use of an unbridled subpoena power will deter potential sources from divulging information or reporters from gathering and printing certain kinds of information—requires a prediction about the occurrence of factual sequences in the future. If X occurs, Y or Z will result N per cent of the time. Again, even if one could produce a proposition in that form that was defensible in methodological terms (and there is substantial reason to doubt that such an achievement is possible),[66] the value question of when N per cent was sufficiently great to require constitutional protection for the right would still be open. If such a proposition cannot be produced, then one's assessment of the assumption—one's presumption about its validity and the degree of "incidence" deemed important—would even more starkly depend upon value preferences.

The reason for determining the validity of the four assumptions isolated above is to help resolve two issues: first, the one posed in this subsection—should *some* right to a confidential relationship exist?; second, the one posed in the next two subsections—how far should that right extend (how important is it compared to other interests)? But the question of factual validity regarding the *existence of confidential relationships* (Assumption #2) and the scope and incidence of *deterrent effects* that result from use of the subpoena power (Assumptions #3 and #4) must be inevitably linked with the value question of the *importance* of the First Amendment interests. Clearly, given the "inconclusive" state of available facts *and* the likelihood that they will in important respects remain "inconclusive,"[67] resolution of the two issues must rest on articulated value choices—on a presumption for or against the First Amendment interests in this setting.

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[64] *See* notes 5 and 6 *supra*. There has not been extensive research in this area, however, to determine the extent that reporters are deterred by the absence of a broad right of confidentiality.

[65] The threat of a deterrence of reporters was recognized in the *Caldwell* case: [I]t is not unreasonable to expect journalists everywhere to temper their reporting so as to reduce the probability that they will be required to submit to interrogaton. The First Amendment guards against governmental action that induces self-censorship."*In re* Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970).

[66] Establishing the empirical basis for the deterrence assumption is complicated by determining what constitutes "unabridled subpoena power," when such power has existed, and when informants have been aware of its existence.

[67] An empirical study is presently being conducted by the Field Foundation under the direction of Vince Blasi of the University of Michigan Law School, and Richard Baker and W. Phillips Davison of the Columbia School of Journalism. While additional data will provide helpful information concerning confidential informer-reporter relationships and the deterrent effects caused by the issuance of subpoenas to reporters, such data can by no means be conclusive and is not necessary for a judicial decision that the informer-reporter relationship should receive constitutional protection. Reporters questioned in a survey cannot determine the number of potential informants who have refrained from contracting newsmen because of the absence of a right of nondisclosure, and it is doubtful whether they can determine the extent to which their informants refrain from fully disclosing information to them because of the absence of a nondisclosure right. If a survey attempts to question informants, it will be extremely difficult to obtain a random sample of confidential informants willing to respond to such an inquiry. Furthermore, it will be difficult to build the requisite objectivity into a survey where all persons questioned have a vested interest in the results of the study. Therefore, courts must rely on logical reasoning, present knowledge of the newsman-informer relationship and presumptions based on First Amendment values, to decide what a constitutional right to confidential informer-reporter relationships is necessary to the maintenance of a free flow of information.

This Note proposes that the facts presently known rebut the charge of invalidity previously attached to the four assumptions by some courts and warrant the establishment of *some* right to a confidential reporter-informer relationship. This conclusion—which is the fulcrum of the subsequent argument—rests on two beliefs.

First, the demonstration of some factual validity of the four assumptions *and* common sense are sufficient grounds for presuming that these assumptions will have some validity in the future. For example, it seems clear that sources within government, who are willing to divulge information to the press about alleged government misfeasance, will dry up if they have reason to believe their names can be compelled.

Second, a relationship, (a) whose protection is consistent with First Amendment theory[68] and (b) that has some basis in fact, should be given constitutional protection if "unnecessary" deterrent effects can be shown. The word "unnecessary" does not have reference to a finely calibrated evaluation of empirically validated behavior in which the "benefits" of the right are quantified and weighed against its "costs."[69]

As will be discussed in the next subsections, both these beliefs draw strength from the Supreme Court's sensitivity to deterrent effects on First Amendment freedoms. This sensitivity is based clearly on value preferences arising out of common sense predictions, since it is extremely difficult for the Court to "prove" the existence of those effects or to demonstrate their "rate of incidence" with any precision.

C. The Right to Protect News Sources Must be Broad and Subject Only To Clear Exceptions

Establishing the necessity for judicial recognition of some First Amendment right to protect informer-reporter relationships, however, does not define its precise nature or scope. Two general principles derived from other First Amendment cases will provide an orientation to help further delineate the dimensions of this right: (1) permissible governmental regulation of First Amendment conduct may not be vague in scope or application; and (2) First Amedment rights are accorded special protections and may be restricted only because of a compelling government interest. Although the First Amendment speaks in terms of "law," the protections of the Amendment are available not only against legislation but against government action in other forms.[70]

In areas where the Supreme Court has recognized that the government may regulate First Amendment conduct, the Court has insisted upon precision and specificity of the prohibitions so that parties will not unnecessarily forego the exercise of First Amendment rights.[71] It is well settled that a statute which is so indefinite in its language or is interpreted to permit the punishment of incidents which are within the protection of the First Amendment is void on its face.[72] Similarly, stricter standards of permissible vagueness are applied to governmental action which has a potentially inhibiting effect on speech or the press than are applied to governmental regulation of economic activity:[73] "A man may the less be required to act at his peril here because the free dissemination of ideas will be the loser."[74] Administrative or executive action would seem logically subject to similar prohibitions regarding overbreadth, vagueness, and abuse of discretion if exercise of this action (*e.g.*, issuance of subpoenas) impinges upon First Amendment rights.

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[68] *See* pp. 326–29 *supra*.

[69] At this point, the Note assumes some "unnecessary" effects exist. An extended discussion of this value judgment occurs at pp. 345–60 *infra*.

[70] Freedman v. Maryland, 380 U.S. 51, 56 (1965). Standards of permissible statutory vagueness are particularly high when a state empowers an administrative or executive agency to take action which may infringe First Amendment rights. *Cf.* United States v. Robel, 389 U.S. 258, 275–76 (1967) (Brennan, J., concurring) [T]he numerous deficiencies connected with vague legislative directives . . . are far more serious when . . . the exercise of fundamental rights [is] at stake. . . . Formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree.

[71] *See generall* Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV 844 (1970); Note, *The Chilling Effect in Constitutional Law,* 69 COLUM. L. REV. 808 (1969).

[72] *See, e.g.,* Stromberg v. California, 283 U.S. 359, 369 (1931). *See generally,* Note, *The Void for Vagueness Doctrine in the Supreme Court* 109 U. PA L. REV. 67 (1960).

[73] Winter v. New York, 333 U.S. 507, 517–18 (1948).

[74] Smith v. California, 361 U.S. 147, 151 (1959).

The Supreme Court has frequently emphasized the need for certainty in the exercise of First Amendment rights, even though precision increases the likelihood that libelous and obscene materials (which the state has a legitimate interest in suppressing) will be published and distributed.[75] This certainty is necessary to effectuate the free press guarantee of the First Amendment because, without certainty, parties responsible for the dissemination of information to the public will be unable to predict when the state can suppress their activities. Thus, there is a substantial possibility that they will unduly censor their publications to avoid punishment. The Court has determined that the mere prospect of self-censorship of activity protected by the First Amendment is sufficient to hold such statutes unconstitutional on the ground of vagueness even though the exact extent of self-censorship is empirically uncertain.[76]

The deterrent effect of an unbridled subpoena power may be analogized to the inhibiting effect of vague and overbroad statutes affecting First Amendment freedoms.[77] Unless reporters and informers can predict with some certainty the likehood that newsmen will be required to disclose names or information obtained in confidential relationships, there is a substantial possibility that many reporters and informers will be reluctant to engage in such relationships.[78] As a result of this deterrence, the flow of information to the public will be diminished regardless of whether disclosure could have actually been compelled. Thus, to prevent this unconstitutional deterrent effect once the right to a confidential relationship has been established, occasions on which the state may compel a newsman to disclose names or information obtained in a confidential relationship must be defined with specificity.

The second general principle that may be used in defining the scope of the news gatherer's right to protect his confidential relations with informants is that First Amendment rights are traditionally "protected against government curtailment at all points, even where the results of expression may appear to be in conflict with other social interests which the government is charged with safeguarding." [79] The rationale for specially protecting First Amendment rights is that freedom of speech and of the press are the indispensable preconditions for the exercise of other freedoms.[80] The Supreme Court once spoke of these rights as being "preferred" [81] in relation to other legal rights, and although this language has been abandoned,[82] the concept of special safeguards still survives in a number of First Amendment doctrines.[83] Correlatively, the Court has explicitly recognized that these rights are "delicate and vulnerable" [84] and must be vigiliantly safeguarded because they are particularly susceptible to government inhibition. Their exercise is easily deterred or "chilled" by government action because the economic self-interest that may be relied upon for the vindication of other legal rights is lacking in the First Amendment area.[85]

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[75] In *New York Times Co. v. Sullivan,* for example, the Court recognized that the common law standard for libel actions, requiring truth as a defense to a claim of libel, would deter the press from publishing matters difficult to establish as true, whether libelous or not. To prevent self-censorship by the press, the Court required a showing of actual malice by the plaintiff in libel actions against public officials. 376 U.S. 254 (1964).

[76] *See, e.g.,* Freedman v. Maryland, 380 U.S. 51, 56 (1965); A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964).

[77] In *Freedman v. Maryland,* the statute to which the vice of vagueness attached was MD. ANN. CODE art. 66A, § 2 (1957), which required films shown in Maryland to be "duly approved and licensed" by a state board of censors before exhibition, 381 U.S. 51 (1965). It is here argued that a similar defect of vagueness (as well as overbreadth) inheres in the statutes which authorize reporters to be subpoenaed before grand juries, legislative committees, and civil and criminal tribunals, but which do not provide for nondisclosure of confidential information and the names of confidential informants. For example, 2 U.S.C. § 190b (1964) provides that a Senate standing committee may require "by subpoena [sic] or otherwise the attendance of such witnesses . . . to take such testimony . . . as it deems advisable." A judicial gloss will later be suggested which will avoid the vagueness and overbreadth of such subpoena statutes. *See* p. 339 *infra.*

[78] *See* pp. 330–32 *supra.*

[79] T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 17 (1970). The Court has held that these rights must be taken as a "command of the broadest scope that explicit language, read in the context of a liberty loving society, will allow." Bridges v. California, 314 U.S. 252, 263 (1941).

[80] Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967).

[81] This doctrine originated in U.S. v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), with the cautious assertion that "there may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments" than when legislation regulates economic activity. *Cf.* Marsh v. Alabama, 326 U.S. 501, 509 (1946). The preferred freedoms doctrine has been formulated in terms of First Amendment rights, however, because freedom of speech and of the press have been viewed as basic for democratic government. Thomas v. Collins, 323 U.S. 516, 530 (1945). The preferred freedoms language seems to have been primarily a rhetorical device to emphasize the importance the Supreme Court attaches to First Amendment freedoms. Note, *A Uniform Valuation of the Religion Guarantees,* 80 YALE L.J. 77, 81 n.20 (1970).

This principle of broad scope for First Amendment rights is translated into a presumption that any governmental restriction of First Amendment rights is impermissible.[86] The Supreme Court has consistently held that only a "compelling," [87] "substantial," [88] "subordinating," [89] "paramount," [90] "cogent," [91] or "strong" [92] state interest in the regulation of a subject within the government's constitutional power to regulate can justify limiting these freedoms. Even the advocacy of law violation or the use of force may only be proscribed when such advocacy is directed to inciting or producing imminent lawless action *and* is likely to incite or produce such action.[93] It is not possible, however, to use these adjectival tests to catalogue the situations in which First Amendment rights must yield to other governmental interests because in each case, speech and non-speech elements may be combined in the same course of conduct.[94] This requirement of an extraordinary government interest seems to be primarily a rhetorical device used to emphasize that only in rare circumstances may First Amendment rights be restricted.

Moreover, the Supreme Court has consistently held that the exercise of First Amendment rights may not be restricted by indirect inhibitions or secondary prohibitions. For example, the Court has recognized that the primary First Amendment right of free association may be impaired by government investigation of membership lists [95] and has therefore prohibited such investigations even though they did not directly prevent individuals from joining any organization.[96] The Court has also struck down tax statutes which indirectly prohibited the exercise of First Amendment rights.[97] The mere threat of sanctions may deter the exercise of free speech or free association almost as much as the actual application of sanctions.[98] Thus, since the right to a confidential news gatherer-informant relationship has been found to be within the First Amendment press freedom, this right should be protected from indirect restrictions, subject to limitation only because of "compelling state interests."

D. Nature and Further Justification of the Right

1. The Proposed Rule

In light of the argument thus far, this Note suggests the following rule as being sufficiently broad and specific to satisfy the First Amendment freedom of the press requirements. The proposed rule consists of the following elements:

a. The right lodges in *news gatherers* to withhold

b *Informants' names* and *information received from informants*

c. Except at a *criminal trial* and in civil trials when the newspaper is a defendant to a libel action covered by the rule of *New York Times Co. v. Sullivan;* [99]

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[82] *Cf.* Justice Frankfurter's criticism of the "preferred freedoms" doctrine in Kovacs v. Cooper, 336 U.S. 77, 90–94 (1949) (concurring opinion).

[83] The clear and present danger rule (*see, e.g.,* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)), the alternative means test (*see e.g.,* Aptheker v. Secretary of State, 378 U.S. 500, 512, (1964)), negative presumptions (*see, e.g.,* Speiser v. Randall 357 U.S. 513, 526 (1958)), and the overbreadth doctrine (*see, e.g.,* U.S. v. Robel 389 U.S. 258, 265–66 (1967)) all indicate the survival of a special "preference" for First Amendment rights in modern constitutional theory.

[84] NAACP v. Button, 371 U.S. 415, 433 (1963).

[85] Dombrowski v. Pfister, 380 U.S. 479, 486–87 (1965).

[86] *See, e.g.,* Epperson v. Arkansas, 393 U.S. 97, 106–07 (1968).

[87] NAACP v. Button, 371 U.S. 415, 438 (1963).

[88] NAACP v. Alabama, 357 U.S. 449, 464 (1958).

[89] Bates v. Little Rock, 361 U.S. 516, 524 (1960).

[90] Thomas v. Collins, 323 U.S. 516, 530 (1945).

[91] Bates v. Little Rock, 361 U.S. 516, 524 (1960).

[92] Sherbert v. Verner, 374 U.S. 398, 408 (1963).

[93] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[94] *Cf.* United States v. O'Brien, 391 U.S. 376–77 (1968).

[95] NAACP v. Alabama, 357 U.S. 449 (1958).

[96] Bates v. Little Rock, 361 U.S. 516 (1960).

[97] Grosjean v. American Press Co., 297 U.S. 233 (1936).

[98] NAACP v. Button, 371 U.S. 415, 433 (1963).

[99] 376 U.S. 254 (1964). See pp. 360–63 *infra.*

d. At a criminal trial, the reporter is only required to give information, according to the rules of evidence, relevant to the alleged elements of the crime charged to an *informer-defendant* and

e. May withhold the *names of third party sources* and *information received from such sources;*

f. Before testifying in the criminal trial context, the reporter may require the party seeking compulsory testimony to *show cause* that the reporter had reason to possess information about the defendant and the alleged criminal acts;

g. In the civil trial setting, the reporter should only be required to testify when he or his publication is a defendant in a libel action under the *Times* rule and when substantial evidence of *defamation*

h. And *falsehood* have been shown by the plaintiff; and

i. When the defendant *cannot bear the burden of proving lack of actual malice or reckless disregard of the truth*

j. *Regardless* of the source's identity or the content of his communication, *i.e.*, assuming the source is anonymous and thus unreliable.

In effect, this rule means that newsmen will not be required to give information at a preliminary hearing or (except in a very limited case) civil trial or before a grand jury or legislative committee.[100] Testimony at a criminal trial will be restricted by the rules of evidence to relevant information concerning the acts and statements of the defendant-informer;[101] the requirement to appear at all is qualified by a showing that it is reasonable to assume that the reporter has knowledge of revelant facts.[102] In the criminal trial setting, only those informants who fear that they will be indicted or arrested as a result of information stemming from sources other than the reporter will be uncertain about the likelihood of compelled disclosure. The proposed rule further limits the material which must be revealed to a sphere of information that surrounds the alleged criminal act.[103] The limited civil trial exception should, in practice, result in very few (if any) compelled disclosures.[104]

In general, this formulation of the right is justified because it is the only way in which uncertainty can be reduced, the unlimited power of compulsory disclosure checked, and vital interests in the administration of justice still served. Justifications for specific elements of the proposed rule follow.

2. *Where the Right Should Lodge and the Primary Discretion Rest*

Once it has been determined that a right to a confidential relationship exists and the power to compel disclosure is to be curbed, a decision must be made about who should have the greatest role in shaping the contours of that right —a judge, the reporter, or the informant.[105] In formulating a right to a confidential informer-reporter relationship, three basic approaches may be taken after analyzing and valuing the deterrent effects on First Amendment freedoms: (a) the right may be determined by the *importance of the subject about which testimony is sought*, that is, by choosing a point on the spectrum ranging from misdemeanor cases to situations involving national security; or (b) the right may be determined by the *degree of relevance the information sought bears to the subject under investigation or at issue*, that is, by choosing a point on the spectrum ranging from "possibly related" to "highly relevant"; (c) the right may be determined by the *importance of the stage of the legislative or judicial process at which the information is to be used*, that is, by comparing the function of the preliminary hearing, grand jury deliberations, legislative inquiry, or criminal or civil trial with the function of the right itself.

The tests thus far developed for reconciling the competing interests have been based on the first two approaches.[106] The difficulty with both approaches is that they necessarily vest substantial discretion in the judge and therefore do not meet the requirements of specificity and predictability which should attach to a definition of the right. Courts must determine in each case whether disclosure of an informant's confidential information or identity should be required according to a developing standard of "importance" or "relevance." Under the case-by-case method of developing rules, it will be difficult for potential informants and reporters to predict whether testimony will be compelled since the decision will turn on the judge's ad hoc assessment in different fact settings of "importance" or "relevance" in relation to the free press interest. A "general" deterrent effect is likely to result. This type of effect stems from the vagueness of the tests and from the uncertainty attending their application. For example, if a reporter's information goes to the "heart of the matter" in Situation X, another reporter and informant who subsequently are in Situation Y will not know if "heart of the matter rule X" will be extended to them, and deterrence will thereby result. Leaving substantial discretion with judges to delineate those "situations" in which rules of "relevance" or "importance" apply would therefore seem to undermine significantly the effectiveness of a reporter-informer privilege. (The "specific" deterrent effects which result from requiring disclosure in Situation X—reporters and informers in all future situations of the type X will not disseminate information —are dscussed in the next subsection.[107]) Because of the prospect of such "general" deterrence, the approaches to a constitutional right recently adopted by state and lower federal courts fail to provide the journalist and informant with sufficient certainty to safeguard adequately the public's First Amendment interest in a free flow of information.[108]

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[100] *See* pp. 348–63 *infra.*

[101] *See* pp. 346–48, *infra.*

[102] *See* pp. 363–65 *infra.*

[103] *See* pp. 364–65 *infra.*

[104] *See* pp. 360–63 *infra.*

[105] A prosecutor should not possess the discretion in criminal actions for obvious reasons. *See* note 108 *infra.*

[106] *See* pp. 320–25 *supra.*

The strictest test yet advanced, a requirement that disclosure only be made when a compelling state interest is shown,[109] still leaves the judge with a substantial amount of discretion and is likely to cause "general" deterrent effects of the type described above. It would seem likely that in many situations the test would not be strictly applied, particularly in those situations where the judge is confronted with evidence from the state that disclosure is relevant to a government investigation.[110] And although an "overriding and compelling national interest" or "national security" requirement[111] may further limit the number of subpoenas issued to reporters, precise guidelines will also be difficult to develop for the administration of this rule. Informers and reporters would thus be unable to predict the situations in which disclosure would be required. Many groups and individuals that considered themselves potential targets of "national security" investigations would probably be deterred from talking with members of the press—especially informants within the government or of an "extreme" political stripe.[112] Moreover, the "compelling state interest" or "national security" tests do not limit the range of material which a reporter must reveal. Not all communications received by the reporter from a "national security" source would be relevant to protection of that state interest, but once the source's reports may be disclosed because of his status, it will be difficult to limit the parts of the communications to be revealed.

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[107] "General" deterrence is thus differentiated from "specific" deterrence. *See* pp. 349–55 *infra* for an extended discussion of both terms.

[108] The "reasonable likelihood," "heart of the matter," and "miscarriage of justice" tests are all based on an ad hoc balancing of interests, and thereby fail to provide the informant and reporter with any assurance of nondisclosure at the time of the reporter-informant communication. As a result of this uncertainty, many reporters and informers will be deterred even though their communications would never have been necessary to the administration of justice, either because no proceeding related to the subject of communication took place or because the reporter's testimony was not required for a determination of the case.

The Justice Department guidelines, suggesting that the desired information should be necessary to the investigation, in fact leave the Department free to subpoena a reporter whenever it determines a need for his testimony, and the guidelines give little indication of what factors other than "reasonableness" and "sufficiency" must be weighed in making this determination. Furthermore, there is an express option to permit, in unusual situations, the issuance of a subpoena under circumstances not conforming to the guidelines. Thus, the reporter and informer can never be assured that the Department will not seek disclosure of their confidential communications. *See* Address by Attorney General John N. Mitchell, *supra* note 27.

[109] *See* pp. 324–26 *supra*.

[110] Under an ad hoc balancing test, the judge would balance the importance of disclosure to a particular investigation against the probable deterrent effect caused by disclosure in that situation. Under such a balancing approach, it would be difficult for the deterrence caused by disclosure in a single case to outweigh the importance of disclosure once the government has shown some need for the desired information. *See* State v. Knops, No. 146 (Wis. Sup. Ct., Feb. 2, 1971).

[111] *See* pp. 324–25 *supra*.

[112] The Ninth Circuit has recognized the importance of maintaining communication between members of the press and dissenting groups: "The need for an untrammeled press takes on special urgency in times of widespread protest and dissent. In such times the First Amendment protections exist to maintain communications with dissenting groups and to provide the public with a wide range of information about the nature of protest and heterodoxy." *In re* Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970).

The basic responsibility for defining the dimensions of the right should not be left to the informant either. In part, this judgment is based on existing practices. Although specific requests for confidentiality are often made, the informer ultimately gives the reporter discretion over what aspects of the communication will be published. In other words, the informer and the reporter negotiate, and then the informer assumes a risk that the reporter will not disclose more information than the informer intended. Although there are no precise studies of the workings of the reporter-informer relationship,[113] informants have clearly been willing to assume this risk in the past; informants talk and the reporter is under pressure of his profession's ethics to honor the informant's request. It is also in the interest of a reporter to honor the confidence so that his relationships with informants are not impaired and he can have continued access to confidential information.

The newsman-informer relationship is different from that of other relationships whose confidentiality is protected by statute, such as the attorney-client and physician-patient relationships.[114] In the case of oher statutory privileges, the right of nondisclosure is granted to the person making the communication in order that he will be encouraged by strong assurances of confidentiality to seek such relationships which contribute to his personal well-being. The judgment is made that the interests of society will be served when individuals consult physicians and lawyers; the public interest is thus advanced by creating a zone of privacy that the individual can control.[115] However, in the case of the reporter-informer relationship, society's interest is not in the welfare of the informant per se, but rather in creating conditions in which information possessed by news sources can reach public attention.

As indicated, the current practices employed by newsmen and informers (absent unrestrained use of the subpoena power) seem to produce a substantial flow of news. However, regardless of how one evaluates current practices, it can be argued that vesting the source with the discretion to invoke the right could only have an adverse impact on the free flow of information, since one who initially sought anonymity would be forced to come forward and identify himself in an effort to prevent the compelled disclosure of information obtained by the newsman. A prosecutor could thus "flush" out a source by subpoenaing the reporter. In fact, sources probably would prefer to have the newsman function as a shield, protecting them from official scrutiny. Further, if the informer attempted to restrain the newsman from voluntarily publishing material gathered, a problem of prior restraint would arise.[116] If the informer could only invoke a right of nondisclosure to prevent a reporter's testimony (either voluntary or compelled) at judicial and legislative proceedings subsequent to publication, the situation would develop in which material had been published and widely circulated and yet was still not available for use in the administration of justice. This practice would largely frustrate accomplishment of state interests without substantially aiding First Amendment concerns.[117]

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[113] *See* note 67 *supra*.

[114] For a general discussion of the attorney-client and physician-patient privileges, see 8 WIGMORE, *supra* note 14, at §§ 2290–2329 and §§ 2380–2391.

[115] Wigmore asserts that four criteria should be met to enact a statutory privilege of the attorney-client or physician-patient type: (1) The communications must originate in a confidence that they will not be disclosed. (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between parties. (3) The relation must be one which in the opinion of the community ought to be sedulously fostered. (4) The injury that would inure to the relation by disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation." 8 WIGMORE, *supra* note 14, at § 2285.

[116] Furthermore, proof of confidentiality would often be impossible, as the only available evidence would be the conflicting views of the informant and reporter. Often, there is not even an express request for confidentiality by the informer, for he relies on the reporter's judgment as to what is not intended for publication. *See, e.g.*, Affidavit of Earl Caldwell, accompanying Petitioner's Brief, Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970).

[117] The informant could not protect his identity regardless of whether he was a criminal defendant or third party source. Either his name would have already been publicly disclosed or he would have to come forth in order to claim his right. If he were a third party, his confidential communications could probably be protected at a criminal trial by the hearsay rule. However, if he were a defendant, there would be little justification for protecting his communications. At both grand jury and legislative investigations, an informer's right of nondisclosure of confidential communications could be easily circumvented because of the breadth of the investigation and absence of strict evidentiary

Therefore, the *right* of nondisclosure should lodge in the reporter, not the source. Similarly, as argued, the *primary discretion* in deciding whether the right applies should not rest with the judge. The decision to give such discretion to the newsman occurs in part because there is no better alternative. In part, it must rest on an assumption that, generally speaking, the interests of the newsman are congruent with First Amendment values. Since his professional success depends upon presenting fresh, important information to the public, the reporter will presumably act in a manner that will contribute to the full flow of information. Finally, the right of nondisclosure is constructed in a fashion which protects the newsman when he acts in a professional but not a personal capacity.[118]

3. Protecting the Informant and His Communication

The reporter should possess the right to protect from compulsory disclosure both the identities of his informants *and* communications received from them.[119] Disclosure of private communications may make it possible to trace the informer. Furthermore, protection of off-the-record communications is as important as protection of names in terms of preserving informer-reporter relationships, for informers may be deterred from talking with newsmen unless they are assured that their off-the-record communications will not be disclosed. Empirical evidence[120] and the recent *Caldwell* case[121] indicate that off-the-record communications are a significant part of news gathering, for reporters often use background information in order to evaluate material for publication.[122] A confidential informer-reporter relationship can only be honored, and deterrence minimized, if such confidential background communications are protected from compulsory disclosure.

When a newsman invokes the right, he need not demonstrate that the relationship or the material sought was confidential. Again, substantial discretion must lodge in the newsman in the form of a strong presumpion of confidentiality.[123] An intent of confidentiality will often be elusive of proof without revelation of the identity of the informant. It will also be virtually impossible for the newsman to distinguish between off-the-record confidential material and on-the-record material for publication without revealing the material that deserves protection. Only in situations in which the party desiring disclosure can almost conclusively show non-confidentiality should disclosure of communications be required.[124]

4. Absolute Right at Grand Jury Proceedings and Legislative Hearings

This Note has argued that the primary danger to First Amendment values posed by unrestrained use of the subpoena power is that informers and reporters will be deterred from revealing or gathering information. Unless one can predict with relative certainty when communications must be divulged and when they are privileged, activity protected by the First Amendment will be restrained. These deterrent effects are especially likely to occur during legislative investigations and at grand jury proceedings, when the government will be

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rules. If the reporter wanted to disclose the informer's communication, this information could always be conveyed by someone else in a manner that did not directly link the communication to the reporter.

[118] Only that information is protected which was gathered in the course of preparing material for publication. *See* pp. 365–69 *infra.*

[119] The majority of cases, statutes, and commentary concerning the newsman's claim of nondisclosure have limited their discussion to the question of protection of the identities of confidential informants although no justification has been offered for this limitation. Apparently few cases have arisen in which newsmen have resisted disclosure of confidential communications although it is impossible to determine whether this is because newsmen have been willing to disclose such information or because disclosure has not been asked of them. *See* notes 2, 5, 6 and 15 *supra.*

[120] *See* Affidavits of eighteen reporters submitted with Petitioner's Brief and Amicus Briefs in Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970).

[121] *In re* Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970). *See* pp. 324–26 *supra.*

[122] For example, Walter Cronkite asserts: "In doing my work I (and those who assist me) depend constantly on information, ideas, leads and opinions received in confidence. Such material is essential in digging out newsworthy facts, and equally important in assessing the importance and analyzing the significance of public events. Without such materials, I would be able to do little more than broadcast press releases and public statements." Affidavit of Walter Cronkite accompanying Brief for Columbia Broadcasting System as Amicus Curiae, Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970).

[123] *See* pp. 342–43 and note 116 *supra.*

[124] *See* pp. 367–69 *infra.*

tempted to use the press as an informal investigative arm of the state and to make fishing expeditions for information.[125] Such effects may also result at civil trials, where broad discovery is allowed and evidentiary standards are relaxed.[126]

Restricting compulsory disclosure to criminal trials and to defendant-sources meets these salient dangers. To justify this approach to the problem concerning the informer-reporter relationship, it is necessary, first, to show that the proposed rule is consistent with the First Amendment values discussed thus far and, second, to demonstrate that these values, when compared with the interests served by compelled disclosure at legislative hearings, grand jury (or preliminary hearing) proceedings and civil trials, do not require disclosure of sources' names or informer-reporter communications.

Obviously, a rule that protects the newsman-source relationship at civil trials, legislative hearings and grand jury proceedings advances the First Amendment values of limiting deterrence of protected activities and insuring the free flow of information. (Justification for the limited civil trial exception with respect to First Amendment values will be given below.) [127] The rule is both broad and, more important, certain. An informer need only establish a relationship of trust with a reporter through a private bargaining process, following practices that currently exist.[128]

Making the confidential communications between a defendant-source and a reporter open to scrutiny at criminal trial, however, should not cause substantial deterrent effect on the flow of information. First, the source cannot have his identity revealed merely by the subpoenaing of a reporter, since an indictment is obviously prerequisite to trial. Nor can the reporter be used to uncover the whereabouts of the source. The reporter cannot thus be used for investigative purposes. Second, the defendant-source can often predict with some certainty whether or not he is going to be indicted. He can thus choose not to talk about his own criminal acts to a reporter if he fears that he will be indicted, arrested and brought to trial. (The source is not likely to do this in any event, unless he has enormous trust in the reporter; the more common occurrence would seem to be fore the source to give information about third parties.) Third, the defendant-source is assured, by the rules of evidence, that the reporter's revelations at the trial proceedings will be circumscribed to information relevant to his own alleged criminal conduct. (He need not worry that the party seeking information at trial can explore his unrelated activities or those of his colleagues.)[129]

An exception to the reporter-informer privilege is justified at criminal trial not simply because the potential deterrent effect is sharply reduced by the relative certainty provided by the rule, but also because the source has been linked with some specificity to allegedly criminal acts. Although the indictment does not function perfectly as a screen, keeping the innocent from trial,[130] nonetheless, at criminal trial there is probable cause to believe that the source did commit a crime. With diminished deterrent effects and the subject matter of compelled disclosure limited to specifically alleged criminal behavior, there is much less reason to shield the informer-reporter relationship.

On the other hand, communications from third parties and identities of third party sources must be protected even during criminal trial.[131] Of course, the rules of evidence will often make inadmissible, as hearsay, information about the defendant received by a reporter from a third party.[132] However, there may be occasions when the hearsay rule does not apply.[133] In these instances, third parties should be protected; the reporter should not be compelled to disclose identities or information. Again, the primary reason for protecting third party sources is that without such protection deterrence of future sources is likely to result. A third party will not have been indicted and thus his identity is not known. When talking with a reporter, a third party source will be unable to determine whether the indictment of someone else will result in disclosure of the source's identity. Where the identity of the third party source is known, the reporter still should not be required to divulge confidential information;[134] the deterrent effects may still result, since potential sources may not want any off-the-record communications revealed for a variety of reasons and compelled disclosure of such information—even information controlled by the rules of evidence—will contravene this desire. Moreover, if there is no diminution of deterrent effects regarding third party sources at criminal trial, there is also no increase in the interests of the state, since the third party source is not yet formally accused of any crime (though he may, obviously, fear such an accusation).[135]

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[125] *See* pp. 354, 358, and note 152 *infra.*

[126] *See* pp. 358–59 *infra.*

[127] *See* pp. 360–63 *infra.*

[128] *See* pp. 342–43 *supra.*

[129] *See* pp. 364–65 *infra.*

[130] *See* A. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 YALE L.J. 1149 (1960).

[131] A criminal defendant could subpoena a reporter if he wanted the reporter to testify about prior defendant-reporter communications. However, the reporter's right of nondisclosure of confidential information obtained from third parties is also applicable when a criminal defendant seeks information, for the deterrent effects caused by disclosure would be similar. Although the Sixth Amendment grants the defendant the right of compulsory process, that Amendment was adopted to guarantee the defendant the same right of process as that provided the prosecution by common law. This right to compulsory process does not override exemptions from disclosure protected by the Constitution, statutes, and common law. 8 WIGMORE, *supra* note 14, at 2191.

[132] *See* C. MCCORMICK, LAW OF EVIDENCE §§ 223–29 (1959).

While disclosure at a criminal trial limited to communications received from an informer-defendant is consistent with First Amendment values, disclosure of information obtained through confidential informer-reporter relationships should not be compelled in other settings. At grand jury investigations, legislative investigations, and civil trials, the interests served by compulsory disclosure of confidential sources or information are not as substantial when compared with the potential impairment of the public's First Amendment interest in a free flow of information.

Because of the extremely broad scope of a *grand jury investigation*,[136] there is the danger of a substantial deterrent effect on informants if reporters are compelled to appear before it. The function of a grand jury investigation is twofold: to investigate possible areas of criminal conduct and to serve as a pre-trial safeguard to insure that an individual is not tried for a crime on the basis of inadequate evidence.[137] In order that it can effectively perform these functions, grand jury investigations are not limited in scope to specific criminal acts[138] nor are they confined to strict evidentiary rules of admissibility.[139] Furthermore, they are conducted in secret in order to protect the effectiveness of the grand jury process and to insure that information about persons suspected of crime is not publicly revealed unless there is some cause to believe them guilty.[140]

Two types of deterrent effects may result from grand jury subpoenas to newsmen. First, *general effects due to vague rules* will occur when the newsman or informant can neither predict when the identities of sources will be disclosed nor determine what will, in fact, be revealed when a reporter who has been subpoenaed actually appears before a grand jury. The rule most obviously plagued by vagueness is a "compelling need" or "heart of the matter" test used to decide whether the newsman should appear at all. "Importance" or "relevance" tests must be decided on the facts of each case, and the informant and the newsman may often not be able to determine whether the facts of their case will justify a value judgment of "compelling need" by the judge. The rules regulating the grand jury itself and the secrecy requirement also make prediction difficult. Second, *specific effects result from a judicial decision that an inquiry into a particular type of activity creates a compelling need*—for example, a ruling that investigation of a violent criminal act, such as murder, justifies an abrogation of the right to a confidential relationship. This ruling would deter publication of stories that occur after murders and depend upon confidential informants, since the right would not be available to protect the source.

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[133] With no constitutional right of nondisclosure, information received from a third party informer might be admissible under an exception to the heresay rule. For example, a declaration against interest by a third party would be admissible if the declarant were not available at the time of trial. *Id.* at § 253.

[134] Obviously the party desiring testimony as to a known source's confidential communications will try to get direct testimony from the source. But should that fail, the reporter must still be protected so that his confidential communications cannot be admitted under an exception to the hearsay rule.

[135] The confidential relationship should not be violated solely for investigative purposes. *See* p. 354 and note 152 *infra*. However, if the third party source is indicted in another proceeding, the reporter should obviously not be able to invoke the right with regard to this source at that proceeding.

[136] *See* Hale v. Henkel, 201 U.S. 43 (1906); Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590, 591–92 (1961).

[137] *See* note 11 *supra*.

[138] The grand jury may summon and examine witnesses with no defendant or crime specifically in mind. *See, e.g.*, Wilson v. United States, 221 U.S. 361 (1911). It can pursue all ramifications of a particular subject of inquiry. *See, e.g.*, United States v. Johnson, 319 U.S. 503, *rehearing denied*, 320 U.S. 808 (1943).

[139] *See* Note, *Exclusion of Incompetent Evidence From Federal Grand Jury Proceedings*, 72 YALE L.J. 590, 596 (1963): "Attempts to limit the basis of grand jury decisions to evidence admissible at trial are complicated by the fact that the issues and direction of the case have not yet been fully developed. Because the precise nature of the charges is not defined prior to indictment, questions about the admissibility of evidence at trial which turn on the content of the accusation cannot be answered before the grand jury acts; questions concerning evidence whose admissibility depends on a particular situation developing at trial are likewise unanswerable at this pretrial stage."

[140] *See generally*, Note, *Defense Access to Grand Jury Testimony: A Right in Search of a Standard*, 1968 DUKE L.J. 556 (1968); 8 WIGMORE, *supra* note 14, at § 2360.

If we are concerned about preventing the general deterrent effects caused by the breadth and secrecy of the grand jury inquiry, the use of the subpoena to compel testimony concerning confidential informant-reporter relationships must be circumscribed, much as an over-broad statute must be more narrowly drawn so that constitutional rights are not infringed. As noted,[141] courts have recently adopted a "compelling need" test to so circumscribe the subpoena power. However, as indicated above,[142] use of this test, no matter how narrowly interpreted, will still result in some general deterrent effects. In spite of this, it could be argued that, although there will be some deterrent effects of a general nature, there will also be some clear cases where compelling need exists, and thus this sort of test must be available for judges to utilize when necessary despite the potential abuse of such a test and the uncertainty that will result even from careful use. In order, first, to rebut that argument—that the compelling need test (or a compelling need test with some form of alternative means rule) must be available despite its defects—and, second, to justify an absolute right of nondisclosure before the grand jury, it is necessary to argue the following point: the specific deterrent effects which result from a judicial decision that inquiry into a particular kind of activity creates a "compelling need" for a reporter's confidential information are of sufficient importance, and the benefits to the administration of justice are so slight, as to make inappropriate the use of a "compelling need" test.

Such an argument can most effectively be made in the context of a hypothetical case. Let us assume the following facts.[143] On Monday, a science building at a major state university is bombed, killing one person and causing several million dollars worth of damage. On Wednesday, an "underground" paper on campus prints a story headlined, "The Bombers Tell Why and What Next—Exclusive." The story includes an account of the reasons for the act and states that future bombings may occur, but does not identify the informants. On Thursday, the editor of the paper is called before a county grand jury, presumably to be asked to identify the persons interviewed and to discuss the nature of the interviews. The editor either seeks a protective order or, upon appearing before the grand jury, refuses to answer questions of the type mentioned. For purposes of discussion, it should be assumed that the "underground" paper is a part of the "press" within the First Amendment meaning of that term, that the editor is a "journalist," and that the information sought by the grand jury was obtained by the editor only after a promise of nondisclosure by him.[144]

It seems clear, on these facts, that if there is ever to be a finding of "compelling need" for the testimony, this is the case. A violent crime, resulting in loss of life and substantial property damage, has been committed; the newsman purports to know the identities of the criminals and to have information about the crime. Why should the reporter be able to invoke the right of nondisclosure? For the moment, let us consider this question with regard to the *past actions* discussed in the hypothetical story, and not with reference to the future acts also mentioned.

The fundamental reason for allowing the newsman to invoke the right is that to require disclosure in this case is to say, in effect: no story, based on confidential sources, may ever be printed after commission of the "same type of crime" or a "similar crime." After a ruling requiring disclosure in this particular case, if such a story is printed after the commission of a similar crime, the newsman and the source can know with relative certainty that their relationship will not be protected when the newsman is subpoenaed. In all likelihood, the story will not then be printed, since the story was predicated on the maintenance of confidentiality.

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[141] *See* pp. 324–25 *supa.*

[142] *See* pp. 341–42 *supra.*

[143] This hypothetical is similar to the recent Wisconsin Case, State v. Knops, No. 146 (Wis. Sup. Ct. Feb. 2, 1971).

[144] For general treatment of these issues, see pp. 365–69 *infra.*

To put the same point in a slightly different way, the result of the ruling in this case will be to bar effectively the publication of such stories in the future. The *general* administration of justice will not be served in the future since newsman will not print stories based on "after the act" interviews with people who call themselves fugitives or with third parties who seek protection from disclosure. Without the publication of the story, it is unlikely that the newsman would be linked with the act and called to testify.[145] At the same time, there will be a substantial impairment of the flow of information to the public, information which is of special importance given the seriousness of the events. Alternatively, the future effect of the ruling will be to exact a penalty—a criminal contempt citation—from a newsman who is able to get such a story, and who is willing to publish it while honoring the request for confidence. Again, the administration of justice will not be served since nothing will be revealed and the newsman will take a sentence for contempt. This contempt sentence might serve some purpose if it could force the newsman to reveal names or information, but the probability that the story will either be left unpublished or that the newsman will choose to suffer the contempt penalty would seem high in such future cases that follow the first ruling. Since there is a strong likelihood that such a story will have been based on trust between the reporter and the source, the newsman will either not print or be willing to absorb a contempt citation rather than reveal the names.

The argument may be advanced that these future effects are uncertain and that the administration of justice must be served in this particular case. However, since there is a strong likelihood that the reporter will take the contempt citation,[146] the administration of justice will not be served in the instant case by a subpoena. And there are very plausible further grounds for believing that there will be future deterrent effects of the kind described in the above paragraphs. First, it would seem likely that courts facing future cases involving the right of nondisclosure will construe "the same type of crime" or "similar crime" to include crimes of violence generally. Thus, a grand jury inquiry into a broad range of behavior will lead to a finding of "compelling need" and the demand for testimony; many stories based on confidential informants may thus be "specifically deterred" and not published as a result. Second, the general deterrent effect caused by vague rules may also result, since the probable extension of a "compelling need" finding in the hypothetical case to subsequent crimes of violence would leave other areas uncertain.[147]

The addition of an "alternative means" inquiry does not cure the "compelling need" test of its significant deficiencies. The government may always argue after commission of a violent act that the reporter has information it cannot get elsewhere; a judge will have difficulty denying that claim.[148] Moreover, the inevitable vagueness that surrounds the administration of so elastic a rule as the alternative means test suggests that "general" deterrent effects will result. The source and the reporter will obviously have a difficult time predicting whether their communications will be shielded by an alternative means test at the time they must decide whether to begin communication.

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[145] The fact that the newsman had previously written stories about individuals suspected of the crime would be insufficient reason for subpoenaing a reporter. *See* pp. 363–64 *infra*. It is conceivable, although highly unlikely, that police informers would know that the reporter possessed information concerning the alleged criminal acts. In any event, if no story were published, it might be difficult for newsmen, particularly those of the underground press, to prove that they were gathering information for publication purposes. *See* pp. 365–67 *infra*.

[146] In the recent Wisconsin decision, the reporter took the contempt citation rather than disclose the desired information which he had received from confidential informants. State v. Knops, No. 146 (Wis. Sup. Ct. Feb. 2, 1971).

[147] For example, the Wisconsin court found the "administration of crminal justice" itself to be a sufficiently compelling need. *Id.*

[148] The concurring opinion in the Wisconsin case attempted to narrow the "compelling need" test through application of an alternative means standard. However, an alternative means standard cannot in fact be applied. For example, federal indictments had been issued in the Wisconsin case, but the state could seek information from the reporter in order to deliver further indictments. Furthermore, even if those suspected of the crime had already been indicted, a grand jury could seek information from the reporter to determine if others were implicated. *Id.*

The value of an absolute right before grand juries is that deterrent effects on First Amendment interests will not occur. A corollary benefit is that an absolute right allows a judge in a controversial case to resist the political pressures that inevitably build around unsolved violent crimes. Although the long-range view might require granting the right to the newsman even in the hypothetical case, it could be difficult for a judge to resist the public outcry against such a violent crime and grant immunity to a newsman—especially a newsman of the "underground" press. The existence of an absolute privilege would allow local judges who believed in the position developed here to rely on a standard adopted nationally, at a time removed from commission of the act under investigation.[149]

A further argument may be advanced against the adoption of a right to nondisclosure in this hypothetical case and in all grand jury settings. One reason for a court to compel a reporter's testimony at trial was that the defendant-source had been indicted (*i.e.*, there was probable cause to believe he had committed a crime). In the hypothetical case, it could be argued that the reporter clearly has " probable cause" to believe the informant has committed a crime because the informant has "confessed" to him, and that, given one part of the rationale advanced above for the criminal trial exception, he should be required to testify before the grand jury.

There are several possible responses to this argument. First, the person being shielded by the reporter may be a third-party source, an informant protected—even by the proposed rule—at criminal trial. Second, a probable cause finding must be delivered by the grand jury; a reporter, however likely that the crime has been committed, is of course not able to make a judicially reviewable probable cause finding, and he should be primarily concerned with publishing information as effectively as possible. (He can, of course, always give evidence about his source if he wishes.) Third, the "at criminal trial" exception was predicated not just on an increased state interest (resulting from the formal issuance of an indictment) with regard to an informer-defendant, but also on diminished deterrence of First Amendment interests. The diminution of these deterrent effects was based on the relative certainty that a source would feel in talking to a reporter, knowing that this reporter would not have to testify until the source was indicted, arrested, and brought to trial. In the hypothetical case, there has been no indictment and no arrest. Only when the defendant-source appears at trial as a result of the state expending investigatory resources should a reporter's testimony be compelled. Only then can the press function so as not to impair First Amendment interests by acting as an investigative arm of the state.[150]

The reporter in the hypothetical case should also not be required to testify before the grand jury about *future acts* based on information from confidential informants. Again, the basic justification is that it is more valuable to have information made public and the news gathering processes unimpaired than to require disclosure or cite newsmen for contempt and, in effect, bar newsmen in analogous future cases from disseminating information which they are able to gather through confidential sources.

If the reporter publishes an account of a "general" nature regarding future events,[151] then a general deterrent effect in the future will result, since it will be very difficult to predict when disclosure will be compelled after publication of a story in which sources indicate generally that a crime may occur. Moreover, this finding of compelling need on the basis of a general discussion regarding future action legitimizes the quintessential fishing expedition, in which the government uses the press as an investigative arm. Such use significantly undermines the autonomy of the press, as the Ninth Circuit has noted.[152]

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[149] In some instances indictment may precede arrest. In such a situation, the state may seek disclosure of a party's whereabouts through a reporter who has acquired information from the indicted party for publication purposes. Disclosure may be sought from the reporter at grand jury proceedings, by means of a special court order, or perhaps by an attempt to indict the reporter under an "obstruction of justice" statute. However, the reporter should possess the constitutional right of nondisclosure until the criminal trial. If disclosure were required in a post-indictment but pre-trial setting, reporters would probably be unable to obtain information from indicted parties prior to their arrest, and the public would be deprived of valuable information concerning criminal conduct.

[150] *See* pp. 346–47 *supra*.

[151] A "general" account regarding future events might be: "The X faction of the militant Y party said Thursday that, in the future, violence could be used to change the structure of American society." This account is "general" as regards time, place, methods, and persons involved. It is distinguished from a "specific" account not in any precise sense, but only for the purposes of argument. In actuality, the line would be difficult to draw (although there would be clear cases of either "type"). In any event, under the theory of this Note such line-drawing would not be necessary since the publication of neither type of account should result in a subpoena.

If the newsman published a report of "specific" nature regarding a future act,[153] a compelling need for subpoenaing the newsman should not be found. First, specific deterrent effects of the type discussed above would result.[154] Second, there would be general deterrent effects resulting from uncertainty about how far the rule in the particular case would be extended. Third, other preventive measures could be taken as a result of the story.[155] Also, the administration of justice in instances involving both "general" and "specific" reports of future actions is not likely to be served, in general, since information will dry up, or, in particular, since a contempt citation is likely to result.

No matter how one varies the facts of this "hard case" (*i.e.*, with regard to the newsman's relation to the informer, the nature of the event, the place published, or the relation in time of the published account and the actual occurrence of the event itself),[156] the basic arguments advanced in the paragraphs above apply. Therefore, the surest way to preserve the public's interest in a free flow of information is to give reporters a right of nondisclosure concerning informer-reporter communications applicable before all grand jury proceedings.[157] This right, thus defined, not only advances First Amendment values, but should not significantly impair the grand jury's functions. The very reason that grand jury subpoenas are generally harmful to an independent press—the breadth of the grand jury investigatory process—minimizes the loss to the grand jury created by exempting reporters from testifying as to confidential informer-reporter relationships. With vast resources at their disposal through the subpoena process and the need only to establish probable cause for an indictment, there is a substantial likelihood that adequate information will be available from other sources to satisfy the purposes of the grand jury investigation, whether the purpose be a general investigation or a pre-trial screen.[158]

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[152] The court of appeals reasoned: If the Grand Jury may require appellant to make available to it information obtained by him in this capacity as news gatherer, then the Grand Jury and the Department of Justice have the power to appropriate appellant's investigative efforts to their own behalf—to convert him after the fact into an investigative agent of the Government. The very concept of a free press requires that the news media be accorded a measure of autonomy; that they should be free to pursue their own investigations to their own ends without fear of governmental interference, and that they should be able to protect their investigative process." *In re* Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970).

[153] A "specific" account regarding future events might be: "The X faction of the militant Y party said Thursday that within five days a major government building in New Haven would be blown up by party members."

[154] For example, once a compelling need has been found for forcing disclosure of identities and information regarding a possible future bombing, stories that were necessarily based on such information would probably cease since neither sources nor reporters could be certain of maintaining a confidential relationship.

[155] There should be no exception to a reporter's right of nondisclosure when he has knowledge about future actions, in part because such situations can be adequately handled through other procedures. For example, if a reporter published an article stating that he had learned from a confidential source that a building was to be bombed the following day, several courses of action would be open to law enforcement officials. First, they could try to convince the reporter to disclose the identity of his informant. Presumably most newsmen would disclose such information in order to save human life. However, if the reporter refused to disclose the needed information, the police might have sufficient independent evidence to indict suspects. If no such evidence existed, they could begin their own emergency investigative efforts in order to obtain sufficient information. Furthermore, they would be able to inspect the building in order to prevent the danger. Had the reporter and informant been deterred by threat of a disclosure requirement, this information might not have been available to law enforcement officials. Of course, the right of nondisclosure might be abused by individuals and groups attempting to create fear and panic by publishing false threats, supposedly based on reliable confidential information. However, this situation is best remedied by government investigations establishing the falsity of such reports.

[156] *See* pp. 365–69 *infra.*

[157] With this absolute right of nondisclosure concerning confidential informer-reporter relationships, the reporter should be required to appear before a grand jury to testify concerning information not acquired for public dissemination purposes. However, if all this is required of a reporter is verification of his published works, it would seem that such verification could be accomplished through affidavit to prevent impairment of First Amendment interests caused by the reporter's appearance before a secret investigatory body. This conclusion is consistent with that reached by the Ninth Circuit, *In re* Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970).

Furthermore, it is not clear that an explicit right of nondisclosure will not be more helpful to the investigatory process in the long run than a diluted privilege. There are a number of situations in which the exemption of newsmen from compulsory disclosure will aid the administration of justice. A New York study indicates that those states which have granted reporters some statutory exemption from compulsory testimony have experienced no detrimental effect on law enforcement but rather have found the privilege to be of aid in securing information through the press concerning illegal activities.[159] In instances of governmental corruption, the value of the press as a recipient of such information is particularly important, for it is possible that the government will ignore reports of internal corruption unless disclosure of such information is made public.[160] Unless sources inside government are protected, an especially important flow of news will be impaired.

The arguments in favor of recognizing the newsman's privilege at grand jury investigations apply with even more force when reporters are subpoenaed before *legislative committees*. The function of a legislative committee is purely investigatory, and to the extent that the press is allowed to become an investigatory arm of Congress and state legislatures, its freedom and independence are further eroded.

The likelihood of general deterrent effects is substantial if informants fear that a newsman may be called before a legislative committee because such committees are not bound by the evidentiary rules that protect parties and witnesses and check abuses of power in judicial trials.[161] Wigmore notes that legislative inquiries are sometimes conducted for partisan purposes and personal aggrandizement. Also, a temptation often exists for such committees to pursue the inquiry beyond what is required for enactment of contemplated legislation and to assume improperly the function of grand juries.[162] The informer and reporter thus cannot determine with any certainty the likelihood of a forthcoming legislative investigation, nor can they predict the scope of inquiry if such an investigation does occur. Even with the use of a limiting test, such as the compelling need rule, specific deterrent effects will result and news sources will probably dry up.

Although a legislature and its committees have power to investigate matters and conditions relating to contemplated legislation,[163] the Supreme Court has recognized that this broad power is subject to certain limitations.[164] Extending the right of news gatherers to refuse disclosure of the names of their informants to legislative committees is supported by the rationale of cases holding that the legislative power to investigate excludes any powers of law enforcement.[165] The theory of these cases is that apprehension of crimes are properly the functions of, respectively, the Executive and the Judiciary. Legislative committee inquiry has been held unconstitutional when it has been judicially determined that the committee was primarily concerned with determining the guilt or innocence of a committee witness.[166]

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[158] The same reasoning requires that reporters have a right of nondisclosure at preliminary hearings, for again, probable cause to believe an individual has committed a crime must be established.

[159] NEW YORK LAW REVISION COMMISSION, REPORT, RECOMMENDATIONS AND STUDIES 109–10, 143–46, (1949). Statements from attorneys-general and police chiefs in those states with a reporter's statutory privilege of nondisclosure are presented asserting that the existence of the privilege statute has had no detrimental effect on law enforcement and criminal prosecution, and that, on occcasion, law enforcement has been assisted because of the privilege statute.

[160] The Supreme Court has recognized the importance of the press in preventing governmental corruption: "Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve." Mills v. Alabama, 384 U.S. 214, 219 (1966).

[161] 8 WIGMORE, *supra* note 14, at § 2185.

[162] *Id.*

[163] *See* p. 320 and note 12 *supra*.

[164] A legislative committee cannot inquire into "private affairs unrelated to a valid governmental purpose." McGrain v. Daughtery, 273 U.S. 135, 173 (1927). The power to investigate does not extend to an area in which the government is forbidden to legislate. Quinn v. United States, 349 U.S. 155, 161 (1955). The power to investigate is subject to limitations imposed by the specific guarantees of the Bill of Rights. For example, the Supreme Court has held that a witness before a Congressional committee may refuse to answer questions by claiming the Fifth Amendment's privilege against self-incrimination. Quinn v. United States, *supra*. Legislative investigating committees are also subject to the Fourth Amendment prohibition of unreasonable searches and seizures. Watkins v. United States, 354 U.S. 178 (1957). *See generally*, Note, *The Power of Congress to Investigate and to Compel* Testimony, 70 HARV. L. REV. 671 (1957); S. Doc. No. 99, 83d Cong., 2d Sess. (1954); STAFF OF SENATE COMM. ON THE JUDICIARY *supra* note 19, at 57–60.

A news gatherer must also have the right before a legislative committee to refuse disclosure of information obtained from informants in the course of news gathering. Although there are no reported cases concerning a reporter refusing to disclose confidential communications,[167] it will often be possible for a committee to discover identities of sources if the reporter, though allowed to conceal specific names, is nevertheless forced to testify concerning the details of his meeting with informants. Also, the rule that legislative committees can only inquire into fit subjects for legislation is not strictly enforced by the courts,[168] and legislative committees can frequently embark upon broad "fishing expeditions" whose purpose is to discredit the organization or individual under investigation.[169] The threat of a news gatherer having to testify at such a far-ranging inquiry has the potential to deter many informants from communicating with reporters if they fear they are a likely target for such investigation.[170]

Extension of the right of nondisclosure to legislative committees will not seriously impair legislative investigations necessary for lawmaking. Such committees have other resources at their disposal and broad subpoena powers enabling them to obtain information necessary for legislation from a variety of sources other than the press.[171] Furthermore, information which the press has obtained through confidential informants and which is disclosed publicly should provide legislators with a better understanding of the problems confronting society.

5. *The Right at Civil Trial and the Limited Exception*

A right of nondisclosure concerning informant relationships must also be available in civil litigation. The general effect of compulsory disclosure of confidential sources and information has already been noted:[172] informants become less willing to communicate with newsmen and the flow of news to the public is restricted. Although the focus of inquiry at civil trials is narrower than at grand jury or legislative investigations, there are still reasons to fear substantial general and specific deterrent effects in civil litigation—effects that do not result from creating an exception to the right at criminal trials. The broad discovery provisions of Rule 26 of the Federal Rules of Civil Procedure enable a party to obtain information that will not be used at trial; the almost unlimited investigation permitted by Rule 26 has frequently led to "malicious, as well as over-extended, questioning."[173] Since a party may discover "any matter not privileged, which is relevant to the subject matter involved in the pending action" and since discovery extends to "the identity and location of persons having knowledge of relevant facts,"[174] the identity of informants may become the subject of discovery.[175] The impact of this extensive discovery machinery is magnified by the fact that any person may initiate a civil suit. In the federal court system, for example, the number of civil cases filed is over twice the number of criminal cases filed.[176] Attempts to limit the range of the subpoena power in civil trial through use of a judicial test (*e.g.*, a "heart of the matter" rule) are, once again, likely to result in both general and specific effects of the type discussed above.[177]

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[165] *See, e.g.*, Kilbourn v. Thompson, 103 U.S. 168 (1880).

[166] United States v. Icardi, 140 F. Supp. 383 (D.D.C. 1956).

[167] On several occasions, reporters have been held in contempt for failure to disclose the identities of informants to legislative committees. These incidents are discussed in Staff of Senate Comm. on the Judiciary, *supra* note 19, at 60–61, although no rationale for these decisions is offered.

[168] *See* Note, *The Power of Congress to Investigate and to Compel Testimony, supra* note 164, at 671–72.

[169] Tests that go to the "importance of the subject" under investigation or "relevancy of the testimony" sought are subject to abuse in a legislative inquiry, as in grand jury proceedings, because the breadth of inquiry is not sufficiently focused to eliminate broad deterrent effects. *See* pp. 349–55 *supra*.

[170] *See* pp. 331–32 *supra*.

[171] *See* p. 320 and note 12 *supra*.

[172] *See* pp 331–32 *supra*.

[173] 4 J. Moore, Federal Practice ¶ 26.02[3] (1970), quoting from Comment, *The Use of Discovery in United States District Courts*, 60 Yale L.J. 1132, 1133 n.3 (1951).

[174] Fed. R. Civ. P. 26(b). The great majority of states also have extremely liberal discovery rules for civil trials. As of January 1, 1963, no fewer than forty-three states adopted, either by statute, supreme court rules, or case law, part or all of the federal discovery procedures. Comment, *Discovery—the Work Product Protection,* 13 Kan. L. Rev. 125, 129 (1964). For a complete list of state provisions as of January 1, 1963, *see id.* at 129 n. 33. At least four states have not followed the Federal Rules but have adopted other extremely broad discovery procedures. Comment, *The Work Product Doctrine in the State Courts*, 62 Mich L. Rev. 1199, 1205 (1964). There is a tendency in the few states with limited discovery procedures to adopt the federal provisions; Ohio, for example, recently adopted the new revised Federal Rules on discovery. Beirne, *Discovery*, 39 U. Cinn. L. Rev. 497, 499 (1970). *See generally Developments in the Law—Discovery,* 74 Harv. L. Rev. 940 (1961).

Although a reporter's right of nondisclosure at a civil trial may exclude relevant testimony and bring about an occasional miscarriage of justice, the penalties accompanying such a miscarriage are not as substantial in civil as in criminal litigation. Unlike a criminal action which involves an attempt by society to impose its collective judgment on an individual, a civil action involves only private parties. Thus the cost of defeat does not include the stigma of social condemnation and the possibility of imprisonment.[178] The judicial system itself recognizes that imprisonment is a relatively more severe sanction than payment of monetary damages by requiring proof of guilt beyond a reasonable doubt for imprisonment. In addition, the Constitution and Supreme Court have recognized a number of other precedural safeguards applicable to criminal, but not civil litigation,[179] in order to minimize the opportunity for wrongful decisions in those situations where a state attempts to incarcerate an individual.

The Supreme Court has already indicated its willingness to deprive civil litigants of recovery in order to protect First Amendment interests in a free press. In *New York Times Co. v. Sullivan*,[180] the Court placed an extremely difficult burden of proof on the public official plaintiff in libel actions in order to assure a free flow of information to the public. And in *Time, Inc. v. Hill*, an individual plaintiff was denied the right of recovery for an invasion of privacy that caused injury to his reputation because of his inability to prove that the error was made with "knowing or reckless falsity." [181]

The only time that the name of a confidential informant should possibly be disclosed at a civil trial is in a libel action which falls under the *New York Times Co. v. Sullivan* doctrine.[182] Here, unlike other civil trial, criminal process or legislative hearing siutations in which the right applies, the reporter or paper is a party to the suit. When a public official sues for libel, he must prove that the allegedly defamatory publication was both false and made with "actual malice."[183] The requirement of actual malice is satisfied if the plaintiff proves that the defamatory statement was made with *knowing* falsity or with a reckless disregard for the truth.[184] Although the Supreme Court has restricted libel recoveries in cases of good faith error, it has inveighed against the use of the "calculated falsehood":

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[175] *See* St. Paul Tide & Marine Ins. Co. v. King, 45 F.R.D. 521 (W.D. Okla. 1968), holding that a party must divulge the names of all persons contacted who had knowledge of relevant facts.

[176] Between July 1 and December 31, 1969, 42,361 civil cases and 18,740 criminal cases were filed in the United States District courts. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 3 (1970).

[177] *See* pp. 340–42, 349 *supra*.

[178] See A. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L. J. 1149, 1150 (1960); H. M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 404 (1958).

[179] *See* A. Goldstein, *supra* note 178, at 1150–51.

[180] 376 U.S. 254 (1964).

[181] 385 ULS. 374, 397 (1967).

[182] 376 U.S. 254 (1964). Since the *Times* case, the privilege of the media to make false statements has been extended to include not only government officials, but also to "public figures," Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), and to persons who are involuntarily newsworthy, Time, Inc. v. Hill, 385 U.S. 374 (1967). The Supreme Court recently granted certiorari to three cases involving the question of whether the *Times* rule extends to cases involving the defamation of private individuals as well. Rosenbloom v. Metromedia, Inc., 415 F.2d 892 (3rd Cir. 1969), *cert. granted*, 397 U.S. 904 (1970) (No. 947, 1969 Term; renumbered No. 66, 1970 Term); Roy v. Monitor Patriot Co., 109 N.H. 441, 254 A.2d 832 (1969), *cert. granted*, 397 U.S. 904 (1970) (No. 891, 1969 Term; renumbered No. 62, 1970 term); Ocala Star-Banner Co. v. Damron, 221 So.2d 459 (Fla. Dist. Ct. App. 1969), *cert. granted*, 397 U.S. 1073 (1970) (No. 1373, 1969 Term; renumbered No. 118, 1970 Term). For a discussion of the manner in which the newsworthiness doctrine may eventually extend a protective umbrealla against libel suits over all that ultimately appears in the media, see Cohen. *A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?* 18 U.C.L.A. L. REV. 371, 381 (1970).

An evaluation of the correctness of the *New York Times* rule is beyond the scope of this Note. For purposes of argument, it is assumed that the rule should not be changed or abolished. Mr. Justice Black and Mr. Justice Douglas, however, advocate an "unconditional right to say what one pleases about public affairs." New York Times Co. v. Sullivan, *supra* at 297.

[183] New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

> "Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published . . . should enjoy a like immunity. . . . For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." [185]

Proof of actual malice is exceedingly difficult under Supreme Court standards because a plaintiff must prove with "convincing clarity" [186] a newspaper's recklessness or its "high degree of awareness of probable falsity." [187] Such a demonstration is usually made by showing that a newspaper has deviated substantially from "standards of good investigation and reporting." [188] Proof of actual malice will often depend on knowing the identity of the newspaper's informant, since a plaintiff will have to demonstrate that the informant was unreliable and that the newspaper violated proper reportorial practices by failing to verify his story. In one of the few cases where the Supreme Court has affirmed a finding of actual malice, the plaintiff proved that a magazine had relied on the affidavit of an informant without checking his character (he had been placed on probation in connection with bad check charges) or the circumstances of his story.[189] Had the plaintiff been unable to obtain the informant's identity (his identity was revealed in the magazine story), proof of actual malice would have been impossible.

Thus, since a plaintiff has the burden of proof in a libel suit that falls under the *New York Times Co. v. Sullivan* rule, if a newspaper which is a defendant in the suit is given the right to conceal the identity of its confidential informants and if, as this Note recommends,[190] a strong presumption of confidentiality attaches to any transactions between a news gatherer and informant, recovery will frequently be impossible because of the plaintiff's failure to prove actual malice. On the other hand, if disclosure is compelled in every instance where defamatory falsehood has been demonstrated, substantial deterrent effects could result. A source who is not entirely certain about the veracity of his information would be reluctant to reveal it to a reporter, since, if it subsequently were proven to be false, his identity would necessarily be revealed. Such an informer might have made a good faith effort to check his information, but still not be certain; [191] thus a type of communication which the First Amendment should protect could be deterred if disclosure is compelled in all *Times* situations where defamatory falsehood is shown.

The proper resolution of this dilemma in a *Times*-type libel case [192] would be the following rule: once enough evidence has been introduced by the plaintiff to establish the probable falsity of the information, the trial judge may order disclosure of the informant's name.[193] However, the defendant may resist disclosure by demonstrating that regardless of the reliability of the informer—even assuming, for example, that the informer was a known congenital liar—it made a good faith effort to check independently the basis and truth of the information. In other words, the defendant may assume the burden of proving lack of malice, rather than revealing an informant's name.[194]

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[184] *Id.*

[185] Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

[186] New York Times Co. v. Sullivan, 376 U.S. 254, 285–86 (1964).

[187] Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

[188] Curtis Publishing Co. v. Butts, 388 U.S. 130, 138 (1967).

[189] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). The informant stated in his affidavit to the magazine that he had accidentally overheard a telephone conversation in which a college athletic director gave away football secrets to an opponent. When the magazine printed a story containing this information, the athletic director sued the magazine for libel. It was revealed at trial that the magazine had not checked the informant's notes of the conversation, had not checked the value of the information the plaintiff athletic director allegedly gave away, and had not viewed the films of the game that it was asserted plaintiff's college lost because of the breach of secrecy.

[190] *See* pp. 342–44 and note 116 *supra*.

[191] The *New York Times* case explicitly asserted that erroneous statements made in good faith are "inevitable in free debate and . . . must be protected if the freedoms of expression are to have the 'breathing space" that they need . . . to survive.'" New York Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964).

[192] This solution will also apply to breach of privacy cases in situations such as that in *Time, Inc. v. Hill,* for here also a plaintiff must prove either knowing use of falsity or a reckless disregard for the truth. 385 U.S. 374 (1967).

[193] Because great variations are possible in factual circumstances, it is difficult to define in advance exactly how the discretion of the trial court should be exercised in requiring disclosure of the identity of a confidential informant. Since the issue of falsity is decided by the jury, it is clear that the judge cannot make an actual finding of falsity before the jury returns its verdict. Libel trials under the *Times* rule are not conducted as "split" trials, with the jury first determining falsity and then actual malice. A judge will necessarily have to predict the point at which the plaintiff has introduced enough evidence to prove falsity; he may wish to reserve decision on a motion to com-

The reason for this rule is that, although disclosure must be allowed or else the *Times* rule would, in effect, be defeated, it may well be possible for a newspaper to prove that it had adequately checked the reliabiilty of a story given by confidential informant and had good faith reason to believe the story true independent of the informer's reliability. The degree of checking on a story would of course vary with the circumstances, but it does not seem unreasonable to encourage the newspaper to follow minimal verification procedures when the story it prints may be defamatory.

Even with such a rule, there may still be some slight deterrent effect. There may be a class of sources whose information cannot be checked and yet whose reliability would justify printing the story. Within such a class, there may be an informer not quite certain of his information who may be deterred from revealing a story. However, the paper can either promise to take a libel judgment or ask him to verify with a greater degree of certainty the information which is being revealed. In such a situation, where by hypothesis there is no way for a paper to check on the information, requiring the informer to have a high degree of certainty about his allegations seems desirable, if the paper wants to avoid the risk of either a libel judgment or forced disclosure of an informant's name.

In a libel case which falls outside the *Times* rule, the general policy of not compelling disclosure at civil trial applies. The burden of proof would be on the defendant newspaper to prove the truth of the printed story. Thus, it could choose either to reveal the source of its information (perhaps putting the informant on the stand) or to protect its source and suffer a possible adverse judgment if it can prove "truth" in no other way. It should be noted however, that both in cases which fall under the *Times* rule and in those which do not, courts have increasingly inteposed stringent qualifications limiting the scope of the action for libel,[195] so this civil trial exception to the general newsman's privilege will be very narrow. Of the modern difficulty in maintaining a libel action, a recent commentator has written: "No other formula of the law promises so much and delivers so little."[196]

III. ADMINISTRATION OF THE RIGHT

A. Quashing a Subpoena Requiring Appearance at Criminal Trial

Subsequent to the issuance of a subpoena to appear at a criminal trial, the newsman desiring to protect his confidential relationships may move to quash the subpoena. Under current practice, the judge may "quash or modify the subpoena if compliance would be unreasonable or oppressive." [197] This determination is based on judicial discretion and involves a balancing of the materiality and relevancy of the party's testimony against the burden that would be placed on the party by requiring him to testify.[198] In most situations the subpoena will not be quashed if there is any reason to believe the party possesses information that may be related to the cause of action before the court.[199] However, a stricter standard should be required in order to compel a newsman to testify at criminal trial.

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pel disclosure of an informant until later in the trial. It would appear that a plaintiff could successfully move for a mistrial if a jury found falsity but was unable to find actual malice because of the identity of an informant was not disclosed.

[194] This test resembles the determination which must be made when a civil defendant moves to dismiss a complaint for failure to state a cause of action: all the allegations in the plaintiff's complaint are assumed to be true and the court decides whether, as a matter of law, the plaintiff could win the suit.

[195] Limitations which make libel recovery difficult include the exclusion of groups and organizations from access to the suit, the absolute immunity granted to judges, legislators, and executive officials in connection with anything remotely connected with their official duty, and the privilege of fair comment. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 519 (1970).

[196] Green, *The Right to Communicate,* 35 N.Y.U. L. REV. 903, 907 (1960).

[197] FED. R. CRIM. P. 17(c).

[198] *See, e.g.,* United States v. Camp, 285 F. Supp. 400 (N.D. Ga. 1967).

[199] *See, e.g.,* State v. Edwards, 68 Wash.2d 246, 412 P.2d 747 (1966).

If reporters could be subpoenaed merely because it appeared that they might possess relevant information, such use of the subpoena power would lead to unnecessary questioning by prosecutors who had no factual reason to believe the reporter possessed information concerning the alleged offense. With the limited criminal trial exception, prosecutors may wish to call reporters at trial in an attempt to investigate other activities under the guise of seeking relevant evidence. Therefore, in order to insure that the subpoena is being used to prosecute the particular crime and not to investigate generally, and to protect the newsman from having to appear unnecessarily, a concomitant of the right to a protected relationship should be the requirement that the party seeking the newsman's testimony show cause that the reporter has reason to know about the defendant ***and*** his allegedly criminal acts. Such a showing is difficult to define with precision beyond saying that it should be more rigorous than the current standard. A newsman's general reports about the political party of the accused or the fact that the reporter at some time had written a story about the accused should not constitute sufficient reason to believe he has information concerning the alleged criminal act. Rather, the requisite showing should include specific evidence, such as the reporter's own writings or testimony of government informers, that the reporter has information relating to elements of the alleged crime. Of course, if the requisite showing is made, the reporter would have to appear at trial and disclose all information received from the defendant relating to his alleged criminal behavior, insofar as it is relevant by trial standards.

In the case of an indictment for conspiracy, special caution must be shown in requiring a reporter to testify. Because of the difficulty in proving a secret agreement to conspire, the standard of relevance of testimony is substantially reduced and other rules of evidence are relaxed at conspiracy trials.[200] Under the proposed rule, a substantial danger exists that conspiracy indictments may be used as weapons to require full disclosure of a journalist's communications with alleged conspirators regardless of whether they further the conspiracy charge. This wholesale disclosure could result in a widespread deterrent effect, particularly among radical groups fearful of conspiracy charges. Conceivably, reporters should be exempted from testifying at conspiracy trials altogether.[201] The breadth of inquiry creates dangers to the free news flow similar to those found at grand jury and legislative investigations, and neither the proposed rule, nor other disclosure tests addressing themselves to the "importance" of the inquiry or "relevance" of the testimony sought, are able to curtails such inquiry.[202] However, if no such exemption as conspiracy trials is granted the newsman, the judge should exercise care in requiring a reporter to appear at trial and should not require his testimony unless he believes the reporter's testimony will clearly further the adjudication of the conspiracy charge.

B. Who May Invoke the Right

A key element of the right of nondisclosure is that the person invoking it must be a "reporter" or "newsgatherer." Given the broad proteciton and discretion afforded a "reporter," there may be attempts to avoid compulsory disclosure requirements by those who would pose as news gatherers. In determining the authenticity of persons who claim that they deserve to invoke the right, the following rule should be used:

"The person invoking the right must have intended to use material, gathered through a confidential informer relationship, in a process aimed at disseminating information to the public."

This "process" may eventuate in a newspaper or magazine article, book, broadcast media presentation, pamphlet, or handbill.[203] However, the person claiming the right must have the burden of establishing his specific intent to use the material sought by the subpoenaing party in order to contribute to the public information flow. The general nature of that material will come out at a hearing when the subpoenaing party seeks information and the individual seeks a protective order as a newsman. The person claiming the right must introduce evidence that the information sought was gathered for use in an actual or planned news story or as background information for such a story.[204]

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[200] *See* Note, *Conspiracy and the First Amendment*, 79 YALE L. J. 872, 877 (1970); Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 984, 988 (1959).

[201] A precise delineation of the impairment to First Amdnement interests caused by subpoenaing reporters at conspiracy trials or a detailed argument about the extension of the newsman's right to a conspiracy setting is beyond the scope of this Note. The latter analysis would rest on the deterrent theories developed here.

[202] *See* pp. 348–58, *supra*.

[203] The First Amendment applies to broadcasting and all forms of publication. *See e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 267 (1969); Marsh v. Alabama, 326 U.S. 501 (1945).

This rule, in essence, turns on a factual inquiry, going to the question of intent to disseminate, given the breadth of the First Amendment's definition of the press and the presumptions recommended by this Note regarding the confidentiality of the relationship and the communications.[205] It will be considerably easier for a professional journalist to satisfy this showing because of his access to publishing facilities and the frequency with which he contributes to the public news flow. However, a reporter for other forms of publication must be able to invoke the right if he can show that it was "more probable than not" that the information sought was acquired for dissemination purposes. Normally, actual dissemination of information related to the subject of the informer's communication will satisfy this showing. However, even if no publication has occurred, the reporter must be protected if he can introduce evidence, such as the testimony of others, that he was gathering information which was to be disseminated. Of course, even the actual publication of a story may be an insufficient showing if other evidence indicates that public dissemination was not the purpose of a relationship with an informant, but rather a contrivance to escape compulsory disclosure. Otherwise, anyone anticipating a subpoena could write an article relating to information which may be sought and then claim a right of nondisclosure of sources and background information.

Various factors that a judge could use in making the requisite factual determination include: (1) affiliation with an organization engaged in disseminating information to the public; (2) access to publishing or broadcasting facilities; (3) previous journalistic experience—past contributions to the public information flow; (4) proof of intent to publicize the acquired information as evidenced by testimony from others; (5) livelihood earned throug hthe process of disseminating news to the public; and (6) act of public disclosure.

C. Material Covered by the Right

The right of nondisclosure concerning an informer-reporter relationship should be applicable to information and identities of sources acquired in the course of gathering material for public dissemination through publication or radio and television broadcasting. It should apply both to oral testimony by the reporter and to notes, files, and other materials possessing confidential information which may be demanded by a subpoena *duces tecum*. As noted, the right should be claimed at the discretion of the reporter.[206] Actual public dissemination cannot be required before the reporter may assert a nondisclosure right, for, at the time of the reporter-informant communication, the informant could not be certain of nondisclosure since he has no assurance that his communication will actually be used in a publication. The court may not require proof of confidentiality because of the difficulties in establishing the intent of an undisclosed informant. However, the presumption of confidentiality is rebuttable, and disclosure may be required if the party requesting it is abe to show clearly that confidentiality was not intended by the informant.[207]

There are three obvious situations where no confidential informer-reporter relationship is involved and where a court may therefore require disclosure by a reporter. Two of these relate to news gathering. First, no claim of nondisclosure should be permissible before judicial and legislative bodies concerning materials already published, and the reporter should be subject to subpoena for the purpose of verifying the accuracy of his published articles.[208] This verification should include authentication of published quotations and a representation that the article in question accurately reflected what the reporter observed and was told. If the reporter testifies that his article contained inaccuracies, a highly unlikely event since such testimony would impair his reputation for reliable reporting, the reporter must then be able to assert a First Amendment right of nondisclosure. Otherwise, the court could probe more deeply into the situation, and the effectiveness of any non-disclosure right would be destroyed.[209]

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[204] *See* pp. 344–45 *supra*. A reporter's superiors in the publishing process who need access to confidential sources and materials for editing and verification purposes must also be protected by this right of nondisclosure.

[205] *See* pp. 343–45 *supra*.

[206] *See* p. 344 *supra*.

[207] *See* p. 345 *supra*.

[208] *See* note 157 *supra*.

Another instance of verification would occur when a news gatherer is called before a grand jury, civil trial court, or legislative committee to corroborate information revealed at criminal trial. Here, public disclosure has already taken place so there is no confidentiality left to protect, and it would therefore be quixotic to deny this same information to another properly constituted tribunal. Of course, under no circumstances could the reporter be required to reveal more information than he had previously disclosed at criminal trial.

The second situation in which no informer-reporter relationship exists, and thus no right of nondisclosure obtains under the proposed rule, concerns activities witnessed by the newsman in public. The test for the non-applicability of the right of confidential informer-reporter relationships is a determination whether or not the reporter was in a situation in which he could have been excluded. Thus, a newsman would have to testify as to his observations of demonstrations on city streets, but would not be required to disclose information relating to a meeting of a dissident group which could have excluded him from the meeting and which admitted him only because he promised to keep the proceedings off-the-record.[210] This distinction would also apply to all taped and filmed materials. Films and tapes of private interviews, or that concern situations in which the informer's permission was required, should not be subject to disclosure. If films and tapes either have already been made public, or concern events that occurred in public, they cannot be protected under a rule protecting confidential informer-reporter relationships. However, a persuasive constitutional argument could be made that, even though no confidential informer-reporter relationship exists, such materials should be exempted from disclosure because of the impairment to a free news flow caused by compulsory disclosure.[211]

The third situation in which there is no right of nondisclosure occurs when information is sought from reporters concerning their private lives, information which was not acquired for public dissemination purposes. For example, if a reporter were being sued for divorce and, at trial, were asked to account for his activities on a certain evening, he should not be able simply to respond that he was with confidential informants. Rather, he should have to introduce evidence to establish a reasonable relationship between his activities on that night and a story on which he was working. If, in fact, he were on a social engagement, he should not be able to claim a right of nondisclosure.

Although no specific exception is necessary, the reporter would be unable to use a First Amendment nondisclosure right to conceal his own criminal conduct. The right is limited to informer-reporter relationships and does not protect disclosure of a reporter's own activities. If a newsman is a party to an indictment involving others, such as conspiracy, the criminal trial exception would prohibit him from claiming a First Amendment right of nondisclosure of information concerning the others also indicted.[212]

D. Waiver

Recognition of the right of a news gatherer to protect the confidentiality of his relations with informants raises the question whether this right may be waived. Since the major reason for recognizing this right is the deterrent effect of compulsory disclosure on informants, an informant should be able to waive the newsman's right of nondisclosure if confidentiality is no longer desired. Such a situation might occur when a party in a civil trial wishes, at the trial, to corroborate an assertion made by him by showing that he had previously told the reporter the same information. Or, in another situation, an informant might want a reporter to testify before a grand jury or legislative committee as to their communications.

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[209] The reporter should be under substantial pressure to account for any errors he is willing to admit, for unaccountable error would probably damage his reputation for reliable reporting even more severely than the admission of error.

[210] *See In Re* Pappas, No. 14,690 (Mass. Sup. Ct. Jan. 29, 1971).

[211] This Note is limited to an analysis of the constitutional right to confidential informer-reporter relationships. However, there is a potential deterrent effect caused by compulsory disclosure of information gathered by reporters at public events. For example, at violent demonstrations photographic equipment may be destroyed if demonstrators believe the film will later be used for government investigatory purposes. Furthermore, demonstrators who might otherwise co-operate with newsmen at later interviews may be deterred if the reporters have aided the government in the past through production of such films. Thus, it could be argued that the threat of this deterrence is sufficient to justify a constitutional right of nondisclosure of all information acquired by reporters while acting in a news gathering capacity.

[212] *See* pp. 346–47 *supra*.

In order to waive the newsman's right of nondisclosure, the informant should appear at court or at a hearing brought about by the newsman's motion to quash the subpoena and testify that confidentiality of his communications with the reporter is no longer desired. The could would then determine the voluntariness of the informant's waiver, based on an evaluation of the "totality of circumstances" surrounding it.[213] If it appears that the waiver was made in voluntary fashion by an informant who understood the newsman's right of nondisclosure, the reporter must then be required to disclose all information communicated to him from that informant.

Since the reporter is given the discretion to claim the right of nondisclosure, he has the right to claim nondisclosure of specific information in one action and later disclose the same information in another action. In every situation, the reporter is given the discretion to balance the deterrent effect that would probably occur if he were to disclose confidential information against the interests to be served by disclosure. It has been suggested that once a reporter claims a right of nondisclosure concerning certain information, he shuold not later be able to disclose that information as a defense to a libel action.[214] However, the fact that he has interest in the outcome of the libel action does not appear to be sufficient reason for denying him the right of disclosure in this action if he chooses to risk a deterrent effect and harm to his professional stature in order to defend himself properly.[215]

E. An Evidentiary Problem

For purposes of impeachment, the scope of admissible cross-examination is considerably broader than the scope of testimony given on direct examination.[216] Therefore,, a situation might arise in which a newsman claims a right of nondisclosure to a question asked on cross-examinatin to show the newsman's bias. For example, the cross-examiner might desire disclosure of information concerning the newsman's relationships with third party informants in an attempt to establish the newsman's bias. If the newsman were to claim a right of nondisclosure on cross-examination, the judge could strike the reporter's direct testimony in the exercise of his judicial discretion because the cross-examiner had been denied his right to a full cross-examination.[217] However, a more common practice would be for the judge to caution the jury to take into account the inadequate cross-examination in evaluating the newsman's direct testimony.

IV. CONCLUSION

The values promoted by the free press clause of the First Amendment are of paramount importance to the just functioning of democratic society. These values may only be secured by guaranteeing the newsman the right to gather, to print and to circulate information—and, by necessary implication, to shield a confidential relationship with his source from compulsory disclosure requirements. Recognizing the primary importance of this relationship, the state legislature of New York, in May, 1970, enacted a "Freedom of Information Act for Newsmen."[218] This legislation grants newsmen an absolute privilege to withhold *any* information (whether obtained in confidence or not) at *any* judicial, legislative or administrative proceeding without fear of a contempt citation.[219]

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[213] Prior to Miranda v. Arizona, 384 U.S. 436 (1966), "totality of circumstances" was the standard applied to determine the voluntariness of a confession. Haynes v. Washington, 373 U.S. 503 (1963). The court, in applying this standard to an informant's waiver, should consider such factors as physical abuse, threats, and ability of the informant to understand his waiver.

[214] NEW YORK LAW REVISION COMMISSION, *supra* note 159, at 7.

[215] The apparent inconsistency of this position stems from the fact that the reporter, by refusing to disclose in the first case, is presumably acting in the "public interest" by assuring a free flow of information, but in disclosing at the libel action, he is acting in a "self-interested" fashion. The theory for prohibiting disclosure would seem to be that since the newsman had "frustrated the administration of justice" in the first case (albeit in the name of the First Amendment) he should have to pay a penalty in the second. However, whether the administration of justice was frustrated in the first case is uncertain. More important, the basic theory of this Note is that newsmen, of all shades of opinion, are the best judges of how to insure a full flow of information to the public. If disclosure is permitted in the second case, the paper which chooses to so disclose may have its credibility with sources injured and may not be able to function as effectively as a news gatherer. However, this should be the paper's decision. Neither the specific nor general deterrent effects of the kind discussed above would result from disclosure, insofar as they affect the press at large, since only the particular paper in question would have its news gathering function impaired.

[216] *See* C. MCCORMICK, LAW OF EVIDENCE § 22 (1954).

[217] *Id.* at §§ 19 and 24.

The First Amendment may not mandate so sweeping an interpretation of the informer-newsman relationship. Yet, if the flow of information to the public is not to be unnecessarily impaired, the relationship between reporters and their sources must be given more protection, as a matter of constitutional right, than is currently afforded by state and federal courts.

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THE RIGHT OF THE PRESS TO GATHER INFORMATION

INTRODUCTION

The debate over the proper boundaries of freedom of the press is older than the Constitution itself. Writing in the *Federalist Papers*, Alexander Hamilton observed:

> "On the subject of the liberty of the press, as much as has been said, I cannot forbear adding a remark or two.... I contend that whatever has been said about it... amounts to nothing. What signifies a declaration that "the liberty of the press shall be in inviolably preserved"? What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government."[1]

Almost two centuries after the adoption of the first amendment, the full scope of the protection afforded the press is still undefined.

The information media serve two principal functions in contemporary American society. First, they expand the boundaries of available knowledge by reporting new factual information; second, they provide critical analyses of events. Of these two functions, the first is clearly as crucial as the second, and perhaps more so. While it is a basic premise of American government that every well-informed, rational adult has the capacity to form his own opinions, no single individual has the time or the resources to gather firsthand all the information he needs to have in order to form intelligent opinions regarding political, social, and economic affairs. The information media have assumed the burden of providing this factual material. Nevertheless, despite the importance of this informing function, it has received scant notice in first amendment litigation.[2]

In the area of critical expression, the boundaries of constituional protection have been outlined in considerable detail. Standards have been established to protect political speech.[3] The definition of obscenity has been narrowed.[4] The substantive law of libel has been reformulated.[5] Procedural obstacles have been erected to magnify the difficulty of stifling expression.[6] Federal equity rules have been remolded to offer greater judicial protection for expression.[7] These changes, and many more, have been undertaken to "allow the widest room for discussion, the narrowest range for its restriction." [8] While these developments have unquestionably aided in the dissemination of information as well as of opinion, their primary focus has been upon freedom of expression.

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[218] New York Civil Rights Law 79–h (1970).

[219] *Id.* The statute, however, does not protect all who disseminate information to the public. Rather, it specifically defines such terms as "professional journalist" and "newspaper," in effect limiting a right of confidentiality to those reporters who earn their livelihood through employment with broadcasting stations and publications which appear regularly.

[1] THE FEDERALIST No. 84, 514 (Rossiter ed. 1961) (A. Hamilton).

[2] The closest the Supreme Court has come to finding a first amendment right based solely on the right to disseminate facts as such was in Griswold v. Connecticut, 381 U.S. 479 (1965). In that case the Court held unconstitutional a statue forbidding the dissemination of birth control information. Yet a careful reading of the case reveals that the Court's holding rested on a penumbral right of privacy, rather than on information dissemination. *See id.* at 482–84.

[3] *See, e.g.*, Dennis v. United States, 341 U.S. 494, 510 (1951); Schenck v. United States, 249 U.S. 47, 52 (1919).

[4] *See, e.g.*, Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).

[5] Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 13–14 (1970); New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964).

As to the informing function, however, and in particular the actual process of gathering information, the Supreme Court has yet to determine the limits of protection under the first amendment.[9] Recent occurrences have raised the question whether that amendment mandates special rights for a newsman subpoenaed to testify in a situation where his cooperation will jeopardize his future access to important sources of information.[10] This situation involves tension between an asserted first amendment protection of information gathering and the law's strong policy that a court has a right to "everyman's evidence." [11] In such conflicts the first amendment does not automatically prevail, since first amendment rights are not absolute.[12] The recognition of a constitutional "right" to gather information is only the threshold step in the analysis.

This Note will argue that the first amendment does indeed include the right of the press to gather information, and that where important governmental or societal interests militate against the right—*e.g.*, where a reporter is called upon to testify, where he is excluded from secret meetings, or where his travel abroad is restricted—existing first amendment standards provide a foundation for devising tests that accommodate these conflicting needs.

I. BACKGROUND ON THE FREEDOM OF THE PRESS AND THE RIGHT TO GATHER INFORMATION

The first amendment provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." [13]

It seems clear from the face of the amendment, first, that its primary focus is on freedom of expression, both religious and secular, and second, that even indirect governmental interference is forbidden, since Congress is prohibited from *abridging* the freedoms. Thus even on first reading the constitutional concept of freedom of the press seems expansive. Despite the Constitution's express protection of that freedom, however, the opinions that have so far been handed down by the Supreme Court have not really dealt with the issue of possible distinctions between speech and press; the Court has generally viewed the freedom of the press as little more than a particularized form of freedom of speech. An example is *Patterson v. Colorado*,[14] the first Supreme Court case involving the assertion of first amendment rights by a newspaper. Justice Holmes, speaking for the Court, cited both the free speech and free press clauses without distinction in upholding the contempt conviction of a newspaper editor who had criticized, in print only, the conduct of a trial.[15]

Three appeals from convictions under the World War I Espionage Act [16] further demonstrated the Court's tendency to view freedom of speech and freedom of the press as virtually synonymous. In *Schenck v. United States*,[17] the defendants were convicted for distributing certain pamphlets. In *Frohwerk v. United States* [18] the offending act was the publication of a newspaper. In Debs

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[6] Speiser v. Randall. 357 U.S. 513, 526 (1958).

[7] Dombrowski v. Pfister, 380 U.S. 479, 486–87 (1965). *But cf.* Samuels v. Mackell, 401 U.S. 66 (1971); Younger v. Harris, 401 U.S. 37 (1971).

[8] Thomas v. Collins, 323 U.S. 516, 530 (1944).

[9] *Cf.* International News Service v. Associated Press, 248 U.S. 215 (1918), especially the dissenting opinion of Justice Brandeis, *id.* at 248–67.

[10] See text accompanying notes 155–92 *infra*.

[11] 8 J. WIGMORE, EVIDENCE § 2192 at 70 (McNaughton rev. ed. 1961).

[12] New York Times Co. v. Sullivan, 376 U.S. 254, 283–85 (1964); Schenck v. United States, 249 U.S. 47, 52 (1919); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 11 (1965).

[13] U.S. CONST. amend. I.

[14] 205 U.S. 454 (1907).

[15] *Id.* at 461–62.

[16] Espionage Act of June 15, 1917 § 3, ch. 30, 40 Stat. 217, 219.

[17] 249 U.S. 47 (1919).

[18] 249 U.S. 204 (1919).

v. United States[19] the defendant was convicted because of a speech he had made. Though the methods of communication in these three cases were entirely different, the Court in affirming the convictions wrote only a single full-length opinion. *Frohwerk* and *Debs* merely cited *Schenck*,[20] in which Justice Holmes' majority treated the freedom of the press as part of the more general freedom of speech. Although *Schenck* involved printed matter, Holmes mentioned only free speech,[21] and his famous hypothettical justifying the limitation of freedom of expression was written in terms of speech, not press:

"The most stingent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." [22]

More recently, the Court has begun to write of a general "freedom of expression" [23] without citing *either* the freedom of speech or freedom of the press clauses. Even the Court's landmark decision in the law of libel—the most important protection afforded so far to the informing function of the information media—was based on the need for increased expression, rather than information. In *New York Times Co. v. Sullvan* [24] an Alabama jury had awarded $500,000 to the police commissioner of Birmingham for damages resulting from false statements made in a political advertisement in the defendant's newspaper. The advertisement, paid for by civil rights activists, called for support for Dr. Martin Luther King, Jr., and in doing so it alleged that civil rights marchers had been abused in specific ways by the Birmingham police. The Supreme Court of Alabama held that the jury could infer the malice required for punitive damages from the falsehood of the publication. The United States Supreme Court reversed, holding that:

> "[t] he constitutional guarantees require . . . a Federal rule that prohibits a public official from recovering damages for a defamatory falsehood relatinb to his official conduct unless he provides that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." [25]

So stated, the rule of the case covers both functions of the information media: critical analysis and the dissemination of information. But the language the Court used in reaching its decision unmistakably demonstrates its reliance on the right of free expression, rather than the right to inform, in reaching its decision. The Court observed:

> "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement. caustic, and sometimes unpleasantly sharp attacks on government and public officials." [26]

Citing its first major obscenity case, *Roth v. United States*,[27] the Court also said:

> "The general proposition that *freedom of expression* upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure the unfettered inter-change of ideas for the bringing about of political and social changes desired by the people.' [28]

The Court has continued to use the rhetoric of *Sullivan* in instances that involved the informing function of the media. In *Greenbelt Cooperative Publishing Association, Inc. v. Bresler* [29] it reviewed a libel award against a newspaper for reports made of a public meeting in which a prominent businessman was accused of blackmail. The plaintiff contended that the statements made at the meeting were false, but not that they were reported inaccurately by the defendant; the Court reversed and remanded, holding that the *Sullivan* doctrine of actual malice was applicable to all public figures. Again, however, the Court spoke in terms of free expression, not freedom to disseminate information. Chief Justice Burger observed in his majority opinion:

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[19] 249 U.S. 211 (1919).

[20] 249 U.S. at 206–07, 215.

[21] 249 U.S. at 51.

[22] *Id.* at 52.

[23] *See, e.g.*, Kingsley Books, Inc. v. Brown, 354 U.S. 436, 444 (1957).

[24] 376 U.S. 254 (1964).

[25] *Id.* at 279–80.

[26] *Id.* at 270.

[27] 354 U.S. 476 (1957).

[28] 376 U.S. at 269, *quoting* Roth v. United States, 354 U.S. 476, 484 (1957) (emphasis added).

[29] 398 U.S. 6 (1970).

> "This case involves newspaper reports of public meetings of the citizens of a community concerned with matters of local governmental interest and importance. The very *subject matter* of the news reports is one of particular First Amendment concern. 'The maintenance of the opportunity for *free political discussion* to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system.' *Stromberg v. California* [283 U.S. 359, 369 (1931)]. '*Freedom of discussion*, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' *Thornhill v. Alabama*, 310 U.S. 88, 102 [1940]."[30]

In *Time, Inc. v. Hill*[31] the Court also used free expression language, while holding that constitutional protection extended to factual reports of matters of public interest. Although the Court observed that "[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs,"[32] it nevertheless went on to remark:

> "Erroneous statement is no less inevitable in such a case [of one other than a public official] than in the case of comment upon public affairs, and in both, if innocent or merely negligent . . . it must be protected if the *freedoms of expression* are to have the "breathing space" that they "need . . . to survive". . . .' *New York Times Co. v. Sullivan* . . . at 271–272."[33]

Despite the lack of a separate body of constitutional law concerning the press' special function of informing the public, society's particular interest in that function has not been unrecognized. Judge Cooley wrote early in this century:

> "The newspaper is . . . one of the chief means for the education of the people. The highest and lowest in the scale of intelligence resort to its columns for information; it is read by those who read nothing else, and the best minds of the age make it the medium of communication with each other on the highest and most abstruse subjects. Upon politics it may be said to be the chief educator of the people; its influence is potent in every legislative body; it gives tone and direction to public sentiment on each important subject as it arises; and no administration in any free country ventures to overlook or disregard an element so pervading in its influence, and withal so powerful.
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> "And yet it may be doubted if the newspaper, as such, has ever influenced at all the current of the common law, in any particular important to the protection of publishers. . . . [T]he changes accomplished by the public press seem to have passed unnoticed in the law, and, *save where modifications have been made by constitution* or statute, the publisher of the daily paper occupies today the position in the courts that the village gossip and retailer of scandal occupied two hundred years ago, with no more privilege and no more protection."[34]

If the world is now a "global village,"[35] in Marshall McLuhan's words, the need for information is ever greater. Distant events affect everyone considerably more than in Jefferson's day,[36] and in large cities news even of nearby events can hardly be gathered by every interested individual. In addition, firsthand knowledge often transcends the barriers of class, race, age, and sex only with extreme difficulty. The social costs of the failure to communicate across these lines are perhaps obvious. The fact that freedom of the press has been only coextensive with free speech has meant, however, that only the distributing or publishing aspect of the newspaper's role has been effectively protected.[37] Prior restraints on distribution are forbidden except in special circumstances,[38] criminal or civil penalties after publication are severely limited,[39] and recently there has been express recognition of the *recipient's* right to perceive the finished product.[40] Yet it seems obvious that the right to gather information is logically antecedent and practically necessary to any effective exercise of these rights, and they cannot be given full meaning unless that antecedent right is recognized.[41]

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[30] *Id.* at 11–12 (emphasis added).

[31] 385 U.S. 374 (1967).

[32] *Id.* at 388.

[33] *Id.* (emphasis added).

[34] T. COOLEY, CONSTITUTIONAL LIMITATIONS 641 (7th ed. 1903) [emphasis added]. The Supreme Court itself has recognized this fact.

"The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded a free press cannot be regarded otherwise than with grave concern." Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

[35] M. MCLUHAN, THE MEDIUM IS THE MESSAGE 63 (1967).

[36] *Id.* at 72.

An overdrawn example will illustrate the point. Present Supreme Court rules do not allow spectators in the Court's public gallery to take notes.[42] If Congress were to provide a criminal punishment for the violation of this rule, with the intention of preventing the publication of a complete record of the Court's proceedings, here would appear to be no constitutional ground to contest the statute apart from one that recognized the right to gather information. The hypothetical statute would not prevent the publication of a verbatim text of the proceedings once the proscribed transcription were removed from the courtroom. Nor would it call for the punishment of a reporter for what is published. A subsequent publication of a verbatim transcript could, however, make a prima facie case that the statute had been violated.[43] Though in form the publication would merely be serving an evidentiary function, it is undeniable that punishment in this context would have the same effect on expression as if Congress had restrained that expression directly. Yet under existing constitutional standards, Congress could not do the latter.[44] The above example shows, however, that in reality free expression is necessarily interconnected with information gathering.

A less hypothetical example is to be found in the case of *New York Times* reporter Anthony Ripley,[45] whose coverage of the 1968 convention of the Students for a Democratic Society (S.D.S.) caused him to be subpoenaed to testify before the House Internal Security Committee.

> "The result was not only total destruction of Mr. Ripley's own relationships with militants, and of his ability to cover militant activities . . . . but severe impairment of the ability of other *Times* reporters to relate to or cover the S.D.S. . . . and the exclusion of the entire 'establishment press' from the 1969 S.D.S convention."[46]

Congress would have had to justify a direct prohibition of the publication of news concerning S.D.S. with a showing of compelling necessity[47]—a showing that is generally difficult to make. But without a first amendment protection for information gathering, Congress is not required to justify the subpoena of the reporter *at all;* it need merely make a colorable claim that the reporter might have information about a subject within Congress' power to investigate.[48] The practical result in both instances, however, is the same.

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[37] *See, e.g.*, Lovell v. City of Griffin, 303 U.S. 444, 452 (1938); *Ex parte* Jackson, 96 U.S. (6 Otto) 727, 733 (1878).

[38] Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 708–17 (1931). *See* Times Film Corp. v. Chicago, 365 U.S. 43 (1961).

[39] *See, e.g.*, Wood v. Georgia, 370 U.S. 375 (1962); Schenck v. United States, 249 U.S. 47 (1919).

[40] Stanley v. Georgia, 394 U.S. 557, 564 (1969). *See also* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 88–89, 94 (1948).

[41] Congress itself no doubt had this in mind when it passed the Freedom of Information Act, 5 U.S.C. § 552 (Supp. III 1968), which provides for non-confidential government records to be made available to any citizen.

As to the constitutional question see Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U.L. REV. 18 (1969).

[42] *See* N.Y. Times, April 11, 1971, § 4, at 6, col. 1.

[43] In Leary v. United States, 395 U.S. 6 (1969), the Supreme Court said in dictum that a criminal statutory presumption would stand up if "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Id.* at 36. As a practical matter, in the case at hand no one could publish a verbatim text of the Court's proceedings without violating the hypothetical statute's prohibition of note-taking.

[44] *See, e.g.*, Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970); Time, Inc. v. Hill, 385 U.S. 374 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See also* Pearson v. Dodd, 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969), holding, on non-constitutional grounds, that a public official could not recover for invasion of privacy where the defendant newspaper columnist published material from the official's files that was admittedly borrowed and copied without authorization. The Court naturally voted that it did "not reach the serious constitutional questions suggested by Time, Inc. v. Hill, 385 U.S. 374 . . . (1967)." 410 F.2d at 703 n.6.

[45] *See* Brief for Appellant at 23–24, Caldwell v. United States, 434 F.2d 108 (9th Cir. 1970), *cert. granted*, 39 U.S.L.W. 3478 (U.S. May 4, 1971) (No. 1114).

[46] *Id.*

[47] *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919); note 44 *supra* and accompanying text.

The news media might thus invoke a constitutional privilege to gather information in a variety of circumstances: access to public records,[49] expanded foreign travel,[50] unnecessary secret meetings,[51] burdensome restrictions on government press conferences, and no doubt many others. Obviously such a privilege would be mo more absolute than other first amendment rights.[52] The recognition of the right, however, would require that is infringement be justified by a compelling state interest.[53]

Although the Supreme Court has never directly confronted the issue of whether the freedom of the press clause gives the information media a right to gather information, three decisions in the last decade—*Zemel v. Rusk*,[54] *Estes v. Texas*,[55] and *Sheppard v. Maxwell*[56]—have touched on various aspects of the subject. The context in which they arose, however, deprived the Court of the opportunity to reach the central question.

In *Zemel v. Rusk*[57] the Court came closest to confronting directly an asserted first amendment right to gather information. The plaintiff, a private citizen who had no connection with the press, had asked that his passport be validated for travel to Cuba. After this request was denied, he renewed it, stating that his purpose was "to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen."[58] The Court held that he had demonstrated no first amendment right, and that the Government therefore need not show the compelling interest necessary to justify the invasion of such a right.[59] Agreeing that the inhibition of travel to Cuba "renders less than wholly free the flow of information concerning that country,"[60] the Court observed:

> "For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition (and it would be unrealistic to assume that it does not), it is an inhibition of action. There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. . . . The right to speak and publish does not carry with it the unrestrained right to gather information."[61]

The Court's apparent reliance on a distinction between speech and action seems misplaced, as well as questionable in this context. The Court ruled long ago that "action" was not at all inconsistent with a first amendment *free expression* claim,[62] though different restrictions might be justified than in a pure speech case. And so in the *Zemel* situation an arguably sounder analysis would be to recognize that travel to Cuba may involve a first amendment right. That a restriction on action can be "clothed by ingenious argument in the garb of decreased data flow"[63] does not, after all, mean that government would have no right to regulate the conduct involved. The only effect of a holding that information gathering is protected by the first amendment is that the state would have to meet *first amendment* standards for restricting conduct.[64]

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[48] *See* Barenblatt v. United States, 360 U.S. 109 (1959); *See also* Blair v. United States, 250 U.S. 273 (1919); Consolidated Rendering Co. v. Vermont, 207 U.S. 541 (1908); Hale v. Henkel, 201 U.S. 43 (1906). Indeed, the Supreme Court has noted that a man's fear of injury to himself or his family is insufficient reason for not answering a grand jury's questions. Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961).

[49] *See, e.g.*, Trimble v. Johnston, 173 F. Supp. 651 (D.D.C. 1959).

[50] *See, e.g.*, Worthy v. Herter, 270 F.2d 905 (D.C. Cir.), *cert. denied*, 361 U.S. 918 (1959).

[51] *See, e.g.*, *In re* United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954) (access to court proceedings).

[52] *See* text accompanying notes 121–54, *infra*.

[53] *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963). *Cf.* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[54] 381 U.S. 1 (1965).

[55] 381 U.S. 532 (1965).

[56] 384 U.S. 333 (1966).

[57] 381 U.S. 1 (1965).

[58] *Id.* at 4.

[59] *Id.* at 16–17.

[60] *Id.* at 16.

[61] *Id.* at 16–17.

[62] Thornhill v. Alabama, 310 U.S. 88 (1940).

[63] 381 U.S. at 17.

[64] *See* text accompanying notes 121–54 *infra*, and cases cited in note 53 *supra*.

Zemel's helpfulness is further limited in that it did not involve a claim by a member of the information media, and thus did not reach the question of special *press* rights. The claimant's position would have been different if he had been a newsman gathering information on Cuba for publication rather than a citizen wishing to satisfy his personal curiosity.

In *Estes v. Texas*[65] the Court, facing the question of permissible publicity surrounding criminal trials, held that the televising of portions of Billy Sol Estes' trial and pretrial hearing over his objection violated due process despite the absence of a showing of actual prejudice.[66] The Court reasoned:

> "It is said, however, that the freedoms granted in the First Amendment extend a right to the news media to televise from the courtroom, and that to refuse to honor this privilege is to discriminate between the newspapers and television. This is a misconception of the rights of the press.
>
> ". . . While maximum freedom must be allowed the press in carrying on this important function [informing the public] in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process. . . . '[T]he life or liberty of any individual in this land should not be put in jeopardy because of the actions of any news media. . . .'
>
> "Nor can the courts be said to discriminate where they permit the newspaper reporter access to the courtroom. The television and radio reporter has the same privilege. All are entitled to the same rights as the general public."[67]

In *Sheppard v. Maxwell*[68] the Court expanded on this theme in reversing a conviction because of prejudicial publicity before and during the trial. The Court observed:

> "The carnival atmosphere at trial could easily have been avoided since the courtroom courthouse premises are subject to the control of the court. . . . Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen. . . . The number of reporters in the courtroom itself could have been limited at the first sign that their presence would disrupt the trial. They certainly should not have been placed inside the bar. Furthermore, the judge should have more closely regulated the conduct of newsmen in the courtroom. For instance, the judge belatedly asked them to handle and photograph trial exhibits lying on the counsel table during recesses."[69]

On the surface the *Estes* and *Sheppard* decisions would seem to raise clear questions regarding the nature and extent of journalistic access to trials; they are not, however, dispositive of the issue of first amendment protection for gathering information. *Estes*[70] really concerned the effect on trial fairness of the dissemination of information, the actual broadcasting of trial excerpts by television stations. The right to gather information was not directly involved, since the Court assumed that all news media had an equal opportunity to report the proceedings verbally, and the Court seemed to decide the case on the ground that the right of the defendant to a fair trial overrode the right of a television station to broadcast,[71] a standard sort of decision under the "balancing" test.[72] The case rests in large part on the especially prejudicial nature of television coverage, as well as the disruptive effect that cameras have on courtroom proceedings. No doubt the result would be the same if the right to a fair trial were balanced against the right to gather information, and indeed *Estes* is an indication of how the Court would effect that balance. The Court did not analyze the problem in terms of information gathering, however, so the case sheds little light on the substantive content of that right.

Sheppard[73] is also not really on point. Again, under traditional first amendment standards freedom of expression is limited upon a proper showing of justification under the proper test.[74] The trial court could have prohibited the information media from such abuses as handling trial exhibits even if the Court found a first amendment right to gather information, and even though permitting such handling of exhibits might, in some way, have aided the media's gathering of information. The defendant's right to a fair trial would outweigh the right of the press to handle the exhibits. The dictum in *Estes* that all media are "entitled to the same rights as the general public" [75] misstates the issue. The question is whether, and in what instances, the general public *when engaged in the task of gathering new information for dissemination through "the press"* may claim constitutional protection for its activities. The Supreme Court has failed to decide this issue, and it is therefore open for determination as a question of first impression in that Court.

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[65] 381 U.S. 532 (1965).

[66] *Id.* at 542–44. The Court was ostensibly following the rule of Rideau v. Louisiana, 373 U.S. 723 (1963), which held "That the televising of a defendant in the act of confessing to a crime was inherently invalid under the Due Process Clause of the Fourteenth Amendment even without a showing of prejudice or a demonstration of the nexus between the televised confession and the trial." 381 U.S. at 538.

[67] 381 U.S. at 539–40, *quoting* Brief for NAB and RTNDA as Amici Curiae at 3–4.

[68] 384 U.S. 333 (1966).

[69] *Id.* at 358.

[70] Estes v. Texas, 381 U.S. 532 (1965).

[71] *Id.* at 540.

[72] *See* text accompanying notes 132–41 *infra*.

[73] Sheppard v. Maxwell, 384 U.S. 333 (1966).

Lower federal courts and the state courts, however, have directly confronted the issue of whether the first amendment protects the gathering of information. The Seventh and Ninth Circuits have stated plainly that it does,[76] and the Second and Fifth Circuits have been willing to assume so *arguendo*.[77] The District of Columbia Circuit once explicitly stated that there was a constitutional right to gather information,[78] although a later decision has cast some doubt on that statement.[79] Four federal district courts [80] and state courts in Hawaii,[81] Illinois,[82] and Ohio [83] have also stated that the right exists.

On the other hand, the Third Circuit has ruled against the right,[84] and the District Court for the District of Columbia has expressed a similar view,[85] as have the state courts of Arizona,[86] Colorado,[87] Florida,[88] Kentucky,[89] Missouri,[90] Maryland,[91] Nevada,[92] New York,[93] Oregon,[94] Pennsylvania,[95] and West Virginia.[96] No case on either side of the issue, however, has given adequate consideration to the difficulties involved: the holdings or dicata have tended to be terse statements, citing little or no authority.

Tribune Review Publishing Co. v. Thomas,[97] decided by the Third Circuit, is a typical example. A newspaper moved to enjoin enforcement of a court rule barring the taking of photographs in certain areas of the courthouse. The court of appeals affirmed the district court's denial of the injunction, and said:

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[74] *See* text accompanying notes 121–48 *infra*.

[75] 381 U.S. at 540.

[76] Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969); Associated Press v. KVOS, 80 F.2d 575 (9th Cir. 1935) (dictum), *rev'd on other grounds*, 299 U.S. 269 (1936); *See also* Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 39 U.S.L.W. 3478 (U.S. May 4, 1971) (No. 1114).

[77] Seymour v. United States, 373 F.2d 629, 631–32 (5th Cir. 1967); Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

[78] Worthy v. Herter, 270 F.2d 905, 908 (D.C. Cir.), *cert. denied*, 361 U.S. 918 (1959).

[79] Shelton v. United States, 280 F.2d 701, 707 (D.C. Cir. 1959), *rev'd on other grounds*, 369 U.S. 749 (1961).

[80] *In re* Caldwell, 311 F. Supp. 358, 360 (N.D. Cal.), *rev'd on other grounds sub nom.* Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *petition for cert. filed*, 39 U.S.L.W. 3273 (U.S. Dec. 12, 1970) (No. 1114); Adams v. Associated Press, 46 F.R.D. 439, 440 (S.D. Tex. 1969); United States v. Peck, 154 F. Supp. 603, 605 (D.D.C. 1957) (dictum); Providence Journal Co. v. McCoy, 94 F. Supp. 186, 195–96 (D.R.I. 1950), *aff'd on other grounds*, 190 F.2d 760 (1st Cir. 1951).

[81] *In re* Appeal of Goodfader, 45 Hawaii 317, 324–26, 367 P.2d 472, 478 (1961).

[82] People v. Dohrn, No. 69–3808 (Cook County Circuit Ct., Illinois, Criminal Divison 1969).

[83] State v. Clifford, 162 Ohio St. 370, 123 N.E.2d 8 (1954), *cert. denied*, 349 U.S. 929 (1955).

[84] Tribune Review Publishing Co. v. Thomas, 254 F.2d 883, 884–85 (3d Cir. 1958).

[85] Trimble v. Johnston, 173 F. Supp. 651, 655–56 (D.D.C. 1959). *But cf.* United States v. Peck, 154 F. Supp. 603, 605 (D.D.C. 1957) (dictum).

[86] State v. Meek, 9 Ariz. App. 149, 152, 450 P.2d 115, 118, *cert. denied*, 396 U.S. 847 (1969).

[87] *In re* Canon of Judicial Ethics, 132 Colo. 591, 593–94, 296 P.2d 465, 467 (1956).

[88] Firstamerica Dev. Corp. v. Daytona Beach News-Journal Corp., 196 So. 2d 97, 99 (Fla. 1966); Brumfield v. State, 108 So. 2d 33, 35 (Fla. 1958).

[89] Courier-Journal & Louisville Times Co. v. Curtis, 335 S.W. 2d 934 (Ky. 1959), *cert. denied*, 364 U.S. 910 (1960); Riley v Lee, 88 Ky. 603, 612–613, 11 S.W. 713, 714 (1889).

[90] State v. Shepherd, 177 Mo. 205, 244–45, 76 S.W. 79, 91 (1903).

[91] *Ex parte* Sturm, 152 Md. 114, 118–21, 136 A. 312, 314–15 (1927).

[92] Azbill v. Fisher, 84 Nev. 414, 417, 442 P.2d 916, 918 (1968).

[93] *In re* United Press Ass'ns v. Valente, 308 N.Y. 71, 77, 123 N.E.2d 777, 778 (1954).

[94] State v. Buchanan, 250 Ore. 244, 248–49, 436 P.2d 729, 731, *cert. denied*, 392 U.S. 905 (1968).

[95] Taylor & Shelby Appeals, 412 Pa. 32, 39–40, 193 A.2d 181, 184 (1963).

[96] Bailey v. Charleston Mail Ass'n, 126 W. Va. 292, 27 S.E.2d 837 (1943).

[97] 254 F.2d 883 (3d Cir. 1958).

> "Realizing that we are not dealing with freedom of expression at all but with rules having to do with gaining access to information on matters of public interest, can it be argued that here there is some constitutional right for everybody not to be interfered with in finding things out about everybody else? We suppose it would not be contended that a newspaper reporter or any other citizen could insist upon entering another's land without permission to find out something he wanted to know. In the same way, merely because someone's private letters might be interesting as gossip or as models of English composition it would hardly be argued that one could open another's desk and read through what he finds there. . . . We think that this question of getting at what one wants to know, either to inform the public or to satisfy one's individual curiosity is a far cry from the type of freedom of expression, comment, criticism so fully protected by the first and fourteenth amendments to the Constitution." [98]

While the Third Circuit thus treated the problem as almost frivolous, the District of Columbia Circuit a year later thought it equally obvious that "a newspaperman's right to travel is a part of the freedom of the press." [99] Yet in both cases the issue was the newsman's right to gather information.

The court's analysis of the issue in *Tribune Review* hardly does justice to the interests involved. The hypothetical of a reporter trespassing on private property or gaining entry to private desk drawers, merey because *he* wants to know something or to obtain "gossip," seems destined to distract from the real issue, which is the right of a reporter to invade areas that have little claim to privacy, to gather information of public interest, particularly in regard to governmental operations. Though the public may have little or no claim to private letters, it has a substantial claim to letters written by public officials concerning decisions made in their official capacity.[100] If that claim is recognized, the special role of the press in vindicating it logically follows. The principle was well stated by the late Justice Musmanno of the Supreme Court of Pennsylvania:

> "Freedom of the press is not restricted to operation of linotype machines and printing presses. A rotary press needs raw material like a flour mill needs wheat. A print shop without material to print would be as meaningless as a vineyard without grapes, an orchard without trees, or a lawn without verdure.
>
> "Freedom of the press means freedom to gather news, write it, publish it, and circulate it. When any of these integral operations is interdicted, freedom of the press becomes a river without water." [101]

Implicit in Justice Musmanno's statement is the understanding that "freedom of the press" is a more expansive right than "freedom of speech." To be sure, free expression, the essence of the free speech guarantee, is also a *sine qua non* of a free press; the right of a free press must go further, however, and embrace the right to disseminate new information and the antecedent right to gather that information.

The proper analysis when such claims are asserted would seem to be recognize that the first amendment protects the gathering of new information by the information media and, since first amendment rights are not absolute,[102] to evaluate the claim in its particular context according to the appropriate tests for restricting the exercise of first amendment rights.

The remaining problem, then, is to examine how the press' right to gather information will work in concrete cases.

II. THE RIGHT TO GATHER INFORMATION IN PRACTICE

A. *Defining "The Press"*

A threshold question is which media will enjoy the information gathering right. Obviously, in many circumstances in which the right could operate, a flood of first amendment claims would be administratively unmanageable and would not necessarily further the policies of the right. For example, if a reporter's privilege not to disclose a confidential source could be invoked by anyone who could claim that he planned to disseminate his findings via placards or leaflets, the right of compulsory process of witnesses would be reduced virtually to nothing.

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[98] *Id.* at 885.

[99] Worthy v. Herter, 270 F.2d 905, 908 (D.C. Cir.), *cert. denied,* 361 U.S. 918 (1959).

[100] *Cf.* FLA. STAT. ANN. § 286.011 (Supp. 1970), which provides that virtually all meetings at which public officials make decisions are public meetings. *See* N.Y. Times, Feb. 28, 1971, § 1, at 71, col. 1.

[101] *In re* Mack, 386 Pa. 251, 273, 126 A.2d 679, 689 (dissenting opinion of Musmanno, J.), *cert. denied*, 352 U.S. 1002 (1956).

[102] *See* note 12 *supra.*

Throughout the course of first amendment adjudication, the Supreme Court has defined the phrase "the press" expansively. As noted above,[103] however, the Court has up to the present considered first amendment rights as a guarantee of freedom of expression, and therefore it is only natural that it would view many different media as enjoying the protection of that guarantee. Thus it has held pamphlets,[104] leaflets,[105] signs,[106] books,[107] motion pictures,[108] and non-commercial advertisements[109] to be constitutionally protected, in addition to the more journalistic media of newspapers,[110] magazines,[111] radio,[112] and television.[113]

At the same time, however, the Court has recognized that there are genuine differences among the various media that might call for different constitutional standards. When it held motion pictures to be protected by the first amendment, the Court observed:

"Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary." [114]

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[103] *See* text accompnaying notes 14–33 *supra.*

[104] *See, e.g.,* Lovell v. City of Griffin, 303 U.S. 444 (1938), where the Court held that "The liberty of the press is not confined to newspapers and periodicals. It necessarily embrances pamphlets and leaflets." *Id.* at 452. The Court went on to strike down a city ordinance vesting the city manager with absolute discretion to prohibit the distribution of pamphlets on the streets. It is clear from such decisions that the Court had in mind only the critical expression function of the press, since pamphlets rarely ever serve as a conduit of disinterested, new information. "[P]amphlets and leaflets . . . have been historic *weapons* in the defense of liberty." *Id.* (emphasis added). Since such publications are merely corporeal forms of speech, it would seem fitting that they be included under the first amendment term "speech."

[105] *See, e.g.,* Schneider v. New Jersey, 308 U.S. 147 (1939).

[106] Thornhill v. Alabama, 310 U.S. 88 (1940).

[107] Roth v. United States, 354 U.S. 476, 488 (1957) (dictum).

[108] Joseph Burstyn, Inc., v. Wilson, 343 U.S. 495, 502 (1952).

[109] New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964). *Cf.* Valentine v. Chrestensen, 316 U.S. 52, 54–55 (1942).

[110] Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 11 (1970).

[111] Time, Inc., v. Hill, 385 U.S. 374, 388–89 (1967).

[112] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386–90 (1969) (dictum); National Broadcasting Co. v. United States, 319 U.S. 190, 226–27 (1943) (dictum).

[113] Estes v. Texas, 381 U.S. 532, 538–40 (1965) (dictum).

[114] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952). This principle has been applied on several occasions. In Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961), the plaintiff film distributor refused to allow a Chicago censoring board to view a movie. The board then refused a license to show the film in Chicago. The film distributor exhausted his administrative appeals, while continuing to refuse to show the film to the board. The film was not made part of the record in the court below, where the distributor had instituted a suit seeking to enjoin the enforcement of the ordinance on the ground that it was unconstitutional on its face. In affirming the lower court's denial of relief, the Supreme Court held that not all forms of prior restraint were invalid. The Court expressly limited its holding to movies, however:

"At this time we say no more than this—that we are dealing only with motion pictures and, even as to them, only in the context of the broadside attack presented on this record."

Id. at 50.

The significance of this statement became apparent in Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), where the plaintiff book distributor sought to enjoin an informal Rhode Island review board practice of informing book distributors of books it considered unfit for juveniles. The review board's only authority was to recommend to the state attorney general the prosecution of anyone it considered to be selling obscene books to juveniles, obviously a milder form of regulation than that employed in *Times Film,* since the Rhode Island board—unlike the Chicago board—had no right to ban distribution outright. Yet the Court held the Rhode Island scheme unconstitutional, noting that the "Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." *Id.* at 67. Referring to *Times Film,* the Court remarked in a footnote:

"The only question tendered to the Court in that case was whether a prior restraint was necessarily unconstitutional *under all circumstances.* In declining to hold prior restraints unconstitutional per se, the Court did not uphold the constitutionality of any specific such restraint. Furthermore, the holding was expressly confirmed to motion pictures."

Id. at 70 n.10. Thus the Court seemed to imply that the safeguards surrounding books must be stronger than those surrounding motion pictures. The Court changed its posi-

The federal government's regulation of the airwaves presents a similar case. Despite the traditional view that the freedom of the press means at least freedom from prior restraint,[115] Congress has undertaken precisely such restraint in the Communications Act of 1934.[116] The Supreme Court upheld the Act because of the especially limited resources available for broadcasting.

> "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied." [117]

Similar distinctions may reasonably be made in deciding which media constitute "the press" for purposes of the right to gather information. Since the policy behind such a right is the ultimate dissemination of *new* information to the public, the right may logically be restricted to those engaged in such dissemination. For those media, such as placards and leaflets, which are used primarily to express opinion, the constitutional guarantee of free expression already provides adequate safeguards.[118]

In concrete cases this rule, for example, would bring a journalist's refusal to divulge the confidential sources of information used in his news stories, or a scholar's travel to North Korea in contemplation of a book about that country,[119] within the ambit of the first amendment, and would deny such protection to persons preparing placards or leaflets with the aim of publicizing their opinions. There will obviously be unusual cases, often where minority groups or unpopular causes are involved, in which placard-bearers or leafleteers will be disseminating new information; in these cases the function served should be controlling. In most cases, however, the interest of minorities or unpopular persons to have their views known, and the public interest in learning of them, will be better served by according fuller protection to more traditional organs of the press.[120]

B. Constitutional Limitation on the Freedom of the Press

Once the right of the press under the first amendment to gather information has been granted in the abstract, and the media that will be able to claim it have been ascertained, existing first amendment standards must be applied to that right to delimit its extent in practice.[121] The Supreme Court has consistently held that rights protected under the first amendment are not absolute,[122] and it has therefore had to fashion tests to determine when other interests of society are to prevail over those rights.

Three major tests have evolved in the course of first amendment litigation. The first test devised was the "clear and present danger" doctrine, articulated by Justice Holmes in *Schenck v. United States*.[123] At first, the Cort attempted

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tion somewhat in Freedman v. Maryland, 380 U.S. 51 (1965), where it set out standards for prior restraint of motion pictures that were substantially similar to those required for books. *See* Note, *Prior Adversary Hearings on the Question of Obscenity*, 70 COLUM. L. REV. 1403, 1410–12 (1970). The distinction is not likely to disappear, however, since it is undeniable that films have unique characteristics. *See id.* at 1417–18.

[115] 4 W. BLACKSTONE, COMMENTARIES *151. *See also* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716–17 (1931).

[116] 47 U.S.C. § 301 *et seq.* (1964).

[117] National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943). *See also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[118] *See* text accompanying notes 14–40 *supra.*

[119] Such rights, of course, would always be subject to more compelling societal interests. *See* text accompanying notes 121–48 *infra.*

[120] An excellent example is Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *cert. granted,* 39 U.S.L.W. 3478 (U.S. May 4, 1971) (No. 1114), where a reporter for the *New York Times* was able to win the confidence of members of the Black Panther Party and thus publish information about it to more people than would ever learn of it from leaflets or placards. The case is discussed in text accompanying note 155 *infra.*

[121] Though the very fact that these standards have been developed in free expression cases means that they are not logically *binding* in the area of unique press functions, the placement of the speech and press freedoms in the first amendment implies that the nature and degree of pdotection afforded to each should be substantially similar. Furthermore, the problems involved in balancing interests are analogous in each case; the use of the old tests in a new context would take maximum advantage of whatever accumulated wisdom they contain; and their flexibility is essential to the adaptation of press freedom to changing needs. *See* text accompanying note 141 *infra.*

[122] *See, e.g.,* Schenck v. United States, 249 U.S. 47 (1919).

[123] 249 U.S. 47 (1919).

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Id. at 52.

to apply this test to all cases in which an enroachment on first amendment rights was claimed,[124] but since it was primarily appropriate to cases of direct punishment of mere utterances, it was unsuited for evaluating some of the more indirect infringements that the Court was holding to be within the ambit of the first amendment. In *American Communications Association v. Douds* [125] the Court recognized some of the difficulties of using the doctrine:

"[T]he attempt to apply the term, 'clear and present danger,' as a mechanical test in every case touching First Amendment freedoms, without regard for the context of its application, mistakes the form in which an idea was cast for the substance of the idea. . . . It is the considerations that gave birth to the phrase, 'clear and present danger,' not the phrase itself, that are vital in our decision of questions involving liberties protected by the First Amendment." [126]

In *Dennis v. United States* [127] Chief Justice Vinson, announcing the decision of the Court and writing an opinion in which three Justices joined, restated the familiar Holmes epigram:

"In each case courts must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." [128]

Even in cases involving criminal sanctions imposed directly for the crime of uttering or publishing exhortations or thoughts deemed to be injurious, however, the Court has never really relied on this restated version of the test. In *Mills v. Alabama,*[129] for example, a newspaper editor was convicted under a statute prohibiting, among other activities, the publication of editorials on behalf of political candidates on election day. The Supreme Court of Alabama upheld the statute as a "reasonable" exercise of the state's right to regulate elections.[130] In reversing the conviction, the Supreme Court refused to discuss what test must be applied to statutes punishing pure speech. It was content to dismiss the state's arguments by saying:

"That no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election." [131]

The implication of this and similar pure speech cases is that the "clear and present danger" test is probably of more historical than practical significance.

The balancing test is by far the most common test for determining first amendment rights;[132] it is used principally in cases in which freedom of expression is inhibited, rather than directly prohibited, by governmental action. In theory, the Court balances the importance of a particular activity to the exercise of first amendment rights, and the degree of restraint of that activity, against the governmental interest in having a particular law. In practice, of course, the weight given each of these factors is largely a personal determination by each Justice, though the doctrine has the advantage of flexibility. Most importantly, perhaps, balancing is a fact of life; the Supreme Court in effect applies the doctrine in first amendment cases whether it acknowledges that fact or not, and for that reason alone the theory is useful for the analysis of such cases.

NAACP v. Button [133] exemplifies the balancing process at work. The NAACP maintained a staff of lawyers under its control to litigate civil rights cases, sought out individuals subjected to discrimination, and offered them free legal assistance in bringing test cases, on the condition that it would exercise complete control over the case, thus assuring that each case would further its national goals. This practice was counter to a Virginia statute prohibiting the "soliciting" of business by attorneys.[134] The purpose of the statute, which was based on the common law's abhorrence of the bar's enticing litigants into court,[135] long antedated the civil rights struggle. The Supreme Court considered the conflicting interests in a textbook example of the balancing process, first determining that the NAACP's litigation efforts were entitled to the strongest possible protection of the first amendment:

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[124] *See, e.g.,* Thomas v. Collins, 323 U.S. 516, 530 (1944); Cox v. New Hampshire, 312 U.S. 569, 574 (1941); Thornhill v. Alabama, 310 U.S. 88, 104–05 (1940).

[125] 339 U.S. 382 (1950).

[126] *Id.* at 394.

[127] 341 U.S. 494 (1951).

[128] *Id.* at 510. Chief Justice Vinson quoted this reformulation from the opinion of Judge Learned Hand in the case below, 183 F.2d 201, 212 (2d Cir. 1950).

[129] 384 U.S. 216 (1966).

[130] Mills v. State, 278 Ala. 188, 176 So. 2d 884 (1965).

[131] 384 U.S. at 220.

[132] For a critical analysis of balancing, compare Frantz, *First Amendment in the Balance*, 71 YALE L. J. 1424 (1962), with Mendelson, *First Amendment and the Judicial Process: A Reply to Mr. Frantz,* 17 VAND. L. REV. 479 (1964).

[133] 371 U.S. 415 (1963).

[134] Chs. 31, 32, 33, 35 and 36 Va. Acts of Assembly (1956), *amending* VA. CODE 1950, §§ 54–74, 54–78, 54–79 (Repl. Vol. 1958).

"In the context of N.A.A.C.P. objectives, litigation is not a technique of resolving private differences; it is a means fo achieving the lawful objectives of equality of treatment by all government . . . for the members of the Negro community in this country. It is thus a form of political expression." [136]

The Court then considered the degree of inhibition caused by the statute and found that legislation:

"Broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however even-handed its term appear. Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens." [137]

Against these two criteria the Court balanced the importance of the state's purpose in passing the legislation. It noted that the purpose was "to insure high professional standards" [138] and that "for a lawyer to reap gain by urging another to engage in private litigation has also been condemned." [139] The Court concluded:

"That although the petitioner has amply shown that its activities fall within the First Amendment's protections, the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions it has imposed." [140]

The imprecision of the balancing method was highlighted by Justice Harlan's dissent, in which Justices Clark and Stewart joined. They also balanced the competing interests, but found that the state's purposes were substantial enough to justify the statute.[141] Thus, the case demonstrates both the ability of the balancing test to accommodate old common-law concepts to present day needs, and the pitfalls inherent in using an imprecise, flexible standard to accomplish this result.

A third test is used by the Court where expression takes the form of conduct, and the conduct, rather than the expression, is prohibited. When a regulation aimed at traffic control, for example, incidentally interferes with expression, it will be upheld on a mere showing that it is a permissible exercise of the police power.[142] As the Court has observed,

"[t]he authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend." [143]

An example of this principle of regulating conduct is *United States v. O'Brien*,[144] where the defendant was convicted of burning his draft card as a general protest against the Selective Service System and the Vietnam war. Assuming *arguendo* that the act of burning a draft card was symbolic expression, the Supreme Court stated:

> "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. . . . [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." [145]

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[135] *See* 4 W. BLACKSTONE, COMMENTARIE **134-36.

[136] 371 U.S. at 429.

[137] *Id.* at 436.

[138] *Id.* at 438-39.

[139] *Id.* at 441.

[140] *Id.* at 444.

[141] *Id.* at 455-65.

[142] *See, e.g.*, Adderley v. Florida, 385 U.S. 39 (1966); Cox v. Louisiana, 379 U.S. 536, 554-56 (1965); Cox v. New Hampshire, 312 U.S. 569, 574-75 (1941).

[143] Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

[144] 391 U.S. 367 (1968).

[145] *Id.* at 376-77 (citations omitted).

Justice Harlan, in a concurring opinion, added an important caveat:

> "I wish to make explicit my understanding that this passage [quoted above] does not foreclose consideration of First Amendment claims in those rare instances where an 'incidental' restriction upon expression, imposed by a regulation which furthers an 'important or substantial' governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate. This is not such a case, since O'Brien manifestly could have conveyed his message in many other ways than by burning his draft card." [146]

Justice Harlan's statement would seem to be applicable to the entire field of "speech plus action" activities. If the result even of traffic regulations is to deny an individual any right to express himself, it would seem necessary that they be subjected to a more stringent standard of justification to be constitutionally acceptable.

In addition to these three tests, the doctrine of overbreadth has been developed as a standard which, while not amounting to a substantive test of permissible activity, nevertheless requires that the legislature not choose an unconstitutionally broad method of eliminating an evil it might have the power to eliminate by a more narrowly drawn statute:

"Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.[147]

"The Supreme Court has stated the rule in fairly explicit terms:

> " '[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.' " [148]

The application of the foregoing tests and standards to the gathering of information, or to other essential press activities, can be illustrated by a hypothetical case of a newspaper reporter wishing to gain access to the deliberations of a government budgetary committee that meets regularly in city hall. If it were made a crime to gather information on the committee's decisions and deliberations by any means whatsoever (such as by interviewing committee members after meetings), a direct curtailment of the right to gather information would be involved, and something akin to "clear and present danger' would be required to uphold the statute.[149] If the committee merely held closed door meetings, the right to gather information would be seriously inhibited, rather than prohibited, and the balancing test would apply.[150] Closing the meetings to all persons because city hall had been put under quarantine to confine a smallpox epidemic would be a regulation of the media representatives in their capacities as private citizens; it would only incidentally restrict information, and it would be justified by a showing of governmental justification to quarantine buildings under the police power.[151] In all three situations the doctrine of overbreadth would invalidate any governmental regulation that accomplished a lawful goal in a manner that unnecessarily interfered with protected activities.[152]

The holding of a closed meeting under ordinary circumstances cannot be viewed as the incidental regulation of media representatives as private citizens, since normally the only purpose of holding such meetings is to maintain secrecy, thus inhibiting the right to gather new information. The balancing test will therefore be appropriate in the vast majority of cases, and the most problematic issue under that test is whether the governmental interest in curtailing press activity outweighs the right of the press to obtain information. Cases involving the national security are one area where governmental interests will often prevail, though they should not do so automatically, but rather only if a particular restraint is essential to protecting that security.

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[146] *Id.* at 388–89 (concurring opinion).
[147] NAACP v. Button, 371 U.S. 415, 438 (1963).
[148] Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnotes omitted).
[149] *See* text accompanying notes 123–41 *supra.*
[150] *See* text accompanying notes 132–41 *supra.*
[151] *See* text accompanying notes 142–46 *supra.*
[152] *See* text accompanying notes 147–48 *supra.*

There are practical limits to press freedom as well. For example, where a courtroom is not large enough to accommodate all the reporters who wish to attend a trial, the state must obviously be allowed to adopt reasonable, nonarbitrary criteria for limiting the number that will attend. Preference could legitimately be given to such large organizations as the Associated Press, on the ground that their presence will result in a wider dissemination of news. The rules in such cases, as well as their underlying justification, are naturally very much like those already in existence for the broadcast media, which must use scarce airwaves.[153] In all cases where press freedom is curtailed, however, the burden must be on the state to justify its acts, lest the press' constitutional rights be vitiated by insupportable burdens of proof.[154]

The foregoing general discussion has suggested several factual situations in which a member of the press might claim a constitutional right, such as the right to governmental confidences and the right to foreign travel. It will be useful to conclude with a more extended analysis of the principles developed as applied to a specific case.

C. The Journalist's Testimonial Privilege

One of the more common occasions on which the right to gather informations has been invoked, even though it is not directly restrained, occurs when a reporter is called upon to disclose sources of information, or to testify in closed hearings. Earl Caldwell,[155] for example, was able to overcome the suspicion of Black Panther Party officials, view the organization first hand, and give readers of the *New York Times* a unique opportunity to understand the Panthers' political ideas, but when he was subpoenaed to testify, in closed session, before a grand jury investigating the Party, its leaders told him that if he were even to go into the hearing room he would forfeit his confidential relationship with the Party.

Another recent case shows a different aspect of the problems raised by a reporter's privilege. During the murder trial of Charles Manson, the state introduced evidence that the crime was committed at about 12:30 A.M. A newspaper report quoted an unidentified witness has having heard a shot and screams at 2:00 A.M., but the reporter refused to divulge her source on the ground that that she had guaranteed anonymity in return for the story.[156]

These two examples suggest that there may be a substantial conflict between the constitutional right to gather information and the state's need for testimony. Clearly the reporter in either of the above cases would be inhibited in his future ability to gather information if he were forced to testify. Walter Cronkite has observed:

> "In doing my work, I . . . depend constantly on information, ideas, leads and opinions received in confidence. Such material is essential in digging out newsworthy facts and equally important, in assessing the importance and analyzing the significance of public events. Without such materials, I would be able to do little more than broadcast press releases and public statements." [157]

On the other hand, testimonial privileges hinder the ascertainment of truth and, according to Wigmore, have a deleterious effect on the administration of justice:

> "The vital process of justice must continue unceasingly. A single cessation typifies the prostration of society. A series would involve its dissolution." [158]

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[153] *See* text accompanying notes 115–17 *supra.*

[154] In Speiser v. Randall, 357 U.S. 513 (1958), for example, the Supreme Court held unconstitutional a California practice of denying war veterans' tax benefits to men who refused to sign a loyalty oath. Noting that the procedure placed a burden on the men to prove themselves not subversive, the Court held:

"Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech. . . .

". . . [W]here particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." *Id.* at 526 (citation omitted).

[155] *See* Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *cert. granted,* 39 U.S.L.W. 3478 (U.S. May 4, 1971) (No. 1114). *See also* note 120 *supra.*

[156] NEWSWEEK, August 31, 1970, at 66.

[157] Brief for Appellant at 20. Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *cert. granted,* 39 U.S.L.W. 3478 (U.S. May 4, 1971) No. 1114).

[158] 8 J. WIGMORE, *supra* note 11, § 2192, at 73.

Since both these interests are substantial, the problem of the reportorial privilege offers an excellent opportunity to test the workability of the broader right to gather information. As the law now stands, the position of a journalist claiming that right it not secure. There is no common-law testimonial privilege, either qualified or absolute, for newsmen.[159] They must respond to compulsory process exactly as any other citizen,[160] and when testifying they must answer all inquiries put to them, unless the court rules otherwise on generally applicable rules of evidence, investigation, or discovery.[161] For example, a journalist can be compelled to submit to discovery and to answer questions under the Federal Rules of Civil Procedure if he has information "relevant to the subject matter involved in the pending action." [162] The only means of avoiding compulsory deposition is to apply to the court under rule 30(b) for a protective order limiting the discovery proceedings; the issuance of such orders is discretionary, and applications for them are not often granted. In *Garland v. Torre*,[163] for example, the Second Circuit held that a finding that the deposition was "a necessary step in the due and proper preparation for trial" [164] was a sufficient reason to deny a newspaper reporter a protective order as long as the purpose (as distinguished from the result) of the deposition process was not to oppress the witness.

The common law protects the journalist even less in the area of investigations by a grand jury or a legislative committee. As long as the investigating body is functioning within its jurisdiction, it may force him to answer any questions relevant to its inquiry.[165] The Supreme Court has held that even a valid fear for one's life will not justify a refusal to answer grand jury questions.[166] Refusal to answer constitutes contempt of court,[167] and many newsmen have elected the penalty for that offense in preference to the revealing of confidences.[168]

Sixteen states [169] have felt a need to ameliorate this situation and have passed statutes granting newsmen some form of testimonial privilege, ranging from absolute immunity to an extremely qualified privilege. Most of the statutes protect only the journalist's confidential *sources* of information, however, not the information itself. In twelve states[170] a reporter would be privileged not to reveal the name of a potential witness in a murder case;[171] in only three[172] would a reporter covering the Black Panthers be able to claim a privilege from revealing confidential information, and in none could he avoid being forced to attend a secret grand jury hearing.[173]

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[159] *See* Subcomm. on Admin. Prac. and Proc., Senate Comm. on the Judiciary, 89th Cong., 2b Sess., The Newsman's Privilege (Comm. Print 1966) for an excellent collection of cases. The only American case in which a newsman's testimonial privilege has ben held to exist is *In re* Nat Caldwell, reported in N.Y. Law Revision Comm., Report on Newsman's Privilege Bill 63 (Legis. doc. 65(A) 1949). In that case, the Anderson County, Tennessee court made the following observation dismissing an action against Caldwell for refusing to testify before a grand jury:

"The press must get its information through others, of necessity much is given in confidence, and I am unable to hold the witness in contempt in this matter. It's true it is hard to have serious charges made against a public official on hearsay evidence but at times much good has been done this way. It puts us all on guard, and to ask ourselves: 'Lord is it I?' "

[160] 8 J. Wigmore, *supra* note 11, § 2286, at 528–30.

[161] *Id.* at 529.

[162] Fed. R. Civ. P. 26(b).

[163] 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

[164] 259 F.2d at 551. The court also noted that the information sought "went to the heart of the plaintiff's claim." *Id.* at 550.

[165] *See* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 557–58 (1963); United States v. Bryan, 339 U.S. 323, 331 (1950); Blair v. United States, 250 U.S. 273 (1919); Hale v. Henkel, 201 U.S. 43, 65 (1906).

[166] Peimonte v. United States, 367 U.S. 556, 559 n.2 (1961).

[167] *See, e.g.*, Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); People *ex rel.* Mooney v. Sheriff of N.Y. County, 269 N.Y. 291, 199 N.E. 415 (1936); *Ex parte* Lawrence, 116 Cal. 298, 48 P. 124 (1897).

[168] In fact, very few newsmen have elected to comply with the law and reveal their sources. Of course, a prime reason for this has been the reluctance of the courts to hand out stiff penalties for failure to testify. In Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958), for example, the penalty was 10 days. *See also* Subcomm. on Admin. Prac. and Proc., Senate Comm. on the Judiciary, 89th Cong., 2d Sess., The Newsman's Privilege (Comm. Print 1966).

[169] Ala. Code tit. 7, § 370 (1960); Alaska Stat. §§ 09.25.150–.220 (Supp. 1970); Ariz. Rev. Stat. Ann. § 12–2237 (Supp. 1970); Ark. Stat. Ann. § 43–917 (1964); Cal. Evid. Code § 10170 (West 1966); Ind. Ann. Stat. § 2–1733 (1968); Ky. Rev. Stat. § 421.100 (1969); La. Rev. Stat. tit. 45, §§ 1451–53 (Supp. 1971); Md. Code Ann. art. 35, § 2 (1965); Mich. Comp. Laws Ann. § 767.5a (1968); Mont. Rev. Code §§ 93–601–1 to 93–601–2 (1964); N.J. Stat. Ann. §§ 2A–84A–21, 2A–84A–29 (Supp. 1970); N.M. Stat. Ann. § 20–1–12.1 (Supp. 1970); N.Y. Civil Rights Law § 79-h (McKinney 1970); Ohio Rev. Code Ann. §§ 2739.04, 2739.12 (1966); Pa. Stat. Ann. tit. 28, § 330 (Supp. 1970).

Judge-made and statutory law thus provide only limited protection for newsmen subjected to compulsory process, and the ability of the information media to gather new information is hindered as a result. In the framework of a recognized constitutional right to gather information, the journalist's protection would much more accurately reflect his and society's needs.

The analysis of the reportorial privilege in light of the constitutional freedom of the press begins with the recognition that newsmen serve the media included in the proposed constitutional protection for the gathering of new information,[174] and while performing that function they are therefore afforded some protection by the freedom of the press clause. It is then necessary to ascertain which test must be applied to determine the scope of the protection. Since the subpoenaing of newsmen is not a direct prohibition of information gathering, the "clear and present danger" test does not apply.[175] Nor is compulsory testimony a form of conduct that is subjected to incidental police regulation.[176] Forced testimony restrains the gathering of information indirectly, however, and therefore the balancing test must be applied.[177] For analytical purposes it can be assumed that the effect of compelling testimony on information gathering will remain constant in different legal contexts, though in reality it will vary in individual cases and will be weighed against the state's need for the testimony. The problematic variable is the state interest to be balanced against the right to gather information.

Discrete testimonial problems usually arise in four legal contexts: general investigations, such as by a grand jury or a legislative committee; criminal trials; civil litigation between third parties; and civil litigation where a member of the news media is a party, most often a libel case.

In the context of a general investigation, there is usually no immediate threat to either the safety of the community or individual liberty, and unless the failure to testify does pose a serious threat, journalists should receive an almost absolute privilege from testifying when they can show that their information gathering is likely to be inhibited. When a newsman is forced to testify under this standard, the doctrine of overbreadth will require that the inquiry be directly relevant to the danger.[178]

Criminal trials, when a newsman is called by the defense, present the most appealing case for mandatory testimony. The Supreme Court in *Estes v. Texas*[179] applied the principle that "[t]he life or liberty of any individual in this land should not be put in jeopardy because of the actions of any news media,"[180] and this principle seems applicable when a journalist fails to disclose the name of a source that might exonerate an accused. This concealment may also conflict with a defendant's sixth amendment right "to have compulsory process for obtaining witnesses in his favor," which the Court in *Washington v. Texas*[181] held to include the right to have a witness testify despite certain state "procedural statutes."[182] There is a problem in that the Court was careful to limit *Washington* to the particular state statute before it,[183] saying in a footnote:

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[170] Alabama, Arizona, California, Indiana, Kentucky, Maryland, Michigan, Montana, New Jersey, New York, Ohio, and Pennsylvania, cited note 169 *supra*.

[171] *See* text accompanying note 156 *supra*.

[172] Michigan, Pennsylvania, and New York, cited note 169 *supra*. The Pennsylvania statute by its terms protects only the "source," but it has been judicially construed to protect the information as well. Taylor & Selby Appeals, 412 Pa. 32, 40, 193 A.2d 181, 184–85 (1963).

[173] *See* text accompanying note 155 *supra*.

[174] *See text accompanying notes* 103–20 *supra*.

[175] *See* text accompanying notes 123–31 *supra*.

[176] *See* text accompanying notes 142–46 *supra*.

[177] *See* text accompanying notes 132–41 *supra*.

[178] *See* text accompanying notes 147–48 *supra*.

[179] 381 U.S. 532 (1965). *See* text accompanying notes 65–67, 70–75 *supra*.

[180] 381 U.S. at 540.

[181] 388 U.S. 14 (1967).

[182] *Id.* at 15. The "procedural statutes" provided that "[p]ersons charged as principals, accomplices or accessories . . . cannot be introduced as witnesses for one another. . ." *Id.* at 16–17 n.4.

> "Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination or the lawyer-client or husband-wife privileges, which are based on entirely different considerations from those underlying the common-law disqualifications for interest." [184]

From this it would be logical to conclude that if the Court recognized the press' constitutional right not to disclose confidential sources of information, it would not require that right to yield to the defendant's desire to summon witnesses. The reporter's privilege is distinguishable from the privileges mentioned in the Court's footnote above, however, in that it is not a privilege that protects important individual or personal interests. Unlike the right against self-incrimination, or the attorney-client or husband-wife privileges, the press privilege exists largely to further the *community's* need for information.[185] Despite the importance of that interest it should yield when the community also seeks to prosecute a man, and his defense is blocked by the reportorial privilege.

When the *prosecution* seeks to discover a reporter's confidential sources, the fifth and sixth amendment rights of defendants are not at stake, and there is no more state interest sufficient to override the newsman's privilege than there is for any other privilege.

In the context of civil litigation between third parties, there is a strong state interest in compelling a reporter to tesify where his testimony is essential and relevant to the dispute. As Wigmore points out, civil litigation is crucial to the order of society, since, at its best, it demonstrates that violence is not necessary to redress private wrongs.[186] The balancing process will naturally weigh the degree of restraint on information gathering; and the overbreadth doctrine should narrow the otherwise broad limits of pretrial discovery to what is essential to a party's case.

The newsman's right not to testify is least appealing in a libel action against a member of the media, where it will usually be invoked in an attempt to remove the burden of proving a defense.[187] It would obviously be unsatisfactory to allow a defendant to attempt to prove the defense of truth, for example, by testifying to undisclosed confidential information, which his adversary would be foreclosed from attacking by the defendant's claim of privilege.[188] Such testimony would contain all the worst sins of hearsay,[189] and would tempt a member of the media to defeat any libel action by falsely testifying that he has confidential information. If the member of the news media must protect its sources, it can admit the libel and join issue only on the measure of damages. A more difficult problem occurs when the journalist pleads that an admittedly false defamatory statement was not caused by malice, in order to negative either punitive damages, in the case of a private individual,[190] or the entire libel action itself, in the case of a public figure.[191] The most reasonable solution is to force the defendant to waive its constitutional privilege if it attempts to introduce testimony to rebut malice and then refuses to elaborate on cross-examination by claiming an interference with future news gathering.[192]

The foregoing analysis of the right to gather information applied in the particular context of a reporter's testimony reflects the tension between societal interests that any court must contend with in specific cases. Though an absolute reportorial privilege would no doubt maximize the flow of information, it would frustrate other individual and community rights in the process, and therefore a proper balance among these needs must be struck.

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[183] *See* note 182 *supra*.

[184] 388 U.S. at 23 n.21.

[185] *See* text accompanying notes 34–36 *supra;* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 88–89, 94 (1948).

[186] 8. J. WIGMORE, *supra* note 11, § 2192(2) at 72–73.

[187] The plaintiff's case-in-chief, which consists only of establishing publication, defamatory meaning, and actionable character, W. PROSSER, HANDBOOK OF THE LAW OF TORTS 795 (3d ed. 1964), is not likely to require a defendant to reveal confidences, unless he wishes to show malice. *See* text accompanying notes 190–91 *infra*.

[188] The defendant has the affirmative burden of proving truth in a libel case. *Id.* at 823–26.

[189] *See* 5 J. WIGMORE, EVIDENCE § 1362, at 3–7 (3d ed. 1940).

[190] *Id.* at 826–28.

[191] Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970); New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964).

[192] This was the approach of the New Jersey Supreme Court in a case decided under a state statute protecting newsmen from revealing confidential sources of information. Brogan v. Passaic Daily News, 22 N.J. 139, 152, 123 A.2d 473, 480 (1956).

CONCLUSION

Throughout the course of first amendment adjudication, the Supreme Court has tended to view freedom of the press as a particularized instance of freedom of speech.[193] It has thus confined its holdings in this area to the protection of freedom of expression. The news media's most important function in contemporary society, however, is to serve as a conduit of information. Freedom of the press should therefore be expanded to include protection for essential and unique functions of the information media, especially the gathering of information. To outline the protected areas, the Court's tests for freedom of expression can logically be carried over to their analogous situations within the area of press functions.

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THE NEWSMAN'S PRIVILEGE: GOVERNMENT INVESTIGATIONS, CRIMINAL PROSECUTIONS, AND PRIVATE LITIGATION

(By Margaret Sherwood)

The recent widespread use of governmental and defense subpoenas for newsmen's testimony and films has posed a grave threat to the ability of the press to gather and disseminate the news. This Comment explores the need for a newsman's privilege and the legal precedent upon which such a privilege would be based. The possible scope of the privilege is examined in connection with governmental and defense subpoenas and court orders in private litigation.

Legal commentators and appellate courts have long debated the advisability of a newsman's privilege. Most of these discussions bear only limited relevance to the contemporary problem of defining the press's role in litigation and governmental investigation, for the issue in the past has been the duty of the newsman to reveal the *source* of his information. Today newsmen are more often asked to reveal the *contents* of that information. Furthermore, a new question is now before the courts: the duty of the news media to produce their films in compliance with subpoenas duces tecum. Finally, whereas subpoenas or court orders were traditionally employed, usually by private litigants, to elicit particular pieces of information aimed toward the disposition of specific questions, subpoenas are now being used by federal, state and local governments as aids to large-scale investigatory and prosecutorial activities.[1] These subpoenas, employing the shotgun approach,[2] are often aimed at eliciting everything the newsman may know or all the films he may have concerning the subject matter or persons under investigation. Conversely, because of the rash of recent prosecutions for loosely defined crimes arising from political protect activity, the press has been serve dwith an equal number of broadly worded subpoenas from numerouss defendants.[3] Because the subject matter under investigation or the alleged offense is often extremely broad and ill defined, the information sought from the newsman may be correspondingly unlimited.

Today an analysis of the newsman's privilege without a careful examination of its factual context is no longer sufficient. To ignore the impact of the aggregate of subpoenas and court orders is to fail to perceive the problem altogether. When newsmen were called upon only occasionally to testify, the courts could dismiss any impairment to freedom of the press as slight or as "some limitation"[4] on the availability of news. Today, the impairment and the corresponding limitation upon the availability of news is increasing.

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[193] *See* text accompanying notes 14–33 *supra.*

[1] See note 17 *infra* and accompanying text.

[2] The subpoena issued in one recent case, for example, called for production of notes and tape recordings of interviews with "officers and spokesmen for the Black Panther Party," covering a period of over a year. *In re* Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970), *aff'd in part and rev'd in part,* No. 26,025, (9th Cir. Nov. 18, 1970) [39 U.S.L.W. 2281], *petition for cert. filed* 39 U.S.L.W. 3273 (U.S. Dec. 6, 1970) (No. 1114). See text accompanying notes 46–77 *infra.* In another instance, *Newsweek* received a subpoena duces tecum from a federal grand jury, directing it to appear through a member or agent and to produce "all photographs of and interviews with members of Students for a Democratic Society taken during the period October 4 through October 13, 1969." Brief for Newsweek as Amicus Curiae at 2, *In re Caldwell, supra* [hereinafter cited as Brief for Newsweek].

[3] See note 21 *infra.*

The United States Supreme Court has never ruled on the question of newsman's privilege.[5] Such a ruling is needed; the series of recent subpoenas and court orders necessitates formulation of guidelines to protect not only the rights of those directly involved, but more important, society's interest in a free and vigorous press. For when numerous subpoenas are issued by an administration avowedly and openly hostile to the news media,[6] the possibility arises that putting a gag on the press may be as much an objective as eliciting information from it.[7]

This Comment explores the issue of newsman's privilege. Part I sets forth the factual context in which the issue arises, focusing on the recent case of *In re Caldwell*.[8] Part II discusses the privilege cases decided to date, evaluating the factual and analytical conceptions on which various courts have relied. Part III suggests a theory for the constitutional protection of the interests asserted by the newsman, examining Supreme Court decisions dealing with these interests in other contexts. Part IV analyzes the form and scope the privilege should take.

I. FACTUAL BACKGROUND

A. *The press and legal compulsion past and present*

The problem of the newsman's privilege is not a new one. Newsmen have been asked to divulge their information in the past. However, until recently only a relative handful of cases arose in which the issue of the privilege was raised,[9] and only a few of these cases involved governmental subpoena.[10]

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[4] The Supreme Court of Hawaii, considering the privilege issue in 1961, brushed aside the impairment:

> We will assume, for the purposes of this case, that the forced disclosure of a reporter's confidential source of information may, to some extent, constitute an impairment of freedom of the press. We nevertheless conclude . . . that such an impairment may not be considered of a degree sufficient to outweigh the necessity of maintaining the court's fundamental authority to compel the attendance of witnesses. . . .

In re Goodfader, 45 Hawaii 317, 329, 367 P.2d 472, 480 (1961). Three years earlier, in 1958, the Second Circuit had described the impairmant in a similar manner: "[C]ompulsory disclosure of a journalist's confidential sources of information *may* entail an abridgment of press freedom by imposing *some* limitation upon the availability of news." Garland v. Torre, 259 F.2d 545, 548 (2d Cir. 1958), *cert. denied,* 358 U.S. 910 (1958) (emphasis added).

[5] The Court has denied certiorari three times. State v. Buchanan, 392 U.S. 905, *denying cert. to* 250 Ore. 224, 436 P.2d 729 (1968); Murphy v. Colorado, 365 U.S. 843 (1961) (state court proceedings unreported); Garland v. Torre, 358 U.S. 910 (1958), *denying cert. to* 259 F.2d 545 (2d Cir. 1958).

[6] *See, e.g.,* N.Y. Times, Nov. 21, 1969 at 22, col. 1; *id.* Nov. 14, 1969 at 24, col. 1.

[7] In *In re* Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970), an affidavit submitted to the district court by one of the government attorneys explained, or perhaps complained, that "leaders and spokesmen of the Black Panther Party and their associates reportedly make full use of coverage by the press and the facilities of commercial and educational radio and television to disseminate their messages to a wide audience." Affidavit of Francis L. Williamson, attached to the Government's Memorandum in Opposition to Motion to Quash Grand Jury Subpoenas at 4 [the memorandum is hereinafter cited as Opposition Memo]. The government in its Second Supplement to Memorandum in Opposition to Motion to Quash Grand Jury Subpoenas explained at greater length:

> The Black Panthers, a small violence-prone group of persons . . . , has gained nation-wide and world-wide prominence through the published utterances of their spokesmen.
>
> . . . [P]ublished utterances of spokesmen of the Black Panther Party, when disseminated in their official publication, reach only a relatively small audience. However, when disseminated in the mass media, such as Newsweek, Time Magazine, the New Pork Times, and CBS, the statements reach a vastly more numerous audience.

Id. at 1–2.

[8] 311 F. Supp. 358 (N.D. Cal. 1970), *aff'd in part and rev'd in part,* No. 26,025 (9th Cir. Nov. 18, 1970) [39 U.S.L.W. 2281), *petition for cert. filed* 39 U.S.L.W. 3273 (U.S. Dec. 6, 1970) (No. 1114).

[9] There were 17 reported cases betwen 1911 and 1968: Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), *cert. denied,* 358 U.S. 910 (1958); *In re* Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964); Deltec, Inc. v. Dun & Bradstreet, Inc., 187 F. Supp. 788 (N.D. Ohio 1960); Rosenberg v. Carroll, 99 F. Supp. 629 (S.D.N.Y. 1951); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D. Mass. 1957); *In re* Howard, 136 Cal. App. 2d 816, 289 P.2d 537 (3d Dist. 1955); Clein v. State, 52 So. 2d 117 (Fla. 1950); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911); *In re* Goodfader, 45 Hawaii 317, 367 P.2d 472 (1961); *In re* Wayne, 4 Hawaii 475 (U.S.D.C. 1914); Beecroft v. Point Pleas-

While the reason for this paucity is unclear, one can conjecture several explanations. In the first place, since most courts imposed only minimal penalties on recalcitrant newsmen,[11] a newsman adjudged in contempt may not bother to demand a hearing; hence, many incidents may have gone unreported. Second, and perhaps more important, while private litigants or criminal defendants would rarely hesitate trying to force information from a reluctant newsman, both local and federal government must maintain a working relation with the press. Consequently, government traditionally turned to the press only as a last resort.[12] In the past when government found it necessary to resort to the press, it usually entered into negotiations with the party from whom the information was sought in order to reach "a compromise acceptable to both parties." [13] Conversely, newsmen, and especially those employed by local newspapers, radio and television stations which do not have the power or prestige of the national press media, often complied with requests for information, even without the issuance of a subpoena, and sometimes still do.[14]

The various representatives of the press are not usually willing to discuss how often they have cooperated with government requests, with or without the legal compulsion of a subpoena.[15] Thus, the frequency and scope of past governmental requests for a newsmen's information, and the press's response thereto, is unclear. However, whatever the situation in the past, it is clear that both federal and local governments are now making frequent demands for wholesale disclosure of information and films, and at least the national press is not uniformly complying.[16] There have been dozens, and probably hundreds of such subpoenas in the last two years, most of which were issued in connection with investigations or prosecutions of dissident political groups.[17] The reasons for this sudden rash of subpoenas are only partially apparent. Government agencies issue subpoenas because a subpoena is necessary to insure that the newsman or his films appear in court or in front of the grand jury or legislative investigating committee.[18] The question is *why*, for the first time, is

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ant Print. & Pub. Co., 82 N.J. Super. 269, 197 A.2d 416 (1964); Brogan v. Passaic Daily News, 22 N.J. 139, 123 A.2d 473 (1956); State v. Donovan, 130 N.J.L. 130, 30 A.2d 421 (1943); *In re* Grunow, 84 N.J.L. 235, 85 A. 1011 (1913); People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936); State v. Buchanan, 250 Ore. 244, 436 P.2d 729, *cert. denied,* 392 U.S. 905 (1968); *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963).

[10] Clein v. State, 52 So.2d 117 (Fla. 1950); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911); *In re* Grunow, 84 N.J.L. 235, 85 A. 1011 (1913); People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936); State v. Buchanan, 250 Ore. 244, 436 P.2d 729 (1968); *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963).

[11] In State v. Buchanan, 250 Ore. 244, 436, P.2d 729 (1968), for example, the editor of a university newspaper who had refused to reveal the names of seven drug users whom she had previously interviewed was fined 300 dollars. An association of newspaper publishers and editors paid the fine. *See* N.Y. Times, June 29, 1966, at 23, col. 1. Fines are almost always paid by the newsman's employer, who may be able to deduct the relatively small amount as a cost of doing business. The newsman himself, however, will have to serve any jail sentence. Sentences have been as long as ten days. *See, e.g.*, Garland v. Torre, 259 F.2d 545 (2d Cir. 1958).

[12] Interview with Tom Reddin, former Chief of Police of Los Angeles, California, in Los Angeles, California, July 23, 1970. Mr. Reddin explained that city officials usually had other sources of information and rarely found it necessary to turn to the press. When it was necessary, they did so only with the greatest reluctance.

[13] Statement of Attorney General John N. Mitchell, Feb. 5, 1970, N.Y. Times, Feb. 6, 1970, at 40, col. 4.

[14] Two sources were willing to admit and discuss this fact. One is legal counsel for a large and nationally prestigious newspaper. The other is a member of a law firm that represents a smaller publication, part of a large chain of newspapers. Both sources were emphatic that neither their names nor the name of their client papers were to be used. Most press representatives will not even discuss this topic on a confidential basis. See note 15 *infra*.

[15] On three separate occasions, editors asked by this writer to discuss cooperation given by their newspapers to government agencies flatly refused and when pressed, terminated the conversation.

[16] See note 45 *infra*.

[17] The number of recent subpoenas is virtually impossible to document or even estimate accurately. The subpoenas have been issued by numerous different governmental agencies to numerous press organizations in various parts of the country, and there is no central file available containing all the subpoenas. Compiling a complete list would involve polling every court or press organization in the country. A partial list, documenting the issuance of several dozen subpoenas, is on file with the *California Law Review*.

[18] The formality of a subpoena is at times apparently dispensed with. According to her attorney, a newswoman recently forced to appear in a San Francisco murder trial received before her first appearance only a post card from the District Attorney's Office instructing her to be in court on a certain date. A subpoena was, however, issued for her second appearance.

government finding it necessary to use the newsman's testimony or films in these proceedings so often? Several answers are possible. First, government for the first time since the labor disturbances of the 1930's is facing large scale social turmoil, and in its haste to restore order is trying to gather evdience from any available source.[19] Second, the advent of subpoenas duces tecum issued for newsmen's film results from the fact that television coverage is a relatively recent phenomenon, and the cameraman's film is the most graphic—if not always the most accurate—record of what actually occured. Third, in many cases the press itself is apparently no longer complying with discreet pre-subpoena governmental requests for information and films.[20] The press's reasons for noncompliance at the pre-subpoena stage are, again, a matter of conjecture. A press that has been the subject of hostile verbal abuse from the current Administration may be hesitant to cooperate in any way with the Federal Government. Furthermore, the press, because of the current social disorder, may be bombarded with pre-subpoena requests, and hence may believe some sort of stand is necessary. Moreover, the press may fear that if compliance results in any useful disclosures, federal and local government agencies will then not hestiate to subpoena the newsman or his films and force him to make a public appearance in court. Finally, the pressure on the press has been compounded by the increased demand for films by criminal defendants,[21] who may be either the protestors or police officers themselves under indictment for violation of federal civil rights statutes.[22]

Thus, although newsmen have always faced demands for disclosure of information, the problem today is of a different magnitude. Since government traditionally used restraint in the issuance of subpoenas, and since any demands government did make were met, on the whole, with quiet and inconspicuous compliance (or resistance), usually at the pre-subpoena stage, the public became aware of the pressure on newsmen only on those infrequent and usually non-political occasions when the newsman showed up in court. On those occasions, the newsman usually took the contempt citation in order to uphold the ethics of his profession [23] and accepted fine or imprisonment rather than disclose his source.[24] Thus the public might rely on the newsman's integrity, unaware that the newsman did at times indeed turn over at least some of his information. With the recent rash of subpoenas and court orders, and the newsman or his films regularly showing up in court, the public can no longer remain unaware of the pressure to which the press is subjected or of the likelihood that any given newsman may be forced to reveal his information and sources.

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[19] The Southern states were, of course, faced with large scale civil rights demonstrations in the late '50's and early '60's. The national press gave these demonstrations great coverage and obtained numerous interviews with the leaders of the movement. The Southern states instigated frequent prosecutions against both the leaders of and the participants in the demonstrations. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Adderly v. Florida, 385 U.S. 39 (1966); Brown v. Louisiana, 383 U.S. 131 (1966); Cox v. Louisiana, 379 U.S. 536 (1965). These states, however, apparently never attempted to subpoena any of the national press media. Had these states issued any subpoenas, the national press media, hostile to the segregationalist position of Southern officials, would almost certainly have resisted the subpoenas and appealed any contempt citations. There are no recorded cases of any such incidents.

[20] For example, in *In re* Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970), the FBI made six separate attempts to question the newsman involved. Affidavit of Raymond N. Byers (Special Agent of the Fedeal Bureau of Investigation), attached to the Government's Second Supplement to Memorandum In Opposition to Motion to Quash Grand Jury Subpoenas at 1.

[21] Newspaper counsel and editors are unanimous in stating that defense subpoenas are probably more numerous than governmental ones. The *San Francisco Examiner,* for example, has received eleven defense subpoenas duces tecum since 1969. A list of these subpoenas is on file with the *California Law Review*. Individual *Examiner* reporters may have also received subpoenas ad testificandum, which would not be in the *Examiner's* records.

The press may find itself subpoenaed by both sides in a criminal case. For example, in one recent trial in which six youths were accused of killing a police officer, Defense Attorney R. J. Engel subpoenaed the *San Francisco Examiner* for production of its back files. Apparently, an examination of these files turned up nothing of use to the defense because no further action was taken. However, Deputy District Attorney Thomas Norman did subpoena an *Examiner* newswoman to testify regarding an interview with one of the defendants. The newswoman appeared in court, but refused to answer any questions and was cited for contempt. *See* S.F. Chronicle, Oct. 20, 1970, at 5, col. 6.

[22] See note 222 *infra*.

[23] In 1934 the American Newspaper Guild adopted the following as part of the newsman's code of ethics: "[N]ewspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies. . . ." G. BIRD & F. MERWIN, THE NEWSPAPER AND SOCIETY 567 (1942).

[24] *In re* Wayne, 4 Hawaii 475 (U.S.D.C. 1914), is the only reported case in which a reporter revealed his source. Recently there have been several instances of reporters testifying under compulsion of governmental subpoena. *See, e.g.*, N.Y. Times, June 4, 1969, at 16, col. 3 (*New York Times* reporter testifying about SDS before House Internal Security Committee).

B. The chilling effect of forced disclosure

The press relies heavily on "confidential," off the record," and "not for attribution" information. In a study taken in 1969[25] 27 out of 32 newspapers surveyed reported publishing stories stemming from confidential information. Newsmen unanimously stress the importance of such information to their work.[26] For example, a noted correspondent explains that in the course of reporting on diplomatic affairs:

> I depend extensively on information which comes to me in confidence from sources whose anonymity must be maintained. Diplomacy is conducted as a private business. In my experience, diplomats detest publicity.[27]

A prominent news commentator agrees on the importance of confidential information:

> I regularly talk with government officials, former officials, military people and a wide spectrum of others who possess special information of expertise on public issues.
>
> A great deal of this talk is of the 'off the record' or 'not for attribution' kind. It is for my own information.[28]

Threat of exposure or disclosure of his confidential information dries up a previously talkative source. The source's motivation in talking to the newsman may be spite, money, a desire to improve his own public image or to justify his official actions, or an altruistic desire to be of public service. But whatever his motivation is it clear that in many cases his main concern is keeping his identity and, in some cases, confidential information secret: were he willing to have either made public, he would have held a public press conference in the first place. Hence, he is willing to talk to a newsman he knows and trusts, but only because he can rely on that reporter's integrity.[29]

Most confidential information comes to newsmen from informants with whom they have had previous dealings.[30] The communications are, in other words, the product of a certain relationship between informant and newsman, the crux of which is the source's confidence in the newsman.[31] The recent rash of subpoenas and the resulting pressure on newsmen has apparently destroyed much of this confidence. Many noted journalists report specific instances of former sources now declining to talk to them, expressly on the grounds of *fear* of forced disclosure.[32] The newsmen are unanimous in stating that an *actual* instance of a newsman's disclosure would cost that newsman all his remaining sources.[33]

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[25] Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources,* 64 Nw. U.L. Rev. 18, 57 (1969).

[26] See text accompanying notes 165–73 *infra.* The government also relies heavily on confidential information—but in a slightly different way. Government officials are notorious for their 'off-the-record' and 'not for attribution' remarks. This tendency has become so pronounced recently that one news columnist was prompted to write the following tongue-in-cheek account:

> Settling back in his chair the Anonymous High Official breathes heavily, glances around the oblong table, notes the poised pencils and makes his decision: will his information be—on-the-record; off-the-record; half-and-half; background; deep background; very deep background; formula attribution ("usually well-informed sources")—?
>
> . . . .
>
> There's always the question whether it's "on or off"—the record, that is. . . . The Women's National Press Club put on a recent whingding where the Attorney General commented easily about "these stupid bastards who are running our educational institutions," and declared that with campus violence "this country is going so far right you are not even going to recognize it."
>
> A reporter from Women's Wear Daily said she identified herself at the start of the conversation for an interview. . . . What she heard she reported.
>
> A protest exploded instantly from the Department of Justice. Who issued it? "A Justice Department spokesman."

T.R.B. from Washington. *The Off-the-Record Administration,* S.F. Examiner & Chronicle, Oct. 11, 1970, Sunday Punch, at 3, col. 1.

[27] Affidavit of Marvin Kalb at 1, attached to Brief for CBS as Amicus Curiae. *In re* Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970) [the brief is hereinafter cited as Brief for CBS].

[28] Affidavit of Eric Sevareid at 1, attached to Brief for CBS.

[29] Walter Cronkite, a well known news analyst, states:

> The material that I obtain in privacy and on a confidential basis is given to me on that basis because my news sources have learned to trust me and can confide in me without fear of exposure. In nearly every case their position, perhaps their very job or career, would be in jeopardy if this were not the case.

Affidavit of Walter Cronkite at 2, attached to Brief for CBS.

[30] *Id.* at 2. *See also* Affidavit of Jon Lowell at 1, and Affidavit of Min S. Yee at 2, both attached to Brief for Newsweek.

[31] *See, e.g.,* Affidavit of Walter Cronkite and Affidavit of Eric Sevareid, attached to Brief for CBS.

In the case of dissident minority groups, the importance of the confidential relationship is accentuated. Dissident groups often feel oppressed by the 'establishment.' They therefore distrust outsiders generally and newsmen in particular.[34] Members of these groups refuse to talk freely with any newsman until he as an individual has satisfied them that he is a trustworthy and safe repository of their confidence.[35] When a newsman has gained the dissidents' confidence, their practice is to rely on his judgment and a sense of mutual understanding to determine which, among the disclosures made to him, he may publish, rather than to announce formally that something is "off the record." [36] The drying up of sources due to recent government pressure on the news media has been especially pronounced in the case of these dissident minority groups. Numerous newsmen report, for example, that Black Panther or Students for a Democratic Society sources previously open to them are no longer accessible for interview.[37]

The newsman faces a vexing dilemma. Much information is no longer available to him, and that which is, he may be forced to reveal on pain of fine or imprisonment. If he gives in to the pressure to divulge his information, he faces, at best, the loss of confidence in him by his remaining sources, and at worst, physical retaliation by the source whose information he has revealed.[38]

Newsmen relying on confidential information and relationships are not the only ones in trouble. The situation has become equally untenable for newsmen covering public protest activity. It is common for reporters, photographers and television cameramen to operate amidst race riots, protest demonstrations, strikes, campus confrontations and other events which could later give rise to civil or criminal inquiry. Widespread use of newsmen's testimony and films in legal proceedings has exposed the newsmen covering these events to physical abuse from both police and dissidents. Aware of the possibility of the films or testimony later being used against them, law enforcement officers are in many cases no longer willing to cooperate with newsmen covering the protest activities, and indeed often attempt to prevent coverage altogether.[39] The dissidents have reacted similarly. In recent months, newsmen have been stoned, clubbed and beaten, and it has become commonplace for photographers and cameramen to have their cameras smashed by individuals—and police—accusing them of "working for the other side." [40]

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[32] *See, e.g.,* Affidavit of Jon Lowell at 2–3, Affidavit of Frank Morgan at 2–3, attached to Brief for Newsweek; Affidavit of Dan Rather at 2, attached to Brief for CBS; Affidavit of Gerald Fraser at 3, attached to Brief for Petitioner, *In re* Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970) [the brief is hereinafter cited as Brief for Petitioner].

[33] *See, e.g.,* Affidavit of Eric Sevareid at 1, Affidavit of Walter Cronkite at 3, attached to Brief for CBS; Affidavit of Earl Caldwell at 4, attached to Brief for Petitioner. Several reporters who have testified under the compulsion of a subpoena explain that after their testimony their former sources severed all relations with them. *See, e.g.,* Affidavit of Anthony Ripley at 2–3, attached to Brief for Petitioner; Affidavit of Min S. Yee at 2–3, attached to Brief for Newsweek.

[34] This point was stressed in a conversation with this author by Black Panther Attorney Charles Garry, October 15, 1970 in San Francisco. *See also* Affidavit of Earl Caldwell at 2, attached to Brief for Petitioner; Affidavit of Thomas A. Johnson at 2, Affidavit of Wallace Turner at 2, attached to Brief for Petitioner.

[35] Mr. Garry explained that Panther leaders will not talk with any newsman without first verifying the newsman's reputation and integrity with him. *See also* Affidavit of Gerald Fraser at 2, and Affidavit of Earl Caldwell at 2, attached to Brief for petitioner.

[36] Affidavit of Earl Caldwell at 3, attached to Brief for Petitioner.

[37] *See, e.g.,* Affidavit of Thomas A. Johnson at 2, Affidavit of John Kifner at 2–3, attached to Brief for Petitioner; Affidavit of Nicholas Charles Proffitt at 3, attached to Brief for Newsweek.

[38] All of the affidavits in the *Caldwell* case from newsmen who have covered radical groups emphasize the possibility of physical retaliation. One reporter explained:

> Based on my own experiences, being black and knowing the black community, I can say with certainty that any appearance by a black journalist behind closed doors, such as the appearance that Earl Caldwell . . . has been subpoenaed to make . . ., could be personally dangerous to him. . . . A reporter covering the black community . . . [is] dealing with a much smaller community than the white community and this smaller community contains a far greater percentage of activists.

Affidavit of Thomas A. Johnson at 3, attached to Brief for Petitioner. Another newsman explained that members of the Venceremos Brigade, whom he had accompanied to Cuba, threatened him with remarks such as "we're not worried. . . We know where to find you." Affidavit of Min S. Yee at 4, attached to Brief for Newsweek.

[39] In one typical incident, a photographer on assignment for the *San Francisco Chronicle* attempted to photograph Berkeley police officers arresting a young man. As the photographer approached the arrest scene, a sheriff's deputy ran toward him and blocked

Newsmen do not function well in this atmosphere. Perhaps equally important, the number of subpoenas and court orders to testify are becoming prohibitive in terms of sheer time and inconvenience.[41] The newsman and especially the cameraman who covers any public confrontation can plan on spending a good many hours before the grand jury or in court. The newsman who establishes a relationship with any dissident group can expect a similar fate. These court and grand jury appearances may cut significantly into the newsman's working hours.[42]

Such circumstances must inevitably hinder the ability of the press to gather the news. They apparently may also have a detrimental effect on some newsmen's willingness to disseminate the news. Reporters, because of their awareness of the risk of subpoena and the consequences ensuing therefrom, sometimes, and perhaps often, now hesitate to include in their articles or broadcasts certain types of information which they believe will induce a subpoena.[43] Similarly, it has become common for newspapers and television stations to destroy all their unpublished film in order to avoid having it available for production under compulsion of subpoenas duces tecum.[44]

Thus, the greatly expanded use of subpoenas and court orders to testify has significantly impaired the press's ability to gather and disseminate the news. This is perhaps why, for the first time, the news media have mounted organized and massive resistance to the pressure upon them.[45]

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him from going any closer. The photographer identified himself as a member of the press and displayed his credentials. The deputy told him that "he didn't give a damn," and warned the photographer in abusive, obscene language not to take any more pictures. Bay Guildsman, Aug. 1970, at 1, (newsletter of the San Francsico-Oakland Newspaper Guild).

[40] The problem of physical assaults on newsmen, and especially cameramen, has become so significant that San Francisco newsmen have organized to demand that newspaper and television station management provide helmets to all newsmen sent to cover public confrontations and that management assign a reporter to stay with each photographer, to keep an eye out for "bricks, police clubs and attacks by militants." Bay Guildsman, Feb. 1969, at 1, col. 5. The newsmen are also requesting management to provide self-defense training for reporters and cameramen. *Id.* An account of physical assault is given by a *San Francisco Chronicle* photographer: "I was standing . . . where the demonstrators built a bonfire, and I heard someone yell 'Get the pig photographer' and there was a hail of rocks. I turned and ran like hell. Luckily, I was only hit a couple of times in the leg." Bay Guildsman, May 1970, at 1 col. 1.

[41] The legal counsel for a large and nationally prestigious newspaper [see note 14 *supra*] explained that his newspaper's main objection to the subpoenas is probably the great amount of time and inconvenience ensuing therefrom. He said that because of the great number of recent subpoenas, the paper's records department, (the newspaper's library) was spending many of its working hours going back through old files to find clippings and photographs for compliance with subpoenas duces tecum, and that the paper's legal department and individual newsmen were spending a great many hours either in court or before grand juries, or preparing for these appearances.

[42] A reporter for the *San Francisco Examiner*, subpoenaed by the prosecution in a recent San Francisco murder trial, spent four full days in court before being sentenced to five days in jail for refusal to testify. *See* S.F. Chronicle, Oct. 20, 1970 at 5, col. 6.

[43] Two of the courts recently recognizing a privilege have taken account of the possibility of self-censorship. An Illinois court explained:

> The indiscriminate serving of such subpoenas necessarily has a chilling effect upon the operation and functioning of media in the City of Chicago. . . . Members of media necessarily become conscious in their news gathering activities of a potential later questioning concerning their conduct and the contents of their stories in relation to what was published and what was not published. In sum, the necessary consequences of indiscriminate subpoenaing could result in the evils inherent in self-censorship.

Order Quashing Subpoenas, People v. Dohrn, No. 69–3808 (Cir. Ct. of Cook County—Crim. Div. June 12, 1970). Similarly, the Ninth Circuit recognized that "it is not unreasonable to expect journalists everywhere to temper their reporting so as to reduce the probability that they will be required to submit to interrogation." *In re* Caldwell, No. 25,025 (9th Cir. Nov. 18, 1970).

[44] The St Louis Post-Dispatch, for example, on June 25, 1970), dropped its appeal of a district court decision requiring it to turn over unpublished photographs of a demonstration at Washington University because of a compromise reached with the Justice Department. The paper, however, immediately ordered all its photographers henceforth to destroy all unpublished prints after one week. *See* The Guild Reporter, July 10, 1970 at 5, col. 5, (official organ of the American Newspaper Guild).

[45] The media's decision to fight the pressure on a collective basis is quite apparent. For example, in *In re* Caldwell, 311 F. Supp. 358, (N.D. Cal. 1970), Earl Caldwell, a *New York Times* reporter, and the *Times* itself were parties at the district court; the *Times*, however, participated only as an amicus curiae at the Ninth Circuit. *Newsweek*, CBS and the Associated Press filed Amici Curiae briefs in the district court and on ap-

C. The Caldwell case: The problem in microcosm

In re Caldwell,[46] arising out of a San Francisco federal grand jury investigation of the Black Panther Party, typifies the events surrounding the recent series of government subpoenas. The *New York Times* had assigned Earl Caldwell, a black journalist, to cover certain militant and dissident groups including the Black Panthers.[47] Caldwell was given this assignment when it appeared that the *Times'* resident San Francisco correspondents, both of whom were white, were unable adequately to cover the activities and views of the black militants. The militants distrusted them, as whites, and refused to talk freely to them.[48] Caldwell had covered the Panthers almost since the Party's beginnings. Having grown to trust Caldwell, Panthers would discuss Party views and activities freely with him.[49] With this information, Caldwell had written a series of articles, based on material for the most part unavailable to other newsmen. Whenever he had felt that disclosures made to him were intended for publication, he had used them in his articles. Many disclosures were not used because he realized they were meant to be confidential.[50]

Since the summer of 1969, if not earlier, a San Francisco federal grand jury had been conducting an investigation into various Black Panther activities. During the summer several subpoenas were served on Party members and records in connection with an investigation of possible criminal activity.[51] In December the Black Panther Chief of Staff, David Hilliard, was indicted on a charge of threatening to kill President Richard Nixon.[52] The alleged threat was uttered by Hilliard in a public speech broadcast on local radio and television stations.[53] On February 5, 1970, the Government filed a Notice of Motion to Compel Compliance with subpoenas served on several Party leaders, including one Raymond 'Masai' Hewitt, requiring the production of certain documents which related to publication of a number of issues of *The Black Panther*, a weekly paper published by the Party.[54] The Government informed the court "that threats to kill President Nixon had been published and disseminated in the aforesaid issues of *The Black Panther*, and the Grand Jury was inquiring into a possible violation of 18 U.S.C. 1751, captioned 'Presidential assassination, kidnapping and assault,' as well as other matters."[55]

On December 14, 1969, Caldwell published an article in *The New York Times* in which he quoted David Hilliard as saying to him: "We are special. We advocate the very direct overthrow of the Government by way of force and violence. . . . The only solution . . . is armed struggle."[56] According to the Government. "[t]his statement, coming after the threat of the Panthers to kill President Nixon, . . . appeared relevant to an inquiry or investigation of a possible violation in connection with the publication of these statements and re-

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peal to the Ninth Circuit, attaching to the briefs affidavits from many eminent newsmen. Each was represented in both the trial and appellate proceedings by counsel from prominent New York and San Francisco law firms. The willingness of CBS, *Newsweek* and the Associated Press to incur the expense of this legal work in an action to which they were not parties is some evidence of how strongly the media feel the need for a privilege.

This feeling is also apparent at the level of the individual newsman. For example, the Seattle Convention of the American Newspaper Guild (the AFL–CIO union representing newsmen) recently, in response to requests from its membership, adopted a demand for employers to join in newsmen's defense, meet all their legal expenses and indemnify them against any monetary loss, including fines and loss of pay. The convention also called on the American Civil Liberties Union to convene a nation-wide conference to establish a legal-aid fund to help newsmen who choose to resist subpoenas. *See* The Guild Reporter, July 10, 1970 at 1, col. 1.

[46] 311 F. Supp. 358 (N.D. Cal. 1970).

[47] Affidavit of Earl Caldwell at 1, attached to Brief for Petitioner.

[48] Affidavit of Wallace Turner at 2, attached to Brief for Petitioner.

[49] Affidavit of Earl Caldwell at 1–2, attached to Brief for Petitioner.

[50] *Id.* at 3.

[51] According to the Justice Department, the grand jury was investigating possible violations of 18 U.S.C. §§ 2101, 231 ("Riots" and Civil Disorders") & 1341 ("Frauds and Swindles"). Affidavit of Francis L. Williamson at 2, attached to Opposition Memo, *supra* note 7.

[52] Affidavit of Francis L. Williamson at 2, attached to Opposition Memo.

[53] *Id.* at 5.

[54] *Id.* at 2.

[55] *Id.* at 3.

[56] N.Y. Times, Dec. 14, 1969 at 64, col. 1.

lated activities of the responsible individuals."[57] Between December 23, 1969 and January 12, 1970, the FBI made six attempts to contact Caldwell, failing each time.[58] On January 30, 1970, a subpoena was issued to Caldwell requiring him to appear before the grand jury. The schedule attached to the subpoena ordered production of:

> Notes and tape recordings of interviews covering the period from January 1, 1969, to date, reflecting statements made for publication by officers and spokesmen for the Black Panther Party concerning the aims and purposes of said organization and activities of said organization, its officers, staff, personnel and members, including specifically, but not limited to, interviews given by David Hilliard and Raymond "Masai" Hewitt.[59]

After negotiation with Caldwell's attorney the Government continued indefinitely the return date of this subpoena, issuing instead a subpoena ad testificandum, stating that "[i]f Mr. Caldwell's personal testimony before the grand jury turns out to be sufficient for the needs of the grand jury, it may not be necessary for the grand jury to examine the tapes and documents."[60] Caldwell and the *Times* moved to quash the subpoenas. The district court refused to grant the motion, but issued a protective order limiting the scope of permissible inquiry. This order provided that Caldwell "need not reveal confidential associations that impinge upon the effective exercise of his First Amendment right to gather news for dissemination to the public through the press or other recognized media until such time as a compelling and overriding national interest which cannot be alternatively served has been established. . . ."[61]

Despite the protective order, Caldwell continued in his refusal to appear before the grand jury and was held in contempt.[62] On appeal,[63] the Court of Appeals for the Ninth Circuit upheld the protective order but vacated the order requiring Caldwell to appear before the grand jury.[64] Affirming the district court's finding of a privilege in the absence of an overriding national interest,[65] the Ninth Circuit held that mere attendance at secret grand jury proceedings would, in this case, violate that privilege because such an appearance, even under the shield of the protective order, would cause Caldwell's Black Panther sources to sever their relationship with him.[66] The court explained that the "question is whether the injury to First Amendment liberties which mere attendance threatens can be justified by the demonstrated need of the Government for appellant's testimony as to those subjects not already protected by the privilege."[67] Because Caldwell could testify to nothing that was not either protected by the district court protective order or already disclosed in his published articles, his testimony would be superfluous. The court reasoned that since Caldwell's "response to subpoena would be a barren performance—one of no benefit to the Grand Jury,"[68] destroying his "capacity as a news gatherer for such a return hardly makes sense."[69] There was, in other words, "no public interest of real substance"[70] in competition with the jeopardized first amendment freedoms.[71]

The court explained that if such a public interest were ever to arise, it would be on an occasion where a witness even with the protection of the privilege would still serve a useful purpose before the grand jury,[72] The court indicated that such occasions would probably be rare[73] and held that: "[W]here it has been shown that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand Jury interrogation, the Government must respond by demonstrating a compelling need for the witness' presence . . . ."[74] The court expressly declined to specify the requirements of such a governmental showing,[75] and then, in an apparent contradiction of its earlier broad rule, carefully cautioned that the holding was a narrow one, confined to a "newsource that is as sensitive as the Black Panther Party,"[76] and a "reporter who so uniquely enjoys the trust and confidence of his sensitive news source.[77]

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[57] Affidavit of Francis L. Williamson at 3, attached to Opposition Memo.

[58] Affidavit of Raymond N. Byers at 1, attached to the Second Supplement to Opposition Memo.

[59] Schedule attached to subpoena issued by the United States District Court for the Northern District of California, on application of the United States, January 30, 1970. Raymond Hewitt was one of the Black Panther leaders served with an earlier subpoena. See note 54 *supra* and accompanying text.

[60] Opposition Memo at 1.

[61] 311 F. Supp. at 360.

[62] Caldwell appeared in court on June 5, 1970 and made a formal statement that he would not testify before the grand jury, despite the protective order. He was cited for contempt, but sentence was stayed pending appeal. *See* N.Y. Times, June 6, 1970 at 20, col. 2.

[63] The *Times* did not join Caldwell in taking the appeal, but rather participated only as an amicus curiae.

[64] No. 26,025 (9th Cir. Nov. 18, 1970) (slip opinion).

[65] *Id.* at 8.

[66] *Id.* at 11.

[67] *Id.* at 12.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

II. PRECEDENT AND THE PRIVILEGE

Except in jurisdictions where a privilege is granted by statute,[78] the courts until very recently have rejected both the common law and the constitutional claims of privilege, and with a single exception[79] even these courts in statutory-privilege jurisdictions have shown their disapproval of the privilege by construing the statutes as narrowly as possible.[80] The earlier cases presented only the question of the confidential source. With one exception,[81] the privilege issue traditionally arose where the newsman published an explosive article and then refused to identity the source of his information. In the last year, however, questions involving the content of a newsman's information and of films have also reached the courts. Some courts have begun to recognize a qualified constitutional privilege.

A. *Precedent: the common law claims*

Until the fifties, the proponents of a newsman's privilege raised only common law claims.[82] They argued that their pledges of confidentiality should be respected either because their means of livelihood would be in jeopardy were they to break the pledge[83] or because the same policies underlying the establishment of the existing common law privileges[84] dictated recognition of a newsman's privilege.[85] The courts brusquely disposed of these contentions. Stressing that disclosure is required of all witnesses "in order that justice may prevail"[86] and that a newsman's privilege would be "detrimental to the due administration of law,"[87] the courts uniformly rejected the privilege, often citing Professor Wigmore:

> In general, then the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege. . . .
>
> Accordingly . . . a confidential communication . . . to a journalist . . . is not privileged from disclosure.[88]

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[73] *Id.*

[74] *Id.*

[75] *Id.* at 13.

[76] *Id.*

[77] *Id.*

[78] Fourteen states have adopted a statutory privilege. *See* ALA. CODE, tit. 7, § 370 (1958); ARIZ. REV. STAT. ANN. § 12-2237 (1956); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE § 1070 (West 1966); IND. ANN. STAT. § 2-1733 (Supp. 1966); KY. REV. STAT. § 421.100 (1962); LA. REV. STAT. §§ 45:1351-54 (Supp. 1952); MD. CODE ANN., art 5 § 2 (1957); MONT. REV. CODES ANN. §§ 93-601-1 to -601-2 (1964); N.J. STAT. ANN. § 2A:81-10 (1951); N.M. STAT. ANN. § 20-1-12-1 (Supp. 1967); N.Y. CIV. RIGHTS LAW, § 79-H (McKinney Supp. 1970); OHIO. REV. CODE ANN. §§ 2739.04, 2739.12 (Supp. 1966); PA. STAT. ANN., tit. § 330 (Supp. 1965).

[79] *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963).

[80] *See, e.g., In re* Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964) (California statute); Deltec, Inc. v. Dun & Bradstreet, Inc., 187 F. Supp. 788 (N.D. Ohio 1960) (Ohio statute); State v. Donovan, 130 N.J.L. 130, 30 A.2d 421 (1943).

[81] *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963).

[82] The first reported case to raise the constitutional claim was Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), *cert. denied,* 358 U.S. 910 (1958).

[83] *See, e.g.,* Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911).

[84] Common law recognized an attorney-client and a marital privilege. *See* 8 J. WIGMORE, EVIDENCE (McNaughton rev. 1961) §§ 2285, 2290–92, 2294–304, 2306–18, 2320–24 (attorney-client), 2227–28, 2230–32, 2334–36, 2239–43, 2245, 2332–41 (marital).

[85] *See, e.g.,* People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936).

[86] *Id.* 190 M.K. at 416.

[87] *In re* Ornow, 84 N.J.L. 235, 236, 85 A. 1011, 1012 (1913).

[88] J. Wigmore, *supra* note 84, § 2286.

Wigmore's conclusion followed from his four requirements for the traditional establishment of a common law privilege: First, the communications must originate in a confidence that they will not be disclosed; second, the element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; third, the relation must be one which in the opinion of the community ought to be sedulously fostered; and finally, the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[89] Wigmore did not specify why he found the four conditions lacking in the case of the journalist; rather, he dismissed the journalist's claim on the basis of a 1938 report of the American Bar Association Committee on Improvement of the Law of Evidence:

> Of recent years, there have appeared on the statute books of several legislatures certain novel privileges. . . . [T]hey bear the marks of having been enacted at the instance of certain occupational organizations. . . . The demand for these privileges seems to have been due, in part to a pride in their organization and a desire to give it some mark of professional status, and in part to the invocation of a false analogy to the long-established privileges for certain professional communications.
>
> The analogies are not convincing. . . .[W]e recommend against any further recognition of . . . privilege for information obtained by *journalists*.[90]

Wigmore and the courts which cited him as authority assumed that journalists could satisfy only the requirement of confidentiality. They did not undertake seriously to consider whether the other requirements could be met. Failing in most cases to recognize the existence of continuing newsman-source relationships, they did not inquire whether forced disclosure resulted in any injury to that relationship or whether that relationship was one which the public interest dictated fostering. Part of this failure stems from the limited context in which the privilege issue usually arose. In earlier years the question presented usually concerned the newsman's duty to reveal the *identity* of his source of already published information, and the courts focused on the flow of information from source to newsman for publication. Since these early cases did not present a newsman's refusal to reveal the contents of information which the source did not intend be published, the courts were never exposed to the quality of the relationship at all. It is significant that the single early case which presented the question of privilege in regard to the contents of the information was the only case to approve and broadly construe an existing statutory privilege.[91] This court recognized that "tips . . . will dry up . . . unless newsmen are able to *fully and completely* protect their sources of information." [92] Since the courts rejecting the common law privilege failed to recognize the *existence* of any relationship, they did not have to deal with the third and fourth of Wigmore's requirements. They perceived no injury arising from the forced disclosure of communications.[93] Even had they seen such an injury, they probably would have concluded nevertheless that it was outweighed by the fundamental common law duty of every citizen to testify.[94]

The reasoning of these courts seems deficient in several respects. It is curious that courts, and Wigmore himself, who zealously defended law enforcement's privilege to keep secret the identity of its informants [95] failed to see the parallel between the police-informant relationship and that of the newsman and his source. Courts have stressed the confidential nature of the police-informant relationship, emphazing that a police informant relies on the disrection of the police officer to keep his identity secret, and justifying this secrecy on the grounds of the public interest in the flow of information.[96] This public interest is sufficient to overcome any duty to testify that the informant might have. Yet these courts have rejected out of hand the possibility that a similar confidential and continuing relationship is necessary to the effective gathering and reporting of news or that the public interest in the flow of news might be sufficient to outweigh the newsman's duty to testify. The courts seemed to attribute to this duty to testify a certain startling variability: it was a fundamental absolute for newsmen, but was only at times applicable to doctors, lawyers or ministers.[97] This dichotomy is an odd one, for the public interest in the dissemination of news is served by the communications made by source to newsman, while only a private interest is served when an individual communicates to his doctor, lawyer or priest. Furthermore, a newsman's informant is much more likely to be deterred by the threat of forced disclosure than is the individual who makes communications to this doctor or lawyer. This argument was recently expounded by Dean Goldstein of the Yale Law School.[98] patients or clients communicate to a doctor or a lawyer because they need the benefit of the other's skill. Even if they were aware of the possibility of forced disclosure, they would probably still make the communication because their fear of disclosure is outweighed by the need for immediate aid. The newssource, on the other hand, is not motivated by the urgency of his own need for medical or legal advice; rather, he acts because of the usually less compelling motives of spite, hope of financial reward or a desire to be of public service. Hence, his communication is probably the result of a calculation and more likely to be deterred by the risk of exposure.

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[89] *Id.* § 2285.

[90] ABA COMM. ON IMPROVEMENT OF THE LAW OF EVIDENCE (1938), ***cited in*** 8 J. WIGMORE, *supra* note 84, § 2286.

[91] *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963).

[92] *Id.*, 193 A.2d at 185.

[93] None of the courts considering the common law claim even mentioned that any injury might occur. *See, e.g.*, Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911).

[94] The courts had little patience with the newsman, brushing aside his claims as frivolous. One court, for example, dismissed the newsman's argument as follows: "A promise not to testify when so required is substantially a promise not to obey the law." Plunkett v. Hamilton, 136 Ga. 72, 84, 70 S.E. 781, 786 (1911). It is unlikely that these courts would have been swayed by any detailed sophisticated analysis showing compliance with Wigmore's four requirements.

[95] Wigmore exhorted that "A genuine privilege . . . must be recognized for the *identity of persons supplying the government with information concerning the commission of crimes*. . . . That the government has this privilege is well established, and its soundness cannot be questioned." 8 J. WIGMORE, *supra* note 84, § 2374(f). ***See also*** Morgan v. State, 211 Ga. 172, 84 S.E.2d 365 (1954) (official communications statute interpreted as including privilege not to disclose informer's identity); ***In re*** Langert, 5 App. Div. 2d 586, 173 N.Y.S.2d 665 (1958) (commissioner not required to disclose informer's identity or communications); First Nat'l Bank v. Williams, 142 Ore. 648, 20 P.2d 222 (19 (privilege based upon Treasury Department regulations recognized).

B. *The constitutional claims*

Beginning with *Garland v. Torre*[99] in 1958, newsmen began claiming a constitutional privilege. Marie Torre was a newspaper columnist who had quoted in her column an unnamed CBS executive as making certain statements about the actress Judy Garland. Miss Garland brought suit against CBS for breach of contract and libel and sought to force Miss Torre to reveal the source of the statements. Miss Torre refused, claiming that to compel newspaper reporters to disclose confidential sources of news would encroach upon the freedom of the press guaranteed by the first amendment, because "it would impose an important practical restraint on the flow of news from news sources to news media and would thus diminish *pro tanto* the flow of news to the public."[100] Mr. Justice Stewart, then sitting on the Second Circuit, rejected this contention. He accepted the hypothesis that forced disclosure might entail an encroachment of press freedom, but reasoned that since freedom of the press is not absolute, the question to be determined was "whether the interest to be served by compelling the testimon of the witness in the present case justifies some impairment of this First Amendment freedom."[101] He concluded that freedom of the press had to give way to the "paramount public interest in the fair administration of justice."[102]

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[96] Wigmore explained:

> ommunications of this kind ought to receive encouragement. They are discouraged if the informer's identity is disclosed. Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually condition his operation on an assurance of anonymity. . . . The government also has an interest in nondisclosure of the identity of its informers. Law enforcement officers often depend on professional informers to furnish them with a flow of information about criminal ivities. Revelation of the dual role played by such persons ends their usefulness to government and discourages others from entering into a like relationship.

J. WIGMORE, *supra* note 84, § 2374(f). *See also In re* Langert, 5 App. Div. 2d 586, 3 N.Y.S.2d 665, (1958).

[97] The common law and statutory privileges are extremely broad in terms of the communications they protect. An attorney, spouse or physician would have to testify only if client, other spouse or patient waived the privilege [8 J. WIGMORE, *supra* note 84, 2327–29, 2242, 2340, 2388–91], or if the communication fell within a few narrow eptions. For example, an attorney must testify concerning communications made to m where his services had been sought or obtained in the commission of a crime. *See,* ., CAL. EVID. CODE § 956 (West 1966).

[98] Goldstein, *Newsmen and Their Confidential Sources,* THE NEW REPUBLIC, Mar. 21, 70, at 13–15.

[99] 259 F.2d 545 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958).

[100] 259 F.2d at 547–48.

[101] *Id.* at 548.

[102] *Id.* at 549.

In 1961, the constitutional claim was again invoked. In *In re Goodfader*,[103] plaintiff, who was seeking damages against the Civil Service Commission of the City of Honolulu for wrongful ouster from her job, sought to force a newsman to reveal the source of his information that the Commission had been contemplating the ouster. Refusing to comply with the court order to disclose his source, the newsman claimed that the court order was an unconstitutional abridgment of freedom of press, since the interest served by compelling disclosure did not justify any impairment of press freedom. On appeal the Supreme Court of Hawaii recognized that the first amendment freedoms were to be given broad scope and that the forced disclosure may constitute an impairment of freedom of the press, but concluded that "such an impairment may not be considered of a degree sufficient to outweigh the necessity of maintaining the court's fundamental authority to compel attendance of witnesses and to exact their testimony. . . ." [104]

In 1968 in *State v. Buchanan* [105] the Oregon supreme court also rejected the constitutional privilege. The editor of a campus newspaper who had published an interview with seven unnamed drug users was subpoenaed by the local District Attorney to appear before the grand jury. She refused to reveal the names of the drug users and was cited for contempt. On appeal she argued that freedom of the press necessarily includes freedom to gather the news, and that since certain news stories cannot be obtained unless the reporter can promise anonymity to a confidential informer, forced disclosure abridges a protected freedom. The court rejected this contention on the grounds that the newsman has no constitutional right to information which is not accessible to the public generally and that to give the newsman such special privileges would conflict with the equal protection clause of the Federal Constitution.[106]

Where the courts dealing with the claims of a common law privilege brusquely dismissed the privilege, as the *Buchanan* court did in the constitutional context, the *Torre* and *Goodfader* courts made some attempt to analyze the claims asserted. Reluctantly willing to assume that forced disclosure may hinder the flow of news and hence constitute an impairment of freedom of the press, these courts nevertheless arrived at the same conclusion previous courts had: any rights or interests the newsman may have must give way to his duty to testify. The courts purported to reach this conclusion through a process of balancing the interests involved. However, the balancing process they employed was deficient in several respects. In the first place, they disregarded the Supreme Court's dictate to balance the interests and weigh the circumstances in *each particular case*.[107] Mr. Justice Stewart, in *Torre*, went as far as determining that he was not faced with "a case where the identity of the news source is of doubtful relevance" [108] and that "[t]he question asked of the appellant went to the heart of the plaintiff's claim," [109] but he also used general language about the "right of a litigant to enlist judicial compulsion of testimony" [110] and the "paramount public interest in the fair administration of justice." [111] He never did examine the actual consequences of disclosure to the newswoman involved. Hence, in the *Torre* case the newswoman Torre's interest was never weighed against the litigant Garland's actual needs and interests; rather, the general press interest in the availability of news was weighed against some general lofty interest in the aministration of justice. *Goodfader*, while beginning with a statement that in the area of first amendment rights a balancing of the interests must be undertaken, never went on to explore those interests. The *Goodfader* court "readily perceive[d] the disadvantages" [112] to a newsman of forced disclosure, but denied that such disadvantages constituted an impairment of constitutional rights and concluded that even if constitutional rights were being impaired, the impairment was not sufficient to outweigh "the necessity of maintaining the court's fundamental authority to compel the attendance of witnesses and to exact their testimony. . . ."[113] Thus the court weighed in the abstract the press's interest in non-disclosure against the necessity of maintaining the court's authority.

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[103] 45 Hawaii 317, 367 P.2d 472 (1961).

[104] *Id.* at 329, 367 P.2d at 480.

[105] 250 Ore. 244, 436 P.2d 729, *cert. denied,* 392 U.S. 905 (1968).

[106] *Id.* at 248–49, 436 P.2d at 731.

[107] Barenblatt v. United States, 360 U.S. 109, 126 (1959); Speiser v. Randall, 357 U.S. 513, 520 (1958); American Communications Ass'n v. Douds, 339 U.S. 382, 399 (1950).

[108] 259 F.2d at 549.

[109] *Id.* at 550.

[110] *Id.* at 549.

[111] *Id.*

[112] 45 Hawaii at 327, 367 P.2d at 479.

Second, in their balancing processes the *Torre* and *Goodfader* courts overestimated the weight of the interest in compelling testimony and underestimated the interest asserted by the press. The interest in compelling testimony has never been as "fundamental" or "paramount" as these courts assumed. Both common law and statute have long recognized numerous privileges against compelled testimony,[114] and if these same cases had arisen in a statutory newsman's privilege state, the courts would have applied the privilege, any fundamental or paramount interest notwithstanding. Moreover, these courts labelled the litigant's right to compelled testimony a 'public' interest and the newsman's interest in non-disclosure a 'private' one.[115] Logically this categorization makes little sense. In the case of civil litigation, the public has no interest in the outcome; only the litigants have anything at stake, and hence compelled testimony serves only their private interests. Conversely, the public has every interest in the newsman-source relationship, because from this relationship comes much of the flow of news.[116] Hence, the question is not whether the newsman's private interest is sufficient to overcome the public's interest in compelled testimony, but rather, whether the *litigant's* private interest is sufficient to overcome the public interest in the flow of news.

A series of Supreme Court cases[117] indicates that a private litigant's interests are normally subordinate to those of the press. In these cases, beginning with *New York Times v. Sullivan*,[118] the Court severely restricted the power of the state to award damages in libel and invasion of privacy suits against the press because of the chilling effect of such damages. Plaintiffs in these suits can now recover only where actual malice or highly unreasonable conduct is shown. The interests of private litigants, then, must give way to those asserted by the press. *New York Times* was decided several years after *Torre* and *Goodfader*, and was apparently unanticipated by them. But whatever the validity of a pre-*New York Times* holding that the press's first amendment rights must give way to the litigant's must give way to the litigant's interest in compelled testimony, such a holding, in light of the subsequent Supreme Court decisions, can no longer stand without some serious re-examination.

The interest in compelled testimony was apparently seen by the *Torre* and *Goodfader* courts to represent not only the litigant's interest in the outcome of the suit, but also the state's interest in the prestige or authority of its judiciary.[119] However, this interest, in the absence of a clear and present danger to judicial proceedings, is still insufficient to override the press' first amendment claims, for the Supreme Court has consistently held that it must give way to freedom of the press. In 1941 in *Bridges v. California*,[120] a case involving a highly publicized and controversial trial, the Court upheld the right of a newspaper to publish, while sentences and a motion for a new trial were under consideration, virulent criticism of and political threats against the judge. The Court also upheld the right of one of the defendants to publish threats of a nationwide labor strike if the new trial were not granted. Six years later, in *Craig. v. Harney*,[121] the Court upheld, because of the absence of a clear and present danger to the proceedings, the right of a newspaper to publish highly critical and threatening editorials against a judge considering a motion for a new trial. In *Wood v. Georgia* [122] the Court upheld the right of a county sheriff to publish harsh criticism of local judges who had just ordered a grand jury investigation into alleged vote-buying activities. The sheriff's campaign against the investigation included delivery of a letter repeating the criticism to members of the jury. In *Garrison v. Louisiana* [123] the Court denied to the state the right to punish by criminal libel, false, muckracking and demogogic statements made by a district attorney about the conduct of local judges.

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[113] *Id.* at 329, 367 P.2d at 480.

[114] See note 84 *supra*. The common law privileges have been codified in almost all American jurisdictions. Numerous new privileges have also been statutorily recognized. See, *e.g.*, CAL. EVID. CODE §§ 994 (physician-patient), 1033-34 (priest-penitent) (West 1966).

[115] The *Goodfader* court, for example, discussed the interests as follows:

> However, despite the broad scope and protective status of First Amendment freedoms and privileges, it is clear that none of them is absolute, and that whether, in any given case, an asserted right under that amendment will prevail or not depends upon the particular circumstances involved and the weighing and balancing of the protection afforded by the right asserted against the purposes that would be defeated or denied by recognition of the freedom or privilege. The *private* or *individual* interest involved must, in each case, be weighed in balance against the *public* interest affected.

45 Hawaii at 324–25, 367 P.2d at 478 (emphasis added).

[116] See notes 25–31 *supra* and 185-92 *infra* and accompanying text.

[117] New York Times v. Sullivan, 376 U.S. 254 (1964); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1966); Rosenblatt v. Baer, 383 U.S. 75 (1966); Time, Inc. v. Hill, 385 U.S. 374 (1967); Greenbelt Coop. Publishing, Ass'n v. Bresler, 398 U.S. (1970).

[118] 376 U.S. 254 (1964).

[119] The *Torre* court spoke of the obligation to testify and the right of a litigant to compel testimony as "incidents of the judicial power of the United States." 259 F.2d at 549. The *Goodfader* court mentioned the necessity of maintaining "the court's fundamental authority to compel the attendance of witnesses and to exact their testimony. . . ." 45 Hawaii at 329, 367 P.2d at 480.

[120] 314 U.S. 252 (1941).

In light of these cases, the question arises why both the *Torre* and *Goodfader* courts chose to subordinate the newsman's interest in nondisclosure to the not-so-hallowed 'public' interest in compelled testimony. The answer seems to be that neither court had any strong conviction that *newsgathering* is a constitutionally protected incident of freedom of the press.[124] *Bridges, Craig, Wood, New York Times* and *Garrison* concerned the right to *publish*, which is the core of the first amendment freedom of press; there was, on the other hand, no precedent for the protection of newsgathering, rather only several lower court cases holding that newsgathering (or "access to the news") *is not* constitutionally protected.[125] The *Torre* and *Goodfader* courts were willing to proceed on the assumption that newsgathering could find some protection—but not enough constitutional protection to make any impairment of newsgathering a significant encroachment on freedom of the press. Thus, in the balancing process they were not willing to attribute any great weight to the interest asserted by the newsman. Because these courts saw in forced disclosure only a *slight* impairment to an *unprotected*—or *penumbra*—incident of freedom of the press, they reasoned that the interest in compelled testimony must prevail.

The factual context in which privilege cases arise has changed. Because of the recent widespread use of subpoenas and court orders, with the ensuing 'drying up' of sources and physical assaults on newsmen, the impairment—to both the aggregate flow of news and to the ability of the individual newsman to gather news—is no longer slight.[126] In consequence, newsgathering must be protected if the benefits of freedom to publish are to be realized. Perceiving this necessity, four courts have now recognized a qualified constitutional privilege. In *Alioto v. Cowles Communications, Inc.*[127] the Mayor of San Francisco brought a libel action in federal court for a magazine article causing him of having Mafia connections. When the authors of the article refused to answer questions relating to the identity of their source, the Mayor filed a motion to hold them in contempt. The district court refused to grant the motion, affirming a "First Amendment claim of privilege and sustaining it in this case under these circumstances, because . . . there is a lack of reasonable necessity at this time, and . . . there are other available methods of handling the situation." [128] In *People v. Dohrn* [129] an Illinois circuit court quashed six subpoenas duces tecum served on local newspapers and television stations by members of the militant Weatherman faction of the SDS, under indictment for harges stemming from a violent rampage in the streets of Chicago. This court recognized the privilege because "[t]he indiscriminate serving of such subpoenas necessarily has a chilling effect upon the operation and functioning of [the] media."[130] The court required the party issuing the subpoena to show: First, probable cause that the film sought contained relevant evidence; second, that the use of subpoenas was the only method available of obtaining that evidence; and, third, that the evidence was so important that non-production thereof would cause a miscarriage of justice.[131] in the *Caldwell* case,[132] the district and circuit courts perceived that the availability of news is not the only interest asserted by the newsman; rather the courts recognized that when a newsman refuses to reveal the identity of his source or the contents of that source's information, he may also be asserting the source's interests in freedom of speech and association.[133]

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[121] 331 U.S. 367 (1947).

[122] 370 U.S. 375 (1962).

[123] 379 U.S. 64 (1964).

[124] The *Goodfader* court was only willing to "assume, for the purposes of this case, that the forced disclosure of a reporter's confidential source of information may, to some extent, constitute an impairment of the freedom of the press." 45 Hawaii at 329, 367 P.2d at 480. Judge (now Justice) Stewart, in the *Torre* case, took a firmer stand, but still seemed to hold some reservations; he accepted "the *hypothesis* that compulsory disclosure . . . *may* entail an abridgment of press freedom by imposing some limitation upon the availability of news." 259 F.2d at 548 (emphasis added). By 1965 Mr. Justice Stewart had apparently completely accepted newsgathering as a protected incident. Dissenting in Estes v. Texas, 381 U.S. 532 (1965), in which the majority held that the televising of trials is a violation of a defendant's right to due process, he wrote that "[t]he suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms." *Id.* at 614–15.

[125] *See, e.g.*, Tribune Review Publishing Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958); United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954); *cf.* Seymour v. United States, 373 F.2d 629 (5th Cir. 1967).

[126] See text accompanying notes 32–44 *supra*.

[127] C.A. No. 52150 (N.D. Cal. Dec. 4, 1969).

[128] Transcript of Proceedings at 167, *id.*

[129] Order Quashing Subpoenas, No. 69–3308, (Cir. Ct. of Cook County—Crim. Div., June 12, 1970).

The balancing process employed by *Alioto, Dohrn* and *Caldwell* differed in two major respects from the process earlier employed by the *Torre* and *Goodfader* courts: First, the degree of impairment to both the flow of news and the individual newsman; and, second, the protection to be accorded to newsgathering. In addition, the *Caldwell* courts weighed a new set of interests—the source's freedoms of speech and association—in the balance. When a source confides to a newsman, for whatever reasons he finds it advantageous or desirable to do so, his first amendment right of freedom of speech may come into play; when the source chooses to serve whatever objective he may have by putting his trust in the newsman and making the confidential communication to him, the source may be exercising his right of freedom of association. The *Goodfader* and *Torre* courts had not grappled with these contentions—probably because they were never argued to them. Whatever the accuracy in 1958 and 1961 of the *Torre* and *Goodfader* courts assessment of the impairment to the flow of news as slight, it is clear that the impairment in 1970 has become great.[134] The remaining questions, then, are first, whether it was the earlier courts, or the more recent ones, who used the more correct method to judge the weight of the interest of the press, and second, whether there is any constitutional basis for the *Caldwell* courts' recognition of a privilege based partially on the source's freedoms of speech and association.

III. SUGGESTED THEORY FOR THE CONSTITUTIONAL PROTECTION OF INTERESTS ASSERTED BY THE NEWSMAN

In the process of gathering, publishing or broadcasting[135] the news, three sets of interests come into play:[136] *the interest of the source of the informa-*

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[130] *Id.* at 2.

[131] *Id.* at 3.

[132] 311 F. Supp. 358 (N.D. Cal. 1970); see notes 46–77 *supra* and accompanying text.

[133] "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S CONST. amend. I. The district court in *Caldwell* recognized that the relief sought by petitioner presented "issues that go to the very core of the First Amendment, the resolution of which may well be determinative of the scope of the journalist's privilege in sensitive areas of freedom of speech, press and association. . . ." 311 F. Supp. at 360. The court explained that when "the exercise of the grand jury power of testimonial compulsion . . . may impinge upon . . . First Amendment rights of freedom of speech, press and association . . ., such power shall not be exercised in a manner likely to do so until there has been a clear showing of a compelling and overriding national interest. . . ." *Id.* at 360. The Ninth Circuit agreed that "the First Amendment requires this qualified privilege. . . ." No. 26,025 (9th Cir. Nov. 18, 1970) (slip opinion) at 8.

[134] See notes 32–44 *supra* and accompanying text.

[135] Television has become probably a more important medium for the distribution of news than the newspapers. The *New York Times*, the most prestigious publication in the country, has a daily circulation of approximately 890,000. *Time* Magazine has a circulation of approximately 3.9 million, 1970 WORLD ALMANAC 250, 351. The nationally televised network news programs have, on the other hand, audiences in the tens of millions. Hence, any discussion of the press must today include broadcasting as well as publishing.

[136] A fourth set of interests also arises: that of the *subject* of the information. This subject—who may also be the source—is the person or group that the information concerns, for example, a rioter whom the newsman films, or a government official whom a confidential source accuses of accepting bribes. The interests of the subject of the information do not belong in a discussion of newsman's privilege. His interests are protected by the laws against libel, or invasion of privacy, or both; or if he will be subject to criminal prosecution, by the fourth, fifth, sixth and fourteenth amendments. If the subject happens also to be the criminal defendant or private litigant seeking to force disclosure or production of films, his interests may *override* the newsman's, but they have no bearing on the original determination of whether or not the interests asserted by the newsman are of constitutional stature.

tion, if there is one, in making his information known to the newsman, the public, or both; *the interest of the newsman* in being free to gather and publish what information he chooses; and *the interest of society* in the dissemination and receipt of news. These interests are inseparable. Society receives news when the newsman gathers and disseminates it by publication or broadcast. The source, who normally does not have his own means of dissemination, reaches the public through the newsman's publication. The Supreme Court in discussing the goals of the constitutional guarantees of freedom of the press has succintly recognized the inseparability of these interests: "Those guarantees are not for the benefit of the press so much as the benefit of all of us." [137] Mr. Justice Murphy, concurring in *Craig v. Harney,*[138] had earlier expounded in greater detail: "A free press lies at the heart of our democracy and its preservation is essential to the survival of liberty. Any inroad made upon the constitutional protection of a free press tends to undermine the freedom of all men to *print and to read* the truth." [139] This part analyzes these interests in three contexts: First, the constitutional protection of newsgathering, examined independently of the question of whether or not there is a confidential source; second, the constitutional protection of a news source's interests when he intends his communication to be published, but his identity kept secret; and, third, the constitutional protection of a confidential communication where the source intends that the contents of the communication be kept secret.

A. The constitutional protection of newsgathering

The Supreme Court has held that both the dissemination and the receipt of information are constitutionally protected. In holding the Sherman Antitrust Act applicable to a news distribution association which prevented non-member newspapers from using information gathered by member newsmen, the Court said that the first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." [140] In *Martin v. Struthers* [141] the Court struck down a city ordinance forbidding the door to door distribution of handbills because the "[f]reedom to distribute information to every citizen wherever he desires to receive it" is protected by the first and fourteenth amendments.[142] In *Lamont v. Postmaster General* [143] the Court held that a post office regulation requiring the Postmaster General to detain and deliver only upon the addressee's request certain communist propaganda abridged the addressee's right to receive the material. Hence, dissemination and receipt of news are squarely within the protection of the first amendment. This protection would seem to extend to newsgathering, and not merely as a penumbra right, for unless the news is gathered, it cannot be disseminated and received.

Other Supreme Court cases support this conclusion. The dissemination and receipt of news is usually accomplished through the act of *publication,* the core of the first amendment guarantee—or, in the case of television or radio news, through the act of broadcasting which is also protected by the first amendment.[144] Restrictions on *publication* are traditionally recognized as encroachments on freedom of the press.[145] However, insisting that freedom of the press be broadly defined,[146] the Court has extended the first amendment protection to invalidate other types of restrictions where these restrictions would have an eventual chilling effect on publication. In *Grosjean v. American Press Co.*[147] the Court struck down a Louisiana statute placing a tax on newspapers. In *New York Times v. Sullivan,*[148] *Curtis Publishing Co. v. Butts,* and *Walker*

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[137] Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

[138] 331 U.S. 367 (1947).

[139] *Id.* at 383 (emphasis added).

[140] Associated Press v. United States, 326 U.S. 1. 20 (1944). *See also* Associated Press v. KVOS, 80 F.2d 575 (9th Cir. 1935).

[141] 319 U.S. 141 (1943).

[142] *Id.* at 146. In 1968 in Stanley v. Georgia, 394 U.S. 557 (1968), the Court reaffirmed that freedom of speech and press "necessarily protects the right to receive." *Id.* at 564.

[143] 381 U.S. 301 (1964).

[144] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969).

[145] *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

[146] *See, e.g.,* Time, Inc. v. Hill, 385 U.S. 374, 389 (1967); Martin v. Struthers, 318 U.S. 141, 143 (1942).

[147] 297 U.S. 233 (1936).

[148] 376 U.S. 254 (1964).

v. Associated Press,[149] and *Time, Inc. v. Hill*[150] the Court severely limited the power of the states to award damages for libel and invasion of privacy because of the chilling effect of such damages.

These cases were concerned with the chilling effect on *future* publication. Newspapers that are taxed may go out of business; papers that are held liable on one story may fear to publish a similar one in the future. Restrictions on newsgathering, however, have a chilling effect on *present* publication—what is not gathered cannot be published.[151] Furthermore, the chilling effect of a tax or civil liability is speculative. A newspaper may survive a tax, and it may risk liability if it believes a story will increase its circulation. The chilling effect of restrictions on newsgathering is, on the other hand, certain and measurable: the press can only publish what information it can gather; what it cannot obtain will not be published. Because of the direct cause-and-effect relationship between restrictions on newsgathering and restrictions on publication or broadcasting, the argument for first amendment protection from limitations on newsgathering is far stronger than the one for protection from taxation or civil liability. If the Court has granted the latter, presumably when presented with an appropriate case, it would also grant the former. In the absence of other overriding interests, such protection would today necessarily have to include freedom from forced disclosure or production of films, because the omnipresent threat of forced disclosure or production of films is now a great hindrance to the newsman's ability to gather the news.[152]

The Court has, in another context, indicated some limitation on the right of the press to gather news, and several lower courts have expressly denied any constitutional protection to newsgathering (or "access to the news").[153] However, this precedent is not determinative of the question of privilege. The lower courts' express denials of any constitutional protection of newsgathering are unsupported by any Supreme Court dicta or holdings, and the two Supreme Court cases indicating some limitations are easily distinguishable. In *Estes v. Texas*[154] the Court granted a new trial to a convicted defendant on the grounds that pre-trial publicity and the highly disruptive presence of numerous reporters, cameras, and microphones in the courtroom during the trial constituted a denial of due process. The Court indicated that such distracting press presence and the televising of trials is not to be permitted. In *Sheppard v. Maxwell*[155] the Court reversed a conviction on similar grounds, and again indicated that some control of press newsgathering activity is necessary.

These cases should not be taken as a rejection of constitutional protection for newsgathering. In the first place, the behavior of the press in both cases was patently outrageous,[156] and beyond legitimization on constitutional—or any other—grounds. Second, the thrust of the Court's language—and outrage—was at the state officials who encouraged the publicity and circus atmosphere for their own political purposes.[157] Third, and most important, the explicit fifth,[158] sixth[159] and fourteenth[160] amendment guarantees of a criminal defendant's right to a fair trial and an impartial jury were at stake. The Court did not reject a right to gather news; it never considered the right. Rather, the Court focused on and upheld a defendant's right to a fair trial. Because this same right is at stake when a criminal defendant seeks to compel the newsman's testimony or production of his films, the *Estes* and *Sheppard* limitation on the right of the press to gather news is relevant to the proper scope of the privilege. However, this limitation does not defeat the privilege in such cases altogether. The rule laid down by the Court in *Estes and Sheppard* was that "the presence of the press must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged."[161] Hence, where a defendant could show prejudice or disadvantage by non-disclosure of information or non-production of films, there is presumably no grounds for a newsman's claim of privilege. On the other hand, the question of privilege where there is no showing of prejudice or disadvantage is not illuminated by anything in the *Estes* or *Sheppard* opinions.

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[149] 388 U.S. 130 (1966) (companion cases).

[150] 385 U.S. 374 (1967).

[151] To this extent restrictions on newsgathering may be similar to forbidden prior restraints. For a discussion of these restraints see Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713-20 (1931) (invalidating as an unconstitutional previous restraint a state statute providing for the abatement, as a public nuisance, any any "malicious scandalous and defamatory newspaper, magazine or other periodical").

[152] See notes 32-44 *supra* and accompanying text.

[153] *See* Tribune Review Publishing Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958); United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954); State v. Buchanan, 250 Ore. 244, 436 P.2d 729 (1968); *cf.* Seymour v. United States, 373 F.2d 629 (5th Cir. 1967).

[154] 381 U.S. 532 (1965).

[155] 384 U.S. 333 (1966).

[156] For example, in the *Sheppard* case, involving the murder of a prominent socialite and the trial of her osteopath husband, the press had broadcast live the coroner's inquest complete with the five and one-half hour interrogation of the defendant about his married life and a love affair with his nurse. The press covered the trial in such great numbers that the movement of reporters in and out of the courtroom made testimony almost impossible to hear, despite the installation of loud speakers. Reporters hovered so closely over the defense table that Sheppard and his lawyer had to leave the courtroom to speak confidentially. The newspapers repeatedly published out-of-court statements of witnesses concerning matters which were not admissible evidence. 384 U.S. at 339, 340, 344, 356-57.

[157] The *Sheppard* case, for example, came on for trial two weeks before the November general election at which the chief prosecutor was a candidate for judge and the presiding judge was a candidate to succeed himself. *Id.* at 342.

Furthermore, *Estes* and *Sheppard* throw no light on the question of privilege in relation to government prosecutions and private litigants. Non-disclosure of information or non-production of films may work to the disadvantage of civil litigants, but their right to compel testimony, unlike the criminal defendant's sixth amendment right, and their right to a fair trial, unlike the criminal defendant's fifth and fourteenth amendment rights, lack constitutional stature and are, according to *New York Times*[162] and the series of cases following it,[163] subordinate in any event to freedom of the press. Similarly, *Estes* and *Sheppard* are not helpful in relation to a privilege from government subpoena. The proposition that a defendant's fifth, sixth and fourteenth amendment rights override both the state's interest in convicting criminals and the press' interest in gathering news, gives no clue to the outcome when the press asserts its interest in gathering news against the state's interest in convicting criminals. Thus, with the exception of the privilege in relation to the prejudiced criminal defendant, there is no precedent dictating rejection of newsgathering as a constitutionally protected function of the press.

B. The constitutional protection of a source's interests where he intends his identity be kept secret

Threat of forced disclosure adversely affects the interests of a confidential source as well as the interests of the public. When the source communicates information to a newsman, intending that the information be published but his identity be kept secret, he too has an interest in the publication: whatever his reasons, he desires that information disseminated to the public and publication through the newsman is his means of dissemination. His communication to the newsman is an exercise of his right of freedom of speech, but he exercises that right only on condition that his anonymity be respected. The greater the threat of disclosure, the less his willingness to risk communicating to a newsman.[164] Therefore, the question is whether there is any constitutional basis for recognition of a right to anonymity as an incident of freedom of speech. Supreme Court precedent provides ample authority for such a right. The Court has recognized the right of the recipient of printed matter to remain anonymous. In *Lamont v. Postmaster General*[165] the Court held that the Post Office could not compromise the anonymity of recipients of "communist propaganda" by requiring them to request in writing that the material be delivered to them. In *United States v. Rumely*[166] the Court held that a witness could not be held in contempt for refusing to answer questions put to him by a house investigating committee pertaining to the identities of bulk purchasers of political lobbying material.

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[158] "[N]or shall any person be . . . deprived of life, liberty, or property. witnesses in his favor. . . ." U.S. CONST. amend. VI.

[159] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [and] to have compulsory process for obtaining witness in his favor. . . ." *Id.* amend. VI.

[160] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." *Id.* amend. XIV.

[161] 384 U.S. at 358.

[162] New York Times v. Sullivan, 376 U.S. 254 (1964).

[163] Greenbelt Coop. Pub. Ass'n v. Bresler, 398 U.S. 6 (1970); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 1967); Rosenblatt v. Baer, 383 U.S. 75 (1966).

[164] See text accompanying notes 29–37 *supra.*

[165] 381 U.S. 301 (1965).

[166] 345 U.S. 41 (1953).

The Court has extended this right to anonymity to the author and the distributor of printed matter In *Talley v. California*[167] the Court struck down a city ordinance making it a misdemeanor to distribute any handbill which did not identify its author. The Court held the ordinance void on its face because "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."[168] The *Talley* ordinance prohibited any handbill distributed in any place under any circumstances and was thus void for overbreadth. The Court specifically declined to pass on the validity of an ordinance limited in purpose to identifying those responsible for fraud, false advertizing and libel. Hence whether the *Talley* rule protects anonymity in all circumstances was left an open question, but it would seem to extend at least to all political expression and information about "public matters of importance." Since the Court in other contexts had admonished that "[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs,"[169] the areas of speech unprotected by the *Talley* rule are probably limited to those specifically mentioned by the *Talley court:* fraud, false advertizing and libel.

Talley provides a strong basis for the newsman's privilege to refuse to identify his source. *Talley* protects the anonymity of the news sources who choses to print and distribute his information himself. This right to anonymity should not be denied simply because the source chooses to publish through an established press medium. To do so would penalize those who have not the means to print and distribute or broadcast themselves—and few sources do, at least on a large scale. A recent Supreme Court case seems to indicate that such penalization would be unconstitutional. In *Red Lion Broadcasting Co. v. FCC*[170] the Court upheld FCC regulations, promulgated under the "fairness" doctrine, which required radio and television broadcasters to allow equal times to advocates of each side of a public issue. The Court discussed the necessity, due to the shortage of air frequencies, of requiring licenses to broadcast and of limiting the number of licensees.[171] The Court went on to hold that although the technological necessity of limiting the number of broadcasters made constitutional the government practice of requiring licenses and thereby giving control of the airwaves to a limited group of persons, neither the government nor the broadcasters themselves could constitutionally bar non-licensees from access to the air waves for the expression of their views.[172] Under the holding of this case, those who do not themselves have the means to broadcast cannot be denied the right to disseminate through the established broadcasting media. This holding may indicate that the *Talley* right of anonymity cannot be limited to those who have the means to print and distribute or broadcast themselves.

The Supreme Court cases establishing the right of freedom of association further support the conclusion that newsmen should be free to protect the anonymity of their newssources. The Court has recognized a constitutional right of individuals who would be ineffectual acting separately to associate in order to assert their interests collectively. In *NAACP v. Button*[173] the Court held a state statute barring "improper solicitation of any legal . . . business" unconstitutional as applied to the activities of the NAACP because "[i]n the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for the achieving of lawful objectives of equality of treatment by all government . . . ."[174] Similarly, in *Brotherhood of Railroad Trainmen v. Virginia* ex rel. *Virginia State Bar*[175] and *United Mine Workers v. Illinois Bar Association*[176] the Court struck down state regulations against the solicitation of legal business as unconstitutional as applied to the labor union practice of retaining lawyers and referring to them union members' injury claims. The Court explained that "the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be vain and futile if workers could not talk together freely as to the best course to follow."[177] An important incident to this right of association is the right to privacy of association, which confers on members of protected associations the right to anonymity. In *Sweezy v. New Hampshire*[178] six members of the Court[179] upheld the right of a witness in front of a state investigating committee to refuse to answer questions about the membership of the Progressive Party in New Hampshire. In a later series of cases[180] the Court struck down various state attempts to force disclosure of NAACP membership lists because "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association."[181]

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[167] 362 U.S. 60 (1960).
[168] *Id.* at 65.
[169] Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).
[170] 395 U.S. 367 (1969).
[171] *Id.* at 387–89.
[172] *Id.* at 400–01.
[173] 371 U.S. 415 (1963).
[174] *Id.* at 429.
[175] 377 U.S. 1 (1964).
[176] 389 U.S. 217 (1967).

The *Trainmen, United Mine Workers* and NAACP cases provide a compelling argument for the news source's right to anonymity—either as an incident of his right of freedom of speech, or as an incident of a separate and distinct right of freedom of association.[182] Since the news source lacks the means to exercise his right of freedom of speech because he has not the means to print and distribute, he associates with the newsman. Since his goal is the dissemination of information, an interest protected by the first and fourteenth amendments, his association with the newsman should be within the protection of these amendments. Since "inviolability of privacy" is indispensable to the preservation of this association, the newssource, as a party to a protected association, should have the right to remain anonymous.[183] Alternately, the right may also be an incident of freedom of speech: *Talley* recognized a right of anonymity as an incident of freedom of speech in order to encourage public discussion of matters of importance. To limit this right to the few who have the means to print and distribute or broadcast themselves, makes the right futile for the majority who do not have the means themselves and effectively nullifies any encouraging effect on freedom of speech that *Talley* was intended to create.

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[177] Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1, 5–6 (1964).

[178] 354 U.S. 234 (1957).

[179] There was no majority opinion. Justices Black, Douglas and Brennan joined in the opinion of Chief Justice Warren, upholding the witness' right to silence. Justices Frankfurter and Harlan concurred.

[180] Gibson v. Florida Legislative Comm., 372 U.S. 539 (1963); Louisiana v. NAACP, 366 U.S. 293 (1961); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama *ex rel.* Patterson 357 U.S. 449 (1958). *See also* Shelton v. Tucker, 364 U.S. 479 (1960) (holding unconstitutional a state statute compelling every teacher, as a condition of employment, to file annually an affidavit listing all organizations to which he has belonged or contributed).

[181] Bates v. City of Little Rock, 361 U.S. 516, 523 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958). In striking down a state statute imposing criminal sanctions on persons using contraceptives, the Court in Griswold v. Connecticut, 381 U.S. 479 (1965), discussed the *NAACP* cases and concluded: "In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion." *Id.* at 483.

[182] Freedom of association was implied to be a separate and distinct right as early as Sweezy v. New Hampshire, 354 U.S. 234 (1957). Four Justices explained that [e]qually manifest as a fundamental principle of a democratic society is political freedom of the individual. . . . Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.

Id. at 250 (opinion of Chief Justice Warren; Justices Black, Douglas and Brennan joining). In NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958), the Court for the first time isolated the right: "these [are] indispensable liberties, whether of speech, press or association. . . ." *Id.* at 461. By 1960, in Bates v. City of Little Rock, 361 U.S. 516 (1960), it was "now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by . . . the Fourteenth Amendment." *Id.* at 523.

[183] The source and the newsman may not have identical interests, but identity of interest has not been a requirement of the freedom of association. In the *Trainmen* and *United Mine Workers* cases, the right was upheld even though the parties to the association, the workers and the attorneys, may not have had identical interests.

The newsman would have standing to assert the source's right to anonymity. In the first of the *NAACP* cases the Court explained that if the members of the NAACP were constitutionally entitled to withhold their connection with the Association, the Association would have standing to assert this right for them, because "[t]o require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion." NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461 (1958). This reasoning would apply with equal force to the newsman asserting his source's right to privacy of association.

The states in *Trainmen* and *United Mine Workers* could not defeat the statutory rights of workers by prohibiting them from associating; a fortiori, the state should not be able to discourage free speech by defeating the source's right of anonymity merely because he chooses to disseminate his information in association with the newsman.[184]

C. *The constitutional protection of a confidential communication where the source intends the contents of the information be kept secret.*

Where a newssource communicates to a newsman, desiring the *contents* of his communication be kept secret, the source can claim no interest in the dissemination of the information nor can the newsman assert society's interest in the receipt of that information. However, non-published confidential communications should still derive constitutional protection because of their indirect effect on the dissemination of news. The importance of these non-published, confidential communications cannot be overemphasized. Although this confidential information will not directly reach the public, it has a vital impact on that which is published. This information gives the newsman a wealth of background, enabling him to assess events as they happen, track down newsworthy stories and analyze and interpret the information which is given to him for dissemination.[185]

A noted diplomatic correspondent explains that "[s]ecrecy, privacy, off-the-record, background, deep background—these are the words which describe the kind of work involved in the reporting of diplomatic nuance and detail and the building of a pattern which ultimately emerges as a story."[186] Another prominent newsman adds that:

> [m]y work, and that of reporters generally, requires more than merely assembling facts. A reporter can know all the facts and still not know the truth. In order to understand the facts, reporters must constantly appraise the accuracy and meaning of words and the significance of deeds. In that effort, reporters require a background of confidential judgements and observations obtainable only in privacy and in trust.[187]

Mike Wallace, a well known reporter for the Columbia Broadcasting System, gives two examples of the role of his confidential background information. In the first instance, in preparing a broadcast on the production of a motion picture, the filming of which involved the use of large numbers of ships, airplanes and personnel, all supplied at great cost by the United States Navy, Wallace obtained a list of ten "particularly embarassing questions" which certain officials within the Defense Department "believed the Navy should have been prepared to answer satisfactorily before permitting the use without charge of its facilities and equipment by the movie's producer."[188] Wallace explains that:

> Those questions, which could not have been published without a breach of confidence, were nonetheless of great value in interviewing the officials responsible for that decision. The interviews in turn were critical in developing a report on the use of public property and funds for private purposes—a story which resulted in congressional investigation and remedial action by the Navy Department.[189]

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[184] Since the source would have the right to anonymity, citing the newsman for contempt when he refused to identify the source would be an unconstitutional form of state action. *See* Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948).

[185] Walter Cronkite describes the importance of these communications as follows:

> My work involves the preparation, through reading and talking with news sources, of the considerable volume of material necessary for such extemporaneous broadcasts as political conventions, elections and space missions, and for analytical broadcasts such as my daily radio program. It also involes participation in the determination of which stories should be covered on daily television news broadcasts and how they should be covered and participation in the selection of the news items to be broadcast and reading and correcting and, in some cases rewriting those items. All of this work entails the exercise of editorial judgment based on an extensive background of information and ideas gathered from a wide variety of sources.
>
> In doing my work, I (and those who assist me) depend constantly on information, ideas, leads and opinions received in confidence. Such material is essential in digging out newsworthy facts and, equally important, in assessing the importance and analyzing the significance of public events.

Affidavit of Walter Cronkite at 1–2, attached to Brief for CBS, *supra* note 27.

[186] Affidavit of Marvin Kalb at 1, attached to Brief for CBS.

[187] Affidavit of Dan Rather at 1, attached to Brief for CBS.

[188] Affidavit of Mike Wallace at 2, 3, attached to Brief for CBS.

[189] *Id.* at 3. Wallace also describes a series of informal conversations with President Nixon during the early stages of the 1968 campaign:

> Because of the informality of such discussions the language used was more casual than the candidate would use in public. Moreover, ideas were discussed which were ten-

Similarly, confidential information contributed to an informative and balanced series of articles published by *the New York Times* about the Black *Panthers* [190] During the year preceeding these articles, Earl Caldwell, the *Times* man assigned to cover the Panthers, had developed a close relationship with them, as a result of which he received great amounts of information in confidence. With this backlog of confidential information to sharpen his understanding, and probably his skepticism, of the information given to him for publication, Caldwell could attempt to explain the attitude of the Panthers, and more important, the reasons for that attitude.[191] Without such background information Caldwell could have done "little more than broadcast press releases and public statements." [192]

Broadcasting press releases and public statements is not the role assigned to the press by the constitution. Underlying every freedom of the press case yet decided has been the belief that an informed and informative press is the mainstay of a democratic society. For example, in *Near v. Minnesota* ex rel. *Olson*, [193] while striking down a state statute allowing the state to enjoin publication of certain 'malicious, scandalous and defamatory' publications, the Court recognized the abuses of such publications, but refused to allow prior restraints because: [t]he administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press. . . .[194]

Similarly, in *Grosjean v. American Press Co.*[195] the Court struck down a state tax on newspapers because: The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity, and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.[196]

The theme running through these and all other freedom of the press cases is the vital role of the press in informing the public.[197] Because of the impor-

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tative and would later be refined or rejected. Had there been any thought at the time that I could be compelled to divulge a full report of some of these meetings, my presence would never have been permitted. As it was, I was able in the course of those sessions to acquire an understanding of the candidate which contributed significantly to my coverage of the campaign and, perhaps more important, an understanding of the President which has been invaluable in attempting to assess and analyze the present Administration.

Id. at 4.

[190] *See, e.g.,* N.Y. Times, Jan. 21, 1969 at 20, col. 1; *id.*, June 6, 1969 at 22, col. 4; *id.*, June 15, 1969 at 57, col. 2; *id.*, June 18, 1969 at 23, col. 1; *id.*, July 20, 1969 at 43, col. 2; *id.*, July 22, 1969 at 21, col. 1; *id.*, July 27, 1969, § E, at 6, col. 5; *id.*, Dec. 14, 1969 at 64, col. 1.

[191] *See, e.g.*, Caldwell's article, N.Y. Times, Dec. 14, 1969 at 64, col. 1. *See also* Affidavit of Earl Caldwell at 3, attached to Brief for Petitioner, *supra* note 33.

[192] This phrase is Walter Cronkite's. It is an apt one. Cronkite used it in explaining that without a backlog of confidential information to enable him to track down stories and assess and interpret events as they happen, he would only be able to mouth the official version of the news. *See* Affidavit of Walter Cronkite at 2, attached to Brief for CBS.

[193] 283 U.S. 697 (1931).

[194] *Id.* at 719 20.

[195] 297 U.S. 233 (1936).

[196] *Id.* at 250.

[197] It would be difficult to find a case where this idea is not expressed. In Associated Press v. United States, 326 U.S. 1 (1945), the Court held the provisions of the Sherman Anti-Trust Act applicable to a new distribution syndicate because the first amendment "rests on the assumption that the widest possible dissemination of information . . . is essential to the welfare of the public." *Id.* at 20. In New York Times v. Sullivan, 376 U.S. 254 (1964), the Court in limiting the right of the state to award damages in libel actions, considered the issue against "the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open. . . ." *Id.* at 270. In the companion cases, Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130 (1966), involving libel actions brought by public figures, the Court reiterated and approved the *New York Times* rule as "an important safeguard for the rights of press and public to inform and be informed on matters of legitimate interest." *Id.* at 169. In Estes v. Texas, 381 U.S. 532 (1965), in reversing a criminal conviction on due process grounds because of pre-trial publicity and chaotic courtroom conditions, the Court said that "[t]he free press has been a mighty

tance assigned to this role, the Court has protected the press from most encroachments upon it.[198] It is an obvious proposition that the press cannot inform the public until and unless it itself is informed. Confidential, not-for-publication communications may never directly reach the public, but they are a crucial factor in making a knowledgeable, informed press, capable of gathering, assessing and interpreting information that is for publication. The greater the threat of forced disclosure, the less this confidential information is available to the press.[199] To the extent that such information is withheld from the press, the public is indirectly but necessarily less well informed. The body of case law designed to protect the press because of the importance of the press' role in informing the public is of little value if the courts withhold protection from one of the key elements necessary to the press' ability to perform in that role. If the reason for constitutional protection of the press is a well informed public, confidential communications from source to newsman should fall within the scope of the protection.

IV. THE SCOPE AND EXTENT OF THE PRIVILEGE

If there is to be a privilege, the question arises: what kind of privilege and what scope is it to have? Various distinctions have been suggested: No privilege where the information sought goes "to the heart of the inquiry"; [200] no privilege where the government can show an overriding state interest; [201] no privilege where the information is unavailable or not readily available elsewhere; [202] privilege limited to information imparted under a promise of confidence; [203] privilege limited to information which has been published, or alternately, to information which has not been published.[204] In light of the interests and considerations previously discussed, it is apparent that the kind of privilege and its scope must depend on the situation in which it is asserted.

A. *The privilege against governmental subpoena*

The Supreme Court has required *inter alia* that an overriding state interest be demonstrated before a state may encroach upon protected first amendment rights.[205] This standard may, however, be inapposite in newsman's privilege cases. In the first place, the government usually cannot make enough of a factual showing for a court to determine if such an interest is involved. Second,

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catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences. . . ." *Id.* at 539. In Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), upholding FCC regulations promulgated under the "fairness doctrine," the Court extolled "the First Amendment goal of producing an informed public capable of conducting its own affairs. . . ." *Id.* at 392.

[198] In only two cases has the Court upheld restrictions on the press. Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965). Both of these cases involved the right of criminal defendants to a fair trial. See notes 154–60 *supra* and the accompanying text. The Court has also indicated that the press is subject to the clear and present danger test. *See* Craig v. Harney, 331 U.S. 367 (1947); Bridges v. California, 314 U.S. 252 (1941). But the Court has yet to find such a danger in any case involving the professional press.

[199] See text accompanying notes 29–37 *supra.*

[200] Garland v. Torre, 259 F.2d 545, 549–50 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958).

[201] The *Caldwell* district court granted the reporter Caldwell a protective order, but reserved jurisdiction to "entertain a motion for modification . . . at any time upon a showing by the Government of a compelling and overriding national interest in requiring Mr. Caldwell's testimony which cannot be served by alternative means. . . ." 311 F. Supp. 358, 362 (N.D. Cal. 1970). The Ninth Circuit affirmed this part of the lower court ruling. No. 26,056 (9th Cir. Nov. 18, 1970). See text accompanying notes 46–77 *supra.*

[202] The court in People v. Dohrn, No. 69–3808, (Cir. Ct. of Cook County—Crim. Div. June 12, 1970) would allow defendants to subpoena news films "where the use of subpoenas was the only method available of obtaining that evidence." Order Quashing Subpoenas, *id.* at 3. See text accompanying notes 129–31 *supra.* The *Caldwell* court also allowed for the possibility of the government not being able to obtain its evidence elsewhere. See note 201 *supra.*

[203] See text accompanying notes 230–31 *infra.*

[204] Four of the statutory privileges are limited to information actually published or broadcast, *See* CAL. EVID. CODE § 1070 (West 1966); KY. REV. STAT. § 421.100 (1963); MD. ANN. CODE, art 35 § 2 (1957); N.J. STAT. ANN. § 2A:81-10 (1952). The privilege in the *Caldwell* case, on the other hand, was limited to unpublished information. See text accompanying note 231 *infra.*

[205] *See, e.g.,* Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); Thornhill v. Alabama, 310 U.S. 88 (1940).

even if the government can show the presence of an overriding state interest in the individual case, forced disclosure or production of film is, in the long run, detrimental to the state's interest. Third, if the privilege can be defeated for any reason, it will not serve to alleviate the chilling effect on the flow of news and is little better than no privilege at all. These reasons, which suggest that an absolute privilege against governmental subpoena may be appropriate, merit detailed examination.

The Supreme Court, in first amendment cases, has consistently required a careful examination of the state interest asserted to determine whether it justifies the abridgment of the first amendment rights. Such an examination, however, is often impossible in newsman's privilege cases. For example, in the *Caldwell* case,[206] the record of events available to all participants except, of course, the government, provides no indication as to what the government hoped to ascertain from Caldwell's testimony or notes, whom specifically the grand jury was investigating, or whether the information sought from Caldwell was available from other sources. Where a subpoena is issued in connection with secret grand jury proceedings, this factual vacuum is the normal state of affairs.[207] In such a factual vacuum governmental action which encroaches on first amendment rights is impermissible, for the Court has set up a strict set of standards by which the state's interest is to be weighed, and satisfaction of these standards requires some sort of factual showing. First, where the state asserts such an interest it must make some sort of factual showing that such an interest does in fact exist, and that it is properly a matter of governmental concern.[208] Where legislative authorizing resolutions have been loosely worded, the Court has required some indication from the investigating committee as to what the subject of an investigation conducted thereunder was, so that it could be determined whether any state interest was in fact involved.[209] Where the information available to the Court was insufficient for such a determination, the Court has held that a witness was protected from questioning.[210] Second, in the area of constitutionally protected freedoms, overbreadth has always been recognized as a fatal deficiency in governmental action. The Court has consistently struck down statutes and regulations which attempt to reach a substantive evil property a subject of governmental control but also restrict constitutionally protected conduct.[211] To prevent a similarly overbroad effect in connection with the compulsory testimony of witnesses in legislative investigations, the Court has carefully examined the evidence set forth by the state to determine whether there was a reasonable relationship between the interest asserted by the state and the information it sought to ascertain.[212] The Court has defined this requirement as follows:

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[206] *In re* Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970).

[207] This factual vacuum arises, of course, because of the traditional secrecy of grand jury proceedings and is compounded by the often very broad subject matter of grand jury investigations. A subpoena served on *Newsweek*, described at note 2 *supra*, is similarly uninformative.

[208] For example, in Watkins v. United States, 354 U.S. 178 (1957), the Court upheld the right of a witness to refuse to answer questions put to him by a House Investigating committee because neither the authorizing resolution nor the questions asked gave any indication of what governmental interest was being asserted. The Court explained:

> The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. . . . But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of Congress. . . . Nor is the Congress a law enforcement or trial agency. . . . Investigations conducted solely . . . to 'punish' those investigated are indefensible.

Id. at 187. Because the Court had "no doubt that there is no congressional power to expose for the sake of exposure" [*id.* at 200], and since the Government made no showing that a more legitimate interest was involved, the Court struck down the witness' contempt citation.

[209] *See, e.g.,* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1962); Scull v. Virginia *ex rel.* Comm. on Law Reform and Racial Activities, 359 U.S. 344 (1959); Watkins v. United States, 354 U.S. 178 (1957); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

[210] *See, e.g.,* Scull v. Virginia *ex rel.* Comm. on Law Reform and Racial Activities, 359 U.S. 344 (1959); Watkins v. United States, 354 U.S. 178 (1957). *Cf.* Barenblatt v. United States, 360 U.S. 109 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959).

[211] *See, e.g.,* NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Talley v. California, 362 U.S. 60 (1960).

[212] *See, e.g.,* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); DeGregory v. New Hampshire, 383 U.S. 825 (1966); Scull v. Virginia *ex rel.* Comm. on Law Reform and Racial Activities, 359 U.S. 344 (1959); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Watkins v. United States, 354 U.S. 178 (1957); *cf.* Barenblatt v. United States, 360 U.S. 109 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959).

> We understand this to mean—regardless of the label applied, be it 'nexus' 'foundation,' or whatever, that it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights . . . that the state convincingly show a substantial relationship between the information sought and a subject of overriding and compelling state interest.[213]

Third, a corrollary to the overbreadth doctrine is that where there are methods available to the state less destructive of first amendment freedoms, the state must use them.[214]

In the *Caldwell* case the only showing the Government made was its assertion that: "[Hilliard's statement as published by Caldwell] coming after the threat of the Panthers to kill President Nixon, made in the November 20, 1969 issue of *The Black Panther* . . . appeared relevant to an inquiry or investigation of a possible violation in connection with the publication of these statements and related activities of the responsible individuals."[215] From such a showing no court could determine if the government's subpoena to Caldwell was necessary or even relevant to any state interest. The grand jury, which meets only to determine if there is probable cause to believe that a crime has been committed and that the subject of the inquiry committed it, is unique in the almost total lack of limitations imposed upon its powers of inquiry.[216] However, where most challenges of grand jury proceedings pose fourth, fifth, sixth and fourteenth amendment questions, a claim of newsman's privilege raises first amendment issues; hence, the applicable standards should be those adopted in legislative investigation cases. If the *Caldwell* subpoena would not meet the requirements imposed upon legislative subpoenas, it should not be upheld simply because it was issued in connection with a grand jury proceeding.

Assuming the government were to supply enough information to make the necessary showing of a valid or even compelling state interest, it is questionable whether this interest would in the normal criminal case be overriding. The government's interest is *not* an interest in *national security*, but rather a relatively narrower one of *convicting criminals* This distinction is an important one, for certainly the government's interest must be judged in relation to the magnitude of the harm asserted and shown. And although the number of government subpoenas has been increasing, the number of criminals who might escape conviction because of a newsman's privilege probably does not present a problem equal to one of national security.[217]

Furthermore, in the great majority of the cases where the government has recently issued subpoenas, the governmental interest may be still narrower. The government often employs the device of "planting" informants in dissident groups. This practice is a matter of public record.[218] Hence, in the *Caldwell* case, for example, it is highly unlikely that Caldwell would have had more information than an informant Black Panther Party member. Thus, when the government chose to subpoena Caldwell, its interest was the convenience of obtaining evidence for prosecution without utilizing or revealing its own informants. Exposure of governmental informants may not be too steep a price to incur in order to avoid subpoenaing a newsman. Exposure of one informant does not prevent the government from utilizing another. Dissident groups have always been aware of the use of informants, but despite this awareness, the government still manages successfully to employ the device. Forced disclosure from a newsman, on the other hand, would do irrevocable harm to that newsman, for it would cost him all his remaining sources,[219] and its detrimental impact would be significantly felt by all other newsmen.[220] Furthermore, any expectation of long range benefits to the administration of justice stemming from subpoenas to the professional press is almost entirely illusory. The more subpoenas issued compelling newsmen to disclose confidential communications, the fewer sources and the less confidential information there will be for reporters to divulge. The more subpoenas issued for newsmen to testify in court about events they have witnessed or to produce films thereof, the less able they will be to cover such events and shoot such films and the less information government will be able to derive from this source.

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[213] Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 546 (1963).

[214] *See, e.g.,* NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1963); Louisiana v. NAACP, 366 U.S. 293 (1961); Shelton v. Tucker, 364 U.S. 479 (1960); Martin v. Struthers, 319 U.S. 141 (1942).

[215] Affidavit of Francis L. Williamson at 3, attached to Opposition Memo, *supra* note 7. See note 57 *supra* and accompanying text.

[216] For a detailed discussion of the grand jury system, see Comment, *The Rights of a Witness Before A Grand Jury,* 1967 DUKE L.J., 111–22 (1967).

[217] It is likely that few, if any, criminals would escape conviction because of a newsman's privilege. Films that the government could not subpoena as evidence would still caping punishment. In a great many cases where newsmen are subpoenaed, the government has other means of obtaining the evidence. See text accompanying note 218 *infra.* Police chiefs and attorneys-general from several statutory privilege jurisdictions, surdential information would probably not result in a significant number of criminals escontribute toward the eventual conviction of offenders. Since the published or televised films would be available to any government agency that spent the fifteen cents to buy the newspaper or took the time to watch the broadcast, they would still be of great use in identifying the offenders. Similarly, the loss of the newsman's testimony as to confiveyed in 1949, unanimously concluded that the privilege had not hampered law enforcement in their jurisdictions. See note 221 *infra* and accompanying text.

[218] *See, e.g.,* N.Y. Times, June 4, 1969, at 16, col. 3 (police undercover agent testifying in congressional hearing about his infiltration of the SDS); *id.,* Dec. 14, 1969 at 1, col. 1 (FBI Director Hoover's testimony before congressional committee about intensification of FBI efforts to "penetrate" the Black Panthers by undercover agents). The role of these undercover agents is cogently illustrated by a recent series of events: on October 19, 1970 Assistant District Attorney Joseph A. Phillips, the prosecutor in a New York bombing trial, revealed that a police undercover agent had infiltrated the
The agent turned the dynamite over to bomb squad detectives, who replaced the explosives with simulated facsimiles. The agent then returned the package to its hiding place, from which it was later taken and used in an attempt to blow up a local police station. According to prosecutor Phillips, this dynamite, which, of course, did not explode, would be key evidence in the subsequent trial. *Id.,* Oct. 20, 1970, at 1, col. 6.

Where the governmental interest asserted is national security, exposure of governmental informants may not be too high a price to pay in order to preserve the press' ability to gather and disseminate the news. Forcing the newsman to testify may, in a given case, advance the state's interest, but by drying up the newsman's sources or hindering his ability to gather news in the future, it may also make impossible the publication of the very stories that alert the government and the public to the fact that national security or self-preservation is imperiled. Forced disclosure, then, is a hindrance to any long-range governmental interests. Privilege from forced disclosure, on the other hand, does not adversely affect these long-range interests. The New York Law Revision Commission, in its 1949 Report, gathered a series of statements from various attorney generals and police chiefs in jurisdictions where a privilege had been in force. These officials were unanimous in stating that the pivilege had not interferred with law enforcement or the prosecution of criminals, and in fact had, on occasion, provided valuable assistance.[221]

The overriding state interest standard would create a limited privilege, that is, one which could be defeated in individual cases. Apart from inadequacies of such a privilege due to the difficulties inherent in a governmental showing of such an interest, a limited privilege does little to alleviate the chilling effect of forced disclosure and production of films on the flow of news. No source can predict ahead of time whether there will be an overriding state interest in disclosure of his information or identity. No policeman[222] or political protester knows whether films taken of him or information written about him, will be related to an overriding state interest. A privilege that forces the newsman to appear and divulge all information in certain cases will do very little to accomplish the goals of the proposed privilege.

If the privilege is limited in scope, so that the newsman has only the right to refuse to answer *certain* questions or produce *certain* films, he will still be subject to grand jury appearances. Such proceedings are secret and no one will ever be sure of what was said or done therein. The newsman's assurance that only non-privileged information or film was divulged is apt not to inspire much confidence.[223] Similarly, a privilege limited in application—for example, one which can be defeated where the information goes to the heart of the inquiry or where the state shows an overriding interest—is unsatisfactory. With such a privilege the policeman or protester knows that there will be times when the newsman must appear and divulge everything and he has no way of predicting whether his particular case will be one of the times: with the recent rash of subpoenas he may well assume that his case will indeed be one of the times.

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[219] See notes 33 & 38 *supra* and accompanying text.

[220] See notes 25–37 *supra* and accompanying text.

[221] *See* letter from Sen. Thomas Desmond to the New York Law Revisions Commission, June 23, 1948, in 1949 N.Y. LAW. REVISION COMM'N REPORT, at 131–32. Despite the recommendation of this committee, the New York Legislature rejected the privilege in its 1949 session. *See id.* at 28–29. The Legislature did, however, finally adopt a privilege in its 1970 session. *See N.Y.* CIV. RIGHTS LAW § 79-H (McKinney Supp. 1970).

[222] Law enforcement officers, subject to prosecution under federal civil rights statutes, may have as much reason as protestors to fear the newsman's films. For example, a former deputy sheriff of Alameda County, California was indicted for the shooting of three persons during a May 1969 riot at Berkeley, California. S.F. Chronicle, Oct. 20, 1970, at 2, col. 1. In another instance, a *Los Angeles Times* reporter was killed by a tear-gas projectile fired into a bar by a Los Angeles sheriff's deputy during a riot. The Justice Department announced that a Deputy Assistant Attorney-General would be sent from Washington to help the local United States Attorney "monitor the sheriff's investigation," and that the Department would begin an investigation "should any discrepancies occur in the findings of the Sheriff's Department." L.A. Times, Sept. 1, 1970, at 1, col. 6.

The Supreme Court, in other contexts, has recognized the chilling effect of this sort of uncertainty, and has stuck down procedural rules, otherwise constitutionally permissible, where the uncertainty of their operation would tend to restrain exercise of first amendment rights. In *Speiser v. Randall*[224] The Court invalidated a state rule that a taxpayer, in order to obtain a tax exemption, must prove that he did not advocate violent overthrow of the government. The Court explained that the state could constitutionally deny exemptions where *it* proved that the claimant advocated violent overthrow, but it could not put the burden on the taxpayer of proving he did *not* engage in such advocacy. The Court discussed "the complexity of the proofs and the generality of the standards applied ... [which provided] but shifting sands on which the litigant must maintain his position."[225] Because of these uncertainities, where "particular speech falls close to the line separating the lawful and the unlawful,"[226] a taxpayer, aware of the difficult burden of proof he would later have to bear, "necessarily must steer far wider of the unlawful zone than if the State must bear these burdens."[227] Thus, because uncertainties inherent in the procedure would serve to deter lawful as well as unlawful advocacy, the regulation was unconstitutional.

Similarly, in *Dombrowski v. Pfister*[228] the Court allowed individuals to seek a declaratory judgment of the invalidity of an overbroad statute, rather than forcing them to follow the normal procedure of undergoing prosecution in the hopes that state courts would narrow the statute's application to within permissible limits. The Court explained the reason for its holding as follows:

> If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution .... By permitting determination of the invalidity of these statutes without regard to permissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution, makes that case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution unaffected by the prospects of its success or failure.[229]

Dombrowski and *Speiser* suggest that, because of the particular context in which the privilege today arises, an absolute privilege may be appropriate in order to avoid the chilling effect of the uncertainities necessarily inherent in any limited privilege. Whatever might once have been the merits of a limited privilege, today it cannot suffice; there have simply been too many subpoenas. Where, in the past, pressure on newsmen was infrequent or, at least, not a subject of public knowledge, the source, policeman or protester had little reason to anticipate the possibility of forced disclosure. Consequently, the non-existence of a privilege or the uncertainties in an existing privilege were not of great moment. Today, because of the great number of recent subpoenas, public attention is directly focused on the frequency of governmental attempts to force disclosure or production of films. Hence, the uncertainties of the limited privilege become increasingly significant.

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[223] The Ninth Circuit in *In re Caldwell* No. 26,025 (9th Cir. Nov. 18, 1970) recognized this problem:

> The secrecy that surrounds Grand Jury testimony necessarily introduces uncertainty in the minds of those who fear a betrayal of their confidences. These uncertainties are compounded by the subtle nature of the journalist-informer relation. The demarcation between what is confidential and what is for publication is not sharply drawn and often depends upon the particular context or timing of the use of the information. Militant groups might very understandably fear that, under the pressure of examination before a Grand Jury, the witness may fail to protect their confidences with quite the same sure judgment he invokes in the normal course of his professional work.

Id. at 10 (slip opinion).

[224] 357 U.S. 513 (1958).

[225] *Id.* at 526.

[226] *Id.*

[227] *Id.*

[228] 380 U.S. 479 (1965).

[229] *Id.* at 487.

Many commentators advocating a privilege have suggested that it be limited to communications intended to be confidential and not for publication. The district court's protective order in the *Caldwell* case,[230] for example, allowed the newsman to refuse to answer questions concerning statements made to him or information given to him "unless such statements or information were given to him for publication or public disclosure."[231] Such a privilege is insufficient and probably creates more problems than it solves. In the first place, a privilege limited to "confidential" information does not aid the reporter who covers public political protest activities. His information is obtained under circumstances involving no assurances of confidence, but compelled testimony or production of films nevertheless impairs his ability to cover these activities.[232] Second, much information is revealed under circumstances where the element of confidentiality, though present, is elusive of proof in a court of law. The record in the *Caldwell* case, for example, shows that Black Panther sources gave information to Caldwell only on an unspoken understanding that he would sense what was non-confidential and intended for publication, and what was not.[233] In the *Torre* case,[234] the court noted with respect to the claim of confidentiality there asserted: "This confidentiality was apparently not explicit: 'Q. Did this network executive ask you to withhold giving his name? A. No, he did not. It is just that having worked in the business so long, in cases like this you don't mention the man's name.' "[235]

To force the source to label each item "confidential" or "non-confidential," especially where he speaks at length to the newsman, would make the task of communicating to the newsman at times quite burdensome, and in any event, this approach does not solve the problem. Unless the newsman's word is to be accepted as proof that the communication was labeled "confidential," the proceedings would be at an impasse. The newsman, without bringing his source into court, cannot prove the confidentiality; nor, however, can the government disprove it. To accept, on the other hand, the newsman's unsupported word is, as a practical matter, not a wise policy. The average newsman would assume that the source did intend certain communications to be confidential whether or not the source remembered to label them as such. The newsman holds to his profession's ethics, which prohibit disclosure;[236] at the same time, he has a self-interest in not being cited for contempt. Since he feels his source's communications are inviolate from any forced disclosure, he resents being put in the awkward position of having to testify about anything said to him, whether confidential or not. Under these circumstances, allowing the matter to be determined upon the newsman's unsupported word makes perjury an attractive proposition.

Any suggestion that the privilege be limited to published or, alternately, unpublished information, does not withstand close scrutiny. The published-unpublished distinction creates a vital uncertainty which might well nullify the proposed protective effect of the privilege: neither the source nor the newsman can predict what will be published. The source can *prevent* his information from being published by labelling it "not-for-publication," but neither he nor the newsman can be sure that information intended for publication will be published. The newsman's editors might decide that only a portion of the information is important enough to publish, or they might reject it altogether for lack of space, fear of libel or pre-emption by later events. Hence, the source cannot rely on the protection of the privilege, and he may still be deterred by the threat of forced disclosure.

The published-unpublished distinction has further flaws. Under a privilege limited to published information the newsman would have to disclose the source of unpublished information or the contents of such information or both. Under a privilege limited to unpublished information the newsman would have to testify as to the source of published information or the contents of such information, or both. In so far as either privilege is limited to the identity of the source, it is insufficient because it does not protect the equally important contents of the source's communications.[237] In so far as the privilege does extend to the contents of the communications, the published-unpublished distinction is logically unsound. The privilege limited to published information[238]—the newsman would have to disclose unpublished information—is a useless safeguard, since it is the unpublished information which is at issue. Similarly, if a privilege is to be recognized, it is pointless to limit it to unpublished information. Under such a privilege the newsman would have to disclose published information, but published information is by definition already disclosed, and short of asking the newsman if he in fact wrote or broadcast the item, there would be nothing to inquire about without slipping back into the area of privileged unpublished information. Hence, a requirement that the newsman testify as to already published information accomplishes nothing.[239]

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[230] *In re* Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970).
[231] *Id.* at 362.
[232] See notes 39–42 *supra* and accompanying text.
[233] See notes 34–36 *supra* and accompanying text.
[234] Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).
[235] 259 F.2d at 547 n.3.
[236] See note 23 *supra*.

The limited privilege, then, whether limited in terms of the published-nonpublished—or broadcast—distinction, the confidential-nonconfidential criterion, or the overriding state interest exception, is an unworkable and self-defeating safeguard. Aside from the difficulties in the mechanics of its application, the limited privilege does not alleviate the chilling effect of forced disclosure and the consequent impairment to the flow of news. At the same time, if the limited privilege, by at times allowing forced disclosure, may occasionally advance the governmental interest in the individual case, it can only hinder that interest over the long run. An absolute privilege, on the other hand, will encourage the flow of news without in the long run adversely affecting any governmental interest.

B. The privilege as against subpoenas by criminal defendants

When a criminal defendant seeks the newsman's information, there is neither any reason nor any justification for an absolute privilege. Colliding with the first amendment right of the press is the defendant's sixth amendment right to compel testimony[240] and his equally basic right to a fair trial.[241] The Supreme Court has recognized that where these rights collide, those of the press must give way.[242] Moreover, the chilling effect on confidential relationships present in forced disclosure under governmental pressure is much less in the case of forced disclosure from defense subpoenas. Information relevant to a criminal trial is either political information or information concerning unlawful or potentially unlawful activities. Sources who communicate this type of information usually fear forced disclosure because of government pressure. It is a rare case where a source anticipates his information being useful to a criminal defendant.[243] Hence, defense subpoenas would not greatly dry up sources or hinder the ability of the press to maintain confidential relationships.

Even defense subpoenas do, however, to a certain extent hinder the ability of the press to cover public protests, strikes, or political activities. These subpoenas put the press in the position of taking sides. A newsman knows he is in court only because of legal compulsion; the public might well believe that the newsman's appearance results from his support of the defendant on trial. With the recent wave of political protest activity and the resulting arrests for such crimes as feloniously assaulting an officer and inciting to riot, the news media have been served with a large number of subpoenas from defendants hoping the films taken during the protest activity would prove their innocence.[244] Partly as a result of these frequent court appearances, newsmen are facing increasing hostility from law enforcement officers, who in many cases no longer are willing to cooperate with newsmen covering the activities.[245] Furthermore, in terms of sheer time and inconvenience, these court appearances are prohibitive.[246] Thus, a balance must be struck between the conflicting interests of the press and the defense.

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[237] See notes 185–92 *supra* and accompanying text.

[238] Four of the statutory privileges are limited to published information. See statutes cited at note 204 *supra*.

[239] The Ninth Circuit in the *Caldwell* case perceived the futility of such a requirement. See text accompanying notes 68–69 *supra*.

[240] "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI.

[241] See note 158 *supra*.

[242] *See* Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); see text accompanying notes 154–55 & 161 *supra*.

[243] The only sources who would fear defense subpoenas are law enforcement officials who make remarks about pending investigations or cases. There is no other category of sources whose remarks would be particularly helpful to the defense. Individual instances may occur, but they would be rare.

One solution is to limit the defense's right to subpoena newsmen to those cases where the defendant can show that the newsman's information or film is relevant and helpful to his defense and is not readily available elsewhere.[247] That this scheme is constitutionally permissible is seen from the fact that in the police-informant identity cases the Supreme Court has applied identical standards: the police must disclose the informant's identity only where the defendant can show that information to be relevant and helpful to his case.[248] Any question raised by the extra requirement of non-availability from other sources can be justified by the fact that in the newsman's privilege case, it is a first amendment interest rather than the public interest of mere convenience in the flow of information to the police which is balanced against the defendant's right to a fair trial.

C. The privilege in relation to private litigation

New York Times v. Sullivan [249] and the series of cases following it [250] provide a useful insight into the proper scope of the newsman's privilege in ordinary civil litigation. In these cases the Supreme Court subordinated the rights of private litigants to the public interest in a free and vigorous press by severely limiting the right of recovery for libel and invasion of privacy. A plaintiff can recover only where he shows "actual malice," defined as knowing falsehood or reckless disregard for the truth,[251] or "highly unreasonable conduct." [252] The Court in these cases held that where vindication of private rights would have a chilling effect on the freedoms of speech and press, the press must prevail as long as its conduct is not deliberately mendacious, reckless or highly unreasonable. The press, in other words, is to be penalized only where it acts in ways not justified by legitimate news reporting considerations and is guilty of socially undesirable conduct. The reasoning of the Court in these cases would seem to apply to the question of forced disclosure of information or production of films, for the same competing interests and policy considerations are present. Threat of such disclosure deters confidential news sources, chilling their exercise of free speech rights and impairing the press' ability to gather and disseminate the news.[253] Because of this chilling effect, the policies behind *New York Times* and its progeny seem applicable to the privilege issue.

News films deserve special treatment under such a standard since filmtaking seldom constitutes malicious, reckless or highly unreasonable conduct. Hence under the *New York Times* series of cases the press should be privileged against production of films. Aside from the question of films, the problem of forced disclosure should be viewed in two contexts: libel actions and actions not involving libel. Where the action is one for libel, the conduct of both the press and the source is at issue. Neither should be able to use the first amendment as a shield against the consequences of wrongful conduct. *New York Times, Curtis Publishing Co. v. Butts and Associated Press v. Walker* [254] were all libel cases. Under their standards newsmen should have to reveal their sources or their sources' confidential information where plaintiff shows actual malice or highly unreasonable conduct.

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[244] See note 21 *supra*.

[245] See note 39 *supra* and accompanying text.

[246] See notes 41–42 *supra* and accompanying text.

[247] This approach was taken by one recent court recognizing a privilege. *See* People v. Dohrn No. 69-3808 (Cir. Ct. of Cook County—Criminal Division June 12, 1970). This case is discussed in text accompanying notes 129–31 *supra*.

[248] McCray v. Illinois, 386 U.S. 300 (1967); Roviaro v. United States, 353 U.S. 53 (1957).

[249] 376 U.S. 254 (1964).

[250] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967); Rosenblatt v. Baer, 383 U.S. 75 (1966).

[251] New York Times v. Sullivan, 375 U.S. 254 (1964), applied an "actual malice" standard to libel suits brought by public officials against critics of their official conduct. *Id.* at 279–80. Time, Inc. v. Hill, 385 U.S. 374 (1967) applies the standard to invasion of privacy suits brought by any individuals. *Id.* at 387–88.

[252] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), applies the "highly unreasonable conduct" standard to libel suits brought by "public figures who are not public officials." *Id.* at 155.

[253] See notes 29–38 *supra* and accompanying text.

[254] 388 U.S. 130 (1967) (companion cases).

In non-libel actions there is no allegation of undesirable press conduct. Rather, the fact that the press published or broadcast an item concerning the events in litigation is entirely fortuitous. It can be argued that the plaintiff's interests should prevail over those of the source where the suspected or probable source is himself a defendant, because under these circumstances the source's conduct might indeed be at issue. For example, in *In re Goodfader*[255] plaintiff, suing civil service commissioners for wrongful ouster from her job, sought to force a newsman who had attended the commission's ouster session to reveal his source of information that the ouster was to be accomplished at that session. The issue in this case was the conduct of the commissioners. If one of the commissioners was in fact the source, his informing the newsman of the contemplated ouster may have been evidence of wrongful conduct. However, even in these circumstances, and whether or not the source is considered to have waived his rights by his own misconduct, the plaintiff should not be able to force disclosure from the newsman; to allow him to do so would penalize not only the source—who may have brought his misfortune upon himself—but the newsman too. Since the newsman is guilty of no misconduct, and because of the public interest in a free flow of news, the newsman's right to silence should be upheld. Where the suspected or probable source is not one of the parties to the action, the argument for prohibiting forced disclosure is even stronger, for then his interests are to be balanced, with the newsman's, against those of the litigant. Since, in non-libel actions, the interests of either the newsman, or both the newsman and the source, should prevail over those of the private litigant, an absolute privilege might be appropriate.

CONCLUSION

The furor over the spate of federal subpoenas recently reached such proportions that Attorney General Mitchell was forced to instruct the Department of Justice to set forth guidelines for the issuance of subpoenas to the press. In an August 1970 press conference Mitchell explained that the "legal confrontation" over the subpoenas appeared to be escalating and that such confrontation could "seriously affect . . . press relationships with the Federal Government, the bar and the courts."[256] He then announced a new set of Justice Department guidelines "to provide new and reasonable safeguards to protect the rights and privileges of the free press in a manner consistent with the paramount public interest in the fair administration of justice."[257]

The Justice Department guidelines were based on a recognition of "limiting effect on the exercise of first amendment rights."[258] The Department announced as its general policy: First, in considering whether to issue a subpoena, the Department would "weigh [the] limiting effect against the public interest to be served in the fair administration of justice"; second, the Department did not consider the press as "an investigative arm of the Government"; hence it would try to obtain information from other sources before subpoenaing the press; third, the Department would negotiate before issuing the subpoena; and, finally, if negotiations failed, subpoenas could only be issued upon the express authorization of the Attorney General.[259] The guidelines set forth specific requirements for Government officials requesting issuance of a subpoena.[260]

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[255] 45 Hawaii 317, 367 P.2d 472 (1961).

[256] N.Y. Times, Aug. 11, 1970 at 24, col. 2.

[257] *Id.*

[258] *Id.* at 24, col. 1.

[259] *Id.* at 24, cols. 1–2.

[260] The specified requirements were that: First, there must be sufficient reason to believe that a crime has occurred from disclosure from non-press sources, so that the press will not be used as a "springboard for investigations"; second, there must be sufficient reason to believe that the information sought is essential to a successful investigation, particularly with reference to directly establishing the guilt or innocence of the persons under investigation; third, there must be an unsuccessful attempt to obtain the information from non-press sources; fourth, great care is to be used in requesting both unpublished information and, because of the harassment incurred by cameramen, publicly disclosed information; and, fifth, the subpoenas whenever possible are to be directed at material information regarding a reasonably limited period of time and should avoid requiring production of a large volume of unpublished material. *Id.*

The new Justice Department policy called a halt to the rash of subpoenas, but the Department served warning on the press that the halt may not last. According to the announced guidelines, the press was to remember that "emergencies and other unusual situations may develop" where the issuance of subpoenas would not have to conform to the specified standards.[261] The press and the Federal Government now coexist in a state of uneasy truce. State and local governments, on the other hand, have yet to reach an agreement with the press, and there is no indication that the stream of subpoenas from these bodies is about to abate. Pressure from criminal defendants and private litigants has, similarly, not ceased.

Newsman's privilege is a constitutional issue; one that belongs in the courts. The only resolution of the issue thus far, however, has been in the political arena: the national news media was able to bring enough pressure to bear to force the federal government to reach a compromise. This compromise is not sufficient. In the first place, it is not binding on the Justice Department, and even within the terms of the agreement, there are loopholes left open.[262] Second, by publicly announcing a policy of "negotiation with the press," it calls public attention to the fact of press-government deals, a fact which cannot be reassuring to the source, policeman or protestor who wonders if his interests are being negotiated away. Third, and most important, the compromise does not lessen the pressure from criminal defendants, private litigants and state and local government. A judicial resolution is necessary. The courts which have considered the issue are in hopeless disagreement. Some courts persist in denying the privilege; four courts have recognized it, but have not agreed on the standards for its application. The Ninth Circuit, the highest court recently to grapple with the issue, adopted a standard of overriding state interest, but expressly declined to define the elements of a showing of this interest.[263] Similarly, state legislatures are in disaccord: 14 legislatures have codified an evidentiary privilege;[264] the rest have either never considered it or rejected it altogether. The press is equally uneven in its reaction. Some subpoenas and court orders have resulted in compliance; others in resistance. An important constitutional question should not be left in such chaos. It is time for the Supreme Court to clear the confusion. The need for a free and unimpeded flow of information to the public demands a workable and authoritative set of rules.

Margaret Sherwood

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Notes

Caldwell v. United States: The Newsman's Constitutional Privilege

(By Dennis J. Mulvihill)

The first amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press. . . ."[1] Until *Caldwell v. United States*,[2] state and federal courts had interpreted the first amendment as granting no constitutional privilege to newsmen to withhold confidential sources and information.[3] In *Caldwell*, however, the Ninth Circuit held that the freedom of the press clause in the first amendment does grant newsmen the right to protect confidentiality by refusing to appear and testify before a grand jury. This Note will analyze THE RATIONALE OF *Caldwell* in light of prior case law, and discuss the scope and validity of the decision as it affects the average newsman seeking to protect his source.

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[261] *Id.* at 24, col. 3.

[262] For example, despite the new policy, the Justice Department announced on December 6, 1970 that it was seeking Supreme Court review of the Ninth Circuit's *Caldwell* ruling. 39 U.S.L.W. 3273 (Dec. 6, 1970) (No. 1114).

[263] See note 75 *supra* and accompanying text.

[264] See notes 78 & 221 *supra*.

[1] U.S. Const. amend. I.

[2] Caldwell v. United States, 434 F. 2d 1081 (9th Cir. 1970).

[3] The Supreme Court of the United States has never ruled on the issue of a newsman's constitutional privilege. Certiorari has been denied on three occasions where the question was presented for the Court's determination: Garland v. Torre, 259 F. 2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958); Murphy v. Colorado, —— Colo. ——, *cert denied*, 365 U.S. 843 (1961); State v. Buchanan, —— Ore. ——, 436 P.2d 729 (1968), *cert. denied*, 392 U.S. 905 (1968).

HISTORICAL BACKGROUND

For many years newsmen attempted to avoid compulsory disclosure of confidential sources in court by demanding a common law evidentiary privilege. They argued that the public interest in the free flow of news required judicial protection of the confidential relationship between a newsman and his source. Although fifteen states have responded by enacting immunity statutes,[4] no court has recognized the privilege at common law.[5] Consequently, in recent years newsmen have adopted a new approach—that of arguing that freedom of the press encompassed by the first amendment guarantees the right to withhold confidential information and sources.

The constitutional approach to a newsman's privilege was first presented in *Garland v. Torre.*[6] At pre-trial discovery proceedings in a libel suit, newspaper columinst Marie Torre refused to answer questions eliciting the identity of a confidential source of information.[7] Miss Torre's continued reticence upon a subsequent court order to disclose her source resulted in a contempt citation. Reviewing the contempt order, the Second Circuit Court of Appeals accepted the hypothesis "that compulsory disclosure of a journalist's confidential sources *may* entail an abridgement of freedom of press by imposing some limitation upon the availability of news."[8] Nevertheless, it was held that public interest in the fair administration of justice excused some infringement on freedom of the press where the information sought went "to the heart of plaintiff's claim." The circuit court affirmed the contempt order, holding "the Constitution conferred no right to refuse to answer."[9]

In 1961, the Supreme Court of Hawaii rejected a news photographer's contention that freedom of the press outweighed public interest in disclosure of identity of his source. In *In re Goodfader's Appeal*[10] the party seeking identity of the source claimed her discharge from a government commission had been illegal, and she filed suit for reinstatement. Appellant, a photographer, had received information relating to the dismissal from a confidential source, whose identity he refused to divulge at deposition proceedings. His ignoring of a subsequent court order demand disclosure resulted in a contempt citation. On appeal the state supreme court concluded that the constitutional protections applicable to the press did not extend to a newsman's confidential sources.[11]

A result similar to *Garland v. Torre* was reached in *Murphy v. Colorado.*[12] A reporter was ordered to identify her source of information, notwithstanding the possibility of some infringement upon freedom of the press. As in *Torre,* the court in *Murphy* did not conclusively recognize the involvement of first amendment rights. Rather, the court stated that if freedom of the press was involved, the public interest in a proper adjudication of the dispute was still paramount.

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[4] ALA. CODE tit. 7, § 370 (1960); ARIZ. REV. STAT. ANN. tit. 12, § 2237 (Supp. 1969); ARK. STAT. ANN. tit. 43, § 917 (1964); CAL. EVID. CODE ANN. § 1070 (1966); IND. STAT. ANN. tit. 2, § 1733 (1946); KY. REV. STAT. § 421.100 (1969); LA. REV. STAT. ANN. § 45:1451-52 (1970 Supp.); MD. CODE ANN. art. 35, § 2 (1965); MICH. COMP. LAWS ANN. § 767.5a (1968); MONT. REV. CODES ANN. tit. 93, ch. 601–2 (1964); N.J. STAT. ANN. tit. 2A. ch. 84 A–21 (1969 Supp.); N. MEX. STAT. ch. 20, § 1–12.1 (Supp. 1969); N.Y. CIV. RIGHTS § 79–h (McKinney Supp. 1970); OHIO REV. CODE ANN. tit. 27, § 2739.12 (1964); PA. STAT. ANN. tit. 28, § 330 (Supp. 1970).

[5] *See* 8 J. WIGMORE, EVIDENCE § 2286 (McNaughton Rev. 1961).

[6] 259 F. 2d 545 (2d Cir. 1958), *cert. denied,* 358 U.S. 910 (1958).

[7] Marie Torre published a statement allegedly made by a Columbia Broadcasting System official relating to a neurotic complex actress Judy Garland had developed as a result of a weight problem. Miss Garland sought the identity of the official to establish a cause of action in a subsequent libel suit against C.B.S.

[8] 259 F. 2d at 548 [emphasis added].

[9] *Id.* at 550.

[10] 45 Hawaii 317, 367 P.2d 472 (1961).

[11] After an exhaustive review of the newsman's argument, the court stated: We have not been convinced that there is a First Amendment protection available to deponent. However, in the absence of any authoritative ruling by the court having the final say on the matter, we will assume, for the purposes of this case, that the forced disclosure of a reporter's confidential source of information may, to some extent, constitute an impairment of the freedom of the press. We nevertheless conclude, in accord with the analysis and the holding on the same hypothesis in Garland v. Torre, (2d Cir. 1958) 259 F. 2d 545, that such an impairment may not be considered of a degree sufficient to outweigh the necessity of maintaining the court's fundamental authority to compel the attendance of witnesses and to exact their testimony if not otherwise privileged or protected. *Id.* at ——, 367 P.2d at 480.

[12] ——Colo. ——, *cert. denied,* 365 U.S. 843 (1961).

A more recent case, *State v. Buchanan*,[13] involved a student newspaper editor's refusal to disclose to a grand jury the names of persons whom she had interviewed. The editor, Miss Buchanan, argued that the protection of identity of sources was essential to insure publication and dissemination of all types of news.[14] However, the Supreme Court of Oregon found the information within the scope of grand jury investigation, and upheld a lower court contempt citation.

Following the *Torre* rationale, most courts have handled the issue of a newsman's privilege by determining whether the interests to be served by compelling the testimony of the witness justifies the possibility of some impairment of the first amendment. Generally, a resolution of the problem has been achieved by the balancing of society's interest in the full disclosure of truth against the constitutional guarantee of a free flow of news. Thus, the disposition of each case necessarily requires a recognition of the actual competing interests involved.

CALDWELL V. UNITED STATES

In *Caldwell v. United States*,[15] the first amendment was again asserted to protect a professional newsman's confidential sources and information. Earl Caldwell, a reporter for the News York Times, was subpoenaed by a federal grand jury to testify on matters relating to Black Panther Party activities. Since Caldwell had conducted several in-depth interviews with members of the Black Panthers, the grand jury felt that he had acquired valuable knowledge of the group's plans and activities. On motion in the Northern District of California to quash the subpoena,[16] Caldwell argued that his forced appearance before the grand jury was violative of the right to a free press, since it would destroy the confidential relationship which he enjoyed with members of the Black Panther Party.[17] The district court recognized that Mr. Caldwell's knowledge of Black Panther activities was derived from a type of confidential relationship commonly developed and maintained by professional journalists. Further, the court noted that such relationships are indispensible to a newsman's function of gathering, analyzing and publishing the news. Since forced disclosure would arouse distrust in the confidential sources and thereby destroy their availability, the public right to all types of information would be impaired.[18] Balancing the particular interests involved, the district court held that the government had not demonstrated a need for the information sufficient to justify an infringement of the first amendment freedom of press.[19] Consequently, the court ordered that while Caldwell must fulfill his public duty to appear before the grand jury,[20] he could not be compelled to disclose confidential sources and information maintained in his work as a professional newsman. Caldwell, however, refused to obey the order compelling his attendance, and was held in contempt.

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[13] —— Ore. ——, 436 P.2d 729 (1968), *cert. denied*, 392 U.S. 905 (1968).

[14] Miss Buchanan's article dealt with the use of marijuana on the University of Oregon campus.

[15] 434 F. 2d 1081 (9th Cir. 1970).

[16] Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970).

[17] Explaining his relationship with the Black Panther Party, Caldwell testified: [A]s they realized I could be trusted and that my sole purpose was to collect my information and present it objectively in the newspaper and that I had no other motive, I found that not only were the party leaders available for in-depth interviews but also the rank and file members were cooperative in aiding me in the newspaper stories that I wanted to do.

. . . As a result of the relationship that I have developed, I have been able to write lengthy stories about the Panthers that have appeared in *The New York Times* and have been of such a nature that other reports who have not known the Panthers have not been able to write.

. . . if I am forced to appear in secret grand jury proceedings, my appearance alone would be interpreted by the Black Panthers and other dissident groups as a possible disclosure of confidences and trusts and would similarly destroy my effectiveness as a newspaperman.

434 F 2d at 1087–88.

[18] This same argument was rejected in *State v. Buchanan*, —— Ore. ——, 436 P.2d 729 (1968), *cert. denied*, 392 U.S. 905 (1968).

[19] When the exercise of the grand jury power of testimonial compulsion so necessary to the effective functioning of the court may impinge upon or repress First Amendment rights of freedom of speech, press, and association, which centuries of experience have found to be indispensible to the survival of a free society, such power shall not be exercised in a manner likely to do so until there has been a clear showing of a compelling and overriding national interest that cannot be served by alternative means. 311 F. Supp. at 360.

[20] Citing Blair v. United States, 250 U.S. 273 (1919), and United States v. Bryan, 339 U.S. 323 (1950).

On appeal, the Ninth Circuit reversed and remanded with instructions that the judgment of contempt and the order directing attendance before the grand jury be vacated. The circuit court agreed that public access to news would be diminished by compelling Caldwell to disclose confidential sources and information. However, the court concluded that refusing to compel attendance upon the subpoena in this situation was also necessary to protect the public's first amendment right to a free flow of news.

Basically, the rationale of the circuit court involved three phases: (1) Acknowledging the applicability of the first amendment; (2) Balancing the interests involved; (3) Defining the scope of the protective order.[21]

In order to assess the validity and scope of the *Caldwell* decision, it is necessary to examine individually each of the following phases of the court's opinion.

Recognizing the Applicability of the First Amendment

Before reviewing the scope of the district court order limiting interrogation, the circuit court considered whether first amendment rights were involved. *The circuit court noted that freedom of the press under the first amendment guaranteed public access to the widest spectrum of available knowledge.* Since the subpoena requiring Caldwell to testify would destroy the trust he enjoyed with the Panther membership, the undesirable result would be that—"[the Black Panthers] would refuse to speak to him; they would become even more reluctant than they are now to speak to any newsmen; and the news media would thereby be vitally hampered in their ability to cover the views and activities of the militants.[22]"

Consequently, such articles would not be available for public dissemination. The court, emphasizing the need "to provide the public with a wide range of information about the nature of protest and heterodoxy,"[23] concluded that first amendment rights were dampened by compelling Mr. Caldwell to testify. Thus, *Caldwell* represents the first case to recognize conclusively the involvement of the first amendment when a newsman is ordered to reveal confidential information and sources.[24]

Although the Ninth Circuit in *Caldwell* did not differentiate between disclosure of infomation and disclosure of identity of sources, such a distinction appears valid in determining the applicability of first amendment protection.[25]

It can be argued that an extension of constitutional protection to confidential information is unwarranted. *The protection afforded by the first amendment was not provided for the benefit of the press, but to insure a free flow of news to the public.* Therefore, constitutional freedom of press safeguards should be applied so as to guarantee the widest possible dissemination of news. The protection granted in *Caldwell*, however, does not serve this purpose. The court recognized that much of the information sought by the grand jury was not imparted to Caldwell with a view toward publication or public disclosure. Rather, it was acquired through information and "off the record" confidential discussions between Caldwell and members of the Black Panther party. Since Caldwell himself would not voluntarily destroy the Black Panthers' trust by publishing the information, the news would probably never be channeled into the public view. Thus, the imposition of constitutional protection does not serve the purpose of insuring full disclosure of the news to the public. Indeed, under the facts in *Caldwell*, forced disclosure by the court may be the sole means by which the public could be completely informed of Black Panther activities. The circuit court appears to be applying the "public" freedom of press in a manner calculated to protect only the private interests involved.

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[21] Caldwell also moved to quash the subpoenas on the ground that they were based upon information obtained by unconstitutional surveillance of his interviews with Black Panther members. The district court denied the motion on the ground that Caldwell lacked standing to raise the issue. In light of the disposition of the first amendment question, the circuit court declined to review this aspect of the lower court decision.

[22] 434 F. 2d at 1084.

[23] *Id.* at 1085 [citations omitted].

[24] Other courts have recognized the applicability of the first amendment on a hypothetical basis only. *See, e.g.*, note 11 *supra*.

[25] All prior cases dealing with a newsman's constitutional privilege have dealt with only the identity of the source. None have considered the protection of confidential information.

In defense of *Caldwell*, it might be said that the confidential information enabled the journalist to present more accurately the sentiments and attitudes of the Black Panther membership. On this argument, the court stated: "It is not enough that the public's knowledge of groups such as the Black Panthers should be confined to their deliberate public pronouncements or ***distant new accounts*** of their occasional dramatic forays into the public view.[26]"

In adopting this approach, however, the court should have considered the issue of whether the first amendment freedom of press encompasses a public right to more balance and well informed reporting by newsmen.

The application of the first amendment by the Ninth Circuit also included the privilege of the journalist to withhold the names of confidential sources. Protection of identity of sources would appear to be more consistent with first amendment freedom of press than a grant protecting information received in a news gathering capacity. As the Supreme Court of Pennsylvania has stated. "important information, tips and leads will dry up . . . unless newsmen are able to fully and completely protect the sources of their information."[27] Thus, protection of anonymity may be necessary to insure public access to all types of news. The recognized public right to receive the news would be shallow indeed if newsmen were unable to gather and disseminate news from all sources.

Balancing the interests involved

The second phase of the court's opinion involved a "balancing of interests" test. The narrow issue posed by the court was whether the restriction on the grand jury's scope of inquiry outweighed the infringement on the public right to a free flow of news.[28]

Although recognizing the traditionally broad powers of inquiry permitted grand jury investigations, the court noted that such grants of power are "necessarily tempered by constitutional prohibitions and other exceptional circumstances."[29] The circuit court, citing the United States Supreme Court decision in *De Gregory v. Attorney General of New Hampshire*,[30] noted that sacrifice of first amendment freedoms is required only where a compelling need for the particular testimony is demonstrated. Consequently, the government, to justify infringement of free press, was required to show a compelling or overriding national interest in the information which could not be served by ny alternative means. Although the opinion might have ceased here, the court further noted that forced disclosure effectively converted news gatherers into Department of Justice investigators, thereby invading "the autonomy of the press by imposing a governmental function upon them".[31] These constrictions caused the court to conclude that since the government had not demonstrated an overriding national interest in the information, forced disclosure was unwarranted.

The application of the balancing test in *Caldwell* results in an absurd anomaly. As Judge Jameson points out in his concurring opinion in *Caldwell*, "the obligation to appear and testify is even stronger and the scope of inquiry is broader in grand jury investigations [than in civil actions]." [32] Yet, the majority approach in *Caldwell* serves to permit a broader scope of inquiry in a civil court of law. The court admitted that in a civil action the public's right to freedom of press may be properly infringed upon where the information sought goes to the "heart of the plaintiff's claim". The court, however, established a far greater burden for justifiable governmental infringement on free press, *i.e.*, an overriding and compelling national interest in the information. It is not sufficient, as in a civil action, that the information possessed by the reporter is highly relevant and material to the investigation.[33]

Defining the Scope of the Protective Order

In reversing the district court order compelling attendance upon the grand jury, the circuit court stressed the very tenuous and unstable relationship existing between the militant Black Panthers and reporters. The relationship depends upon a trust and confidence that—"is constantly subject to reexamination and that depends in turn on actual knowledge of how news and information imparted have been handled and on continuing reassurance that the handling has been discreet. This reassurance disappears when the reporter is called to testify behind closed doors.[34]

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[26] 434 F. 2d at 1084 [emphasis added].

[27] *In re* Taylor, 412 Pa. 32, 41, 193 A.2d 181, 185 (1963).

[28] 434 F. 2d at 1085.

[29] *Id.*

[30] 383 U.S. 825 (1966).

[31] 434 F. 2d at 1861.

[32] *Id.* at 1091.

[33] Perhaps a limited application of the circuit court directive is justifiable where the court is willing to believe Caldwell that "there is nothing to which he could testify [which is not already public] that is not protected District Court's order."

The court felt that Caldwell's appearance alone at a secret hearing might be interpreted by the Panthers as a disclosure of trust. As a result, Caldwell's effectiveness as a reporter would be destroyed. Thus, the issue facing the court in this phase of the opinion was whether the threat to freedom of the press was justified by a demonstrated need for testimony as to matters not protected by the privilege. Finding that the government had not established a prior need for such non-privileged information, the court stated: "Since the cost to the public of excusing his attendance is so slight, it may be said that there is here no public interest of real substance in competition with the First Amendment freedoms that are jeopardized.[35]"

The court again applied a balancing of interests involved, and refused to compel attendance.

In excusing Caldwell's appearance, the Ninth Circuit departed from prior case law in two respects. First, the court recognized that nonattendance upon a court order may, on some occasions, be necessary to protect constitutional rights. Second, the government must establish a compelling national interest in the testimony when infringing upon freedom of the press.[36]

CONCLUSION

With its decision in *Caldwell v. United States*, the Ninth Circuit emerges as the first federal court to recognize a newsman's constitutional privilege to withhold confidential news sources and information. Under *Caldwell*, a reporter may refuse to appear and testify before a grand jury if: (1) to do so would endanger the unique trust and confidence between a reporter and his sensitive sources, and (2) the government cannot establish an overriding or compelling national interest in the information.

Other courts should be wary, however, of accepting the *Caldwell* case as precedent for granting a constitutional privilege to newsmen.[37] Instead of establishing a sound constitutional argument, the decision appears to rest upon the unique social and political exigencies involved. The sensitivity of Caldwell's news sources and public concern for channels of communication with the militant Panthers appear of paramount concern to the court. It is interesting to note, also, that the guidelines established by the court are remarkably similar to those issued on August 10, 1970 by Attorney General John N. Mitchell,[38] with one exception—the circuit court held that the courts are the proper forum to determine the propriety of the subpoenas, while Mr. Mitchell intended to reserve final judgment unto himself. Thus, the political and social atmosphere surrounding the controversy appear to have seriously influenced the court's decision. Perhaps a determination of the proper scope of free press as intended by the Constitution can issue only from the Supreme Court of the United States.

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[34] 434 F. 2d at 1088.

[35] 434 F. 2d at 1089.

[36] The circuit court held that the compelling interest must be shown in advance of issuing the subpoena. However, the court felt that the fashioning of specific rules and procedures to accommodate this holding was better left to the district court.

[37] Since *Caldwell*, at least three courts have refused to grant a constitutional privilege to newsmen. In Re Pappas, 39 U.S.L.W. 2444 (Mass. Jan. 29, 1971); State v. Knops, 39 U.S.L.W. 2445 (Wisc. Feb. 2, 1971); U.S v. Calley, 39 U.S.L.W. 2463 (Army General Court-Martial, 5th Judg. Cir. Jan. 20, 1971).

In *Pappas*, the court refused "to adopt the broad conclusion of [Caldwell v. United States], that a newsman's privilege exists because of the First Amendment, [since] we would be engaging in judicial amendment of the Constitution or judicial legislation." In *Knops* and *Calley*, the courts distinguished *Caldwell* on the basis of factual differences.

[38] [The] Department [of Justice] does not approve of utilizing the press as a springboard for investigations . . . [T]here should be sufficient reason to believe that the information sought is essential to a successful investigation—particularly with reference to directly establishing guilt or innocence . . . [t]he government should have unsuccessfully attempted to obtain the information from alternative non-press sources . . . [Subpoenas] should normally be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information. John N. Mitchell, "Free Press and Fair Trial: The Subpoena Controversy," address before House of Delegates, American Bar Association, (August 10, 1970).

In this context, it is worthy of note that the government did not seek review of the qualified privilege granted by the district in *Caldwell*.

MODEL NEWSMEN'S PROTECTION LAW FOR STATES

Approved by the Board of Directors and supported by resolution of the 1971 National Convention of Sigma Delta Chi.

No person shall be required in any proceeding or hearing to disclose any information or the source of any information procured or obtained by him while he was (a) engaged in gathering, writing, photographing or editing news and (b) employed by or acting for any organization engaged in publishing or broadcasting news, unless the body proposing to require disclosure of such information or source shall have first obtained a final order of a court, made after a hearing, and expressly finding:

(1) The existence of probable cause to believe that the witness or his sources has evidence which is relevant ond material to an issue properly pending before such body, *and*

(2) Disclosure by such person is the only method by which such evidence, or evidence of similar effect, can be obtained, *and*

(3) The failure of disclosure of such evidence will cause a miscarriage of justice.

[From the New York Times, April 7, 1970]

LIMITING THE SUBPOENA

"Our liberty," said Thomas Jefferson, "depends on the freedom of the press, and that cannot be limited without being lost."

The effort by the Department of Justice to infringe on a reporter's ability to gather news and to protect confidential material has been turned back by a United States District Court in San Francisco. The opinion by Federal Judge Alfonzo J. Zirpoli safeguards the public in two ways: It upholds the grand jury's right to summon a journalism to testify. and at the same time it upholds a journalist's right to protect private information and associations that, if revealed, could drastically curtail his ability to function under the First Amendment.

The judicial ruling held that centuries of experience have found that freedom of speech, press and association are indispensable to the survival of a free society. These freedoms are inviolate, Judge Zirpoli said, "until there has been a clear showing of a compelling and overriding national interest that cannot be served by alternative means." The burden of proving such a grave exception to the normal gathering, reporting and protection of the news is placed on the Government—a proof that must be made to the satisfaction of the court.

No such exception existed in the case of Earl Caldwell, a New York Times reporter, who was called upon to give testimony about interviews with Black Panther party members. While holding that Mr. Caldwell had the same responsibility as any other citizen to appear before a grand jury in response to a subpoena, Judge Zirpoli ruled that he was entitled to a protective order limiting the questions he could be asked. The attempt to quash the subpoena was denied but the court upheld the alternative remedy of restricting the subpoena "to protect Mr. Caldwell's confidential relations."

The Department of Justice first subpoenaed the reporter to testify and to bring his personal notes and tape reportings, a requirement that was legally resisted by The Times with the support of many other news agencies and communications media. The second subpoena simply required his personal appearance, which Mr. Caldwell as citizen and journalist must obey, subject to the immunities ordered by the judge.

The First Amendment, the rights of the public and the responsible functioning of the reporting process have been sustained in San Francisco.

[From The Washington Post, Aug. 13, 1970]

NEWSMEN AS WITNESSES

From our point of view—which is admittedly and obviously an interested one—approximately two cheers seem to be in order for Attorney General Mitchell's statement respecting the issuance of subpoenas for news media personnel or property. During the past year or so, federal prosecutors have taken to issuing subpoenas to newsmen and their employers with a kind of reckless abandon that seems to us full of peril for the freedom of the press. Newsmen who are forced to turn informer in the name of law enforcement, forced to tell in public what they were told in confidence and forced, in addition perhaps, to divulge the sources of their information, are likely to be heavily handicapped in the gathering of news. And the burden of that handicap is certain to be borne by the readers who depend upon them for information.

One cheer is due Mr. Mitchell for his recognition that the issuance of subpoenas to newsmen has an important impact on First Amendment freedoms. The guidelines promulgated by the Department of Justice acknowledge that the "compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights." That's an understatement; but it's better than a flat denial. A second cheer is due for Mr. Mitchell's evident desire to be discriminating and restrained in authorizing subpoenas. They are to be authorized, the guidelines say, only when they are requisite to the fair administration of justice, only after negotiations with the media, only when other attempts to get the needed information have failed and only with his express personal approval.

This newspaper is convinced, nevertheless, as we have said in an *amicus* brief filed in the Earl Caldwell case, that "the First Amendment grants to newsmen a constitutional privilege, absolute and unqualified, to refuse in all circumstances, without penalty, to divulge to anyone any information or source, confidential or otherwise, which they obtain in the course of their professional newsgathering activities."

Undoubtedly, such an absolute privilege may entail a loss under some circumstances to law enforcement and the administration of justice. The same may be said about exercise of the Fifth Amendment privilege against self-incrimination, about the privilege generally extended to communications between husbands and wives, lawyers and clients, doctors and patients, priests and penitents and about the exclusion of evidence obtained unlawfully. All these are sometimes used as justification for withholding from a grand jury or a court information which might be of very considerable value. But the community has deemed the cost to justice a price worth paying for the vital social values conserved by the granting of the privilege.

A privileged status for newsmen in the discharge of their professional duties serves even more important social values. For as Supreme Court Justice Frank Murphy said 20-odd years ago, "A free press lies at the heart of our democracy and its preservation is essential to the survival of liberty. Any inroad made upon the constitutional protection of a free press tends to undermine the freedom of all men to print and to read the truth."

If newsmen began to act as informers or as investigative agents of the government, invaluable sources of information would cease to trust them. The free flow of news has not dried up before now for two reasons. One is that prosecutors and policemen have generally respected the special situation of newsmen, have acted as though the First Amendment privilege was a fact. The other reason is that newsmen have traditionally accepted fine or imprisonment rather than disclose confidential sources or information when prosecutors have tried to breach the privilege. Whenever newsmen have thus defied constituted authority, the public has tended to honor rather than to condemn them, as though this martyrdom were a sort of noblesse oblige of their calling. But it is at once foolish and unfair to impose such punishment on persons serving the public interest. Besides, news sources may not always rely on the willingness of newsmen to go to prison.

The preservation of a free press should not depend upon the caprice of government officials or upon the readiness of individual newsmen to sacrifice themselves for the sake of their sources. Rather, the responsibility for preserving a freely functioning press should be assumed by the government, and particularly by the courts, as guardians of a Constitution which guaranteed an independent press because such a press was deemed indispensable to a free and self-governing society.

[From the New York Times, Nov. 20, 1970]

PROTECTING BASIC FREEDOMS

The decision of the United States Court of Appeals in San Francisco requiring the Government to show a "compelling need" for a journalist's evidence before ordering him to testify in secret grand jury hearings gives new protection to essential press freedoms that are particularly vital "in times of widespread protest and dissent."

The Ninth Circuit ruling gives realistic recognition to the public stake in keeping informed about the plans, philosophy and activities by such revolutionary groups as the Black Panthers through channels that go beyond propaganda statements. Access to such information is jeopardized when these groups, inherently distrustful of the "establishment," are made to fear that newsgatherers in whom they have confided can be called behind locked doors and forced to turn state informer.

Even though the judges leave to the district court the responsibility for fashioning specific rules and procedures, the decision marks another long step away from the dragnet subpoenas the Justice Department issued with such abandon to various newspapers, news magazines and television networks earlier this year.

The San Francisco case arises out of attempts to call Earl Caldwell, a reporter for The Times, before a grand jury investigating the Black Panthers. The original subpoena was circumscribed by District Judge Alfonzo J. Zirpoli to limit any grand jury questions that required Mr. Caldwell to disclose confidential information given to him in his journalistic capacity.

The appeals court rightly recognized that even this protection might prove insufficient to preserve the bonds of trust the Panthers had come to have in Mr. Caldwell's integrity as a reporter.

"The secrecy that surrounds grand jury testimony necessarily introduces uncertainty in the minds of those who fear a betrayal of their confidences," the court noted. It added that the facts in the Caldwell case indicated that his capacity as a newsgatherer might well be destroyed with no real benefit to the grand jury in terms of the information he could add to its record.

Unquestionably, there will continue to be differences of opinion between the press and the courts on the criteria to be applied in establishing a compelling governmental need for a reporter's appearance behind the closed doors of the grand jury. But certainly there can be no valid challenge of the Court of Appeals finding that "to convert newsgatherers into Department of Justice investigators is to invade the autonomy of the press by imposing a governmental function upon them."

The dangers involved in such a trespass on press freedom make it essential that subpoenas be confined only to those cases in which there is a clear and demonstrable need for a reporter's testimony in the public interest. And even then the most tightly defined restrictions must be laid down to guard against destruction of confidence.

[From the National Observer July 19, 1971]

PRIVILEGES FOR JOURNALISTS

(By Michael Malloy)

Some journalists may be asking for too much of a good thing by trying to expand freedom of the press to the point where it spares them from any scrutiny of the way they collect and edit the news. Many members of our trade are now insisting on a right to protect their notes, film, and news sources from any congressional or legal inquiry.

Newsmen should, of course, be protected from fishing expeditions by congressmen or prosecutors who merely want to ransack their files in the hope of digging up something to pin on people or organizations they don't like. Some of the pending cases may be of this nature, and one would hope that the courts on a case-by-case basis would not allow it.

But protecting the press and broadcasting from wrongful inquiry is a different thing from insisting on blanket protection from any inquiry at all. A congressional look at the way some news is reported might be useful, for instance, in rewriting the Government secrecy regulations that newsmen so often complain about. And if a crime has been committed, and a newsman knows a lot about it, he should be obliged to testify in court, just as any other citizen would be.

That is the issue in two recent press controversies. An underground newspaper in Madison, Wis., claimed First Amendment protection from revealing its special knowledge about a fatal bombing there. A Washington reporter claimed First Amendment protection against revealing the source of a story for which the newsman himself is defendant in a libel suit, surely one case in which his reportage is a fit subject—almost the only subject—for a court inquiry.

These demands for legal privileges beyond those of ordinary citizens are in a different category from the New York Times' recent defense of the right to publish a news story without censorship by the Government. The Times was defending the freedom of speech and publication that the Constitution grants to all Americans. The special protection demanded in these other cases would apply only to the press, and make of its employes a legally privileged class like doctors and lawyers.

But doctors and lawyers get these privileges at a cost the press cannot afford. They are licensed by the state. Lawyers, in fact, are officers of the judicial branch of government. Nothing could be more disastrous to the freedom of the press than to demand analogous rights and thereby leave the press open to analogous regulation.

Right now the First Amendment gives every American the right to speak and publish as he likes, be he a Mafia *capo* or a bomb-throwing Weatherman. But should a capo be free from inquiry about a "syndicate" crime conference if he says he attended in his capacity as a reporter for the Cosa Nostra Daily? Should a Weatherman be spared from testifying because he took notes for the underground press while his friends were fusing dynamite?

The answer is no. If the answer were yes, the grant of special privileges would eventually be attended by some means of licensing the members of the press so that everyone couldn't enjoy their immunity. The First Amendment freedoms that now belong to all of us would be contracted, not extended. Licensed newsmen would be in danger of becoming officers of the state, like lawyers, instead of its watchdogs. That is the very evil they think they are opposing when they demand legal rights that other citizens don't have.

[From The Wall Street Journal, Feb. 6, 1959]

IN QUEST OF THE NEWS, DO NEWSMEN HAVE A "RIGHT" ALWAYS TO HIDE SOURCES?

(By William H. Fitzpatrick)

(The question whether newsmen should ever be required to reveal a source of information has been much in the news lately. This is a condensation of a talk before the New York State Society of Newspaper Editors on the subject. It was delivered by William H. Fitzpatrick, associate editor of The Wall Street Journal.)

The proposition that newspapermen ought not be required to reveal their sources of information—under any conceivable circumstances—deserves to be questioned on at least two grounds.

One is the relation of this suggested privilege to the public good. The other is to ask how the nation's press, the acknowledged champions of the right of the public to know all where the public interest is involved, can at the same time champion for itself a privilege to remain silent on matters that may also involve the public interest.

The argument goes that if the privilege is not granted, newspapers will not be able to gather news as heretofore. It is also said that a number of states have granted such a privilege. The answer to that, it seems plain, is that an equal number of states have refused to grant such a privilege though the legislatures have considered it. And newspapers in about two dozen other states have got along nicely without such a law.

It is said further that the newspaper privilege sought is similar to that known in the law as the priest-penitent, lawyer-client, doctor-patient and husband-wife privileges. It might help us to examine these privileges.

The priest-penitent privilege is based on the belief that if a man goes to his clergyman to confess a crime the clergyman more than likely will try to persuade him to make amends and to go to the police.

The doctor-patient privilege goes back to medieval times also, when it was believed in the interest of the public to have ill persons seek treatment to prevent the spread of disease. But this privilege has its limitations. There is no doctor-patient privilege now in existence where crime is committed. And doctors have been required to testify about the way a man treated for gunshot wounds came by his hurts, how an accident occurred as a result of which the driver was treated, and whether the driver was drunk.

LIMITED PRIVILEGE

The lawyer-client privilege isn't nearly so broad as a great many of us think, either. This privilege rests on the argument that confidence between lawyer and client serves the ends of justice since a lawyer can advise his client better—sometimes by telling him to plead guilty—for knowing all the facts. But lawyers have been made to reveal the identity of a person hiring them to represent someone else, and to disclose the names of persons for whom they have put money in the bank.

Finally, we come to the husband-wife privilege. This also is an ancient one. The judges knew that to ask a spouse to testify against a spouse was to put an extra burden on marital relations. Further, husbands and wives just weren't to be trusted with the truth where the other was involved. But in most states now, husbands and wives are fully competent to testify for or against the other in civil cases, as any reader of the daily press well knows. And in most states the so-called "privilege" does not now extend to any "crime committed by one against the other."

So far as Federal courts are concerned, Justice Sutherland, speaking for the majority of the Supreme Court, held in Funk v. U.S. that the disqualification of the wife to testify for the husband was no longer part of the modern common law as administered in Federal courts.

Obviously, the so-called lawyer-client, doctor-patient, husband-wife privileges aren't nearly so broad as they probably are thought to be. They have been narrowed in the interests of the administration of justice. At the same time, newspapers should remember that even these privileges exact a price. Lawyers and doctors are answerable to the State, for they are licensed. Are newspapermen willing to submit to licensing by State or Federal boards?

So a lot of questions arise. They are not new; they arose when in 1949 the New York State Law Revision Commission went pretty thoroughly into this question.

MANY QUESTIONS

Some of them are: What sorts of news-gathering and news-dissemination would come within the scope of such a law? Everybody? Or, if not everybody, just a few? Publishers as well as reporters? What of a crime that the reporter himself observes? And what if he participates in it? What about the nature of the news in question? Assuming that the public interest may be well served by refusal to divulge a source of information when a mayor's official misdeeds are exposed, is there a like service to the public interest in permitting a reporter to use the privilege where the private indiscretions of a private citizen are concerned? Should the privilege exist only in criminal cases? What about libel actions? What about grand juries? Or legislative bodies?

In a word, should the privilege be an absolute, or should there be left with the courts or other bodies discretionary power to permit or to withhold the compulsion to testify?

The questions were asked and answered by the Law Revision Commission in this way: An unconditional privilege granted to newsmen to refuse to divulge the sources of information of news stories would be against the public interest. But a privilege containing safeguards essential to the protection of the public interest could safely be granted. In other words, where the public interest was deemed paramount, courts should require that sources be revealed.

Let it be noted that for many newspapermen there are circumstances under which no power on earth could force them to reveal a source of information. Let us assume the writer is handed by a person in a Federal bureau a set of documents. These documents clearly prove that some funny business in contracts has been going. After due checking, the story is printed, and it stands up.

A Congressional investigation follows, the newspaperman is sworn as a witness and on the stand is asked the name of his informant.

Congress doesn't get it because the name of the informant isn't pertinent and the man's identity is not at all necessary to serve the ends of justice. The disclosure could, however, serve the ends of unjust vengeance. And if Congress should vote the newsman in contempt, the Department of Justice should indict him, and a Federal judge sentence him, he might have to live for a time in jail. But he could also live with himself.

Now imagine another situation. A newsman is investigating a report that the local bank is in trouble because somebody has lifted some money. So he goes to the bank president who says the cashier stole $10,000 but please don't quote him as saying so. Instead of digging further, the newsmen writes a story saying that an official of the bank says Joe Johnson, the cashier, stole $10,000; and let's also assume the newspaper is foolish enough to print it as it stands.

CIVIL SUIT

The police grab Joe Johnson and throw him in jail and after a few days of polite questioning, they turn him loose. He hasn't stolen the money at all, it seems. Joe Johnson sues the bank for what happened to him, and the newsman is called as a witness in a civil suit. Can it seriously be claimed this newsman would be entitled to refuse to reveal the source of his information under oath, in a trial to arrive at justice to Joe Johnson, on either moral or legal grounds? Will anyone argue that he is not himself obstructing justice by refusing to testify?

In these cases particular stress has been laid on the word "justice"—indeed, the key is what is the "just" thing to do. The point is not a minor one, for justice is and ought to be the first tenet of responsible newspapermen, just as the public interest, as individual newspapers determine it, ought to be a basic principle of every newspaper.

Indeed, the press freedom anchored in Article I of the Bill of Rights of the Constitution was placed there in the public interest. The founders believed that a freedom to print was necessary to preserve most other freedoms of free men. But it should be remembered that freedom to print is not an irresponsible freedom nor an unlimited one. I need not remind any editor of Justice Holmes' famous remark that "freedom of speech does not include shouting fire in a crowded theater."

Neither is press freedom all that some of us, from time to time, might like it to mean. There are other freedoms possessed by others that sometimes clash with it, and one of them is directly concerned with bearing witness.

Articles VI and VII of the Bill of Rights have to do with criminal trials and civil suits. All criminal trials, and civil suits where the value of the controversy exceeds $20, have guarantees for jury trials, for speedy and public trials, and guarantees of compulsory process for obtaining witnesses in the defendant's favor. Compulsory process means the right to subpoena and the right of trial judges to hold witnesses in contempt for refusal to testify.

There is no exception to this Constitutional right to summon witnesses that excludes newsmen from the same responsibility to serve the public interest required of everybody else.

ARROGANT POWER

And we had best be careful about attempts to broaden freedom of the press lest we be accused of seeking not just liberty to print, but license to print. We may believe that complete immunity will serve a responsible press, but others may well believe that it will lead to irresponsibility flowing from an arrogant power to hold ourselves unaccountable for what we print.

But let us not think for a moment that such a result would ever come about; the result from attempts to grant immunity may be an entirely different one, and one we may well come to fear. Let us take a look at the sort of legislation I have in mind.

Under a bill introduced in Congress, newspapers would have an immunity from revealing sources of information—except where military security is concerned. Well, what department or bureau in Washington these days could not claim at least a peripheral interest in military security, since military security and national security are inexorably linked?

And there is another point, perhaps the most important of all, that ought to be considered.

If newspapers support the proposition that immunity of newspapermen from testimony can be limited in any way for any purpose by Act of Congress, they are supporting a proposition that grants Congress a limiting power. Will the exclusions grow from military security, once the philosophy of limitation is adopted, to such things as "except where an official's reputation," or even a Congressman's chances for reelection, may be injured?

As things are now, there are no spelled-out rights to refuse to testify as to the sources of information nor are there any spelled-out acts of Congress that would force disclosure.

In this, newspapermen are perhaps fortunate. For it permits the individual newspaperman to choose his course, right or wrong, according to his own principles. Balanced against the individual's concepts will be the concept of the individual court asto whether the cause of justice is served or not by the refusal.

It suggests something considerably less than a posture we can take pride in to ask that newspapers be granted an immunity broader than anyone else possesses under the Constitution. Is it possible that we are so blind as to believe we can have it both ways—that we can demand full disclosure where all others are concerned but deny it where we are concerned?

Or is it possible that, if we follow such a course, the public will some day wonder whose interest, ours or the public's is our real concern?

"THE PENTAGON PAPERS" CASE

[From The New York Times, July 1, 1971]

'AN ENLIGHTENED PEOPLE'

The historic decision of the Supreme Court in the case of the United States Government vs. The New York Times and The Washington Post is a ringing victory for freedom under law. By lifting the restraining order that had prevented this and other newspapers from publishing the hitherto secret Pentagon Papers, the nation's highest tribunal strongly reaffirmed the guarantee of the people's right to know, implicit in the First Amendment to the Constitution of the United States.

This was the essence of what The New York Times and other newspapers were fighting for and this is the essence of the Court's majority opinions. The basic question, which goes to the very core of the American political system, involved the weighing by the Court of the First Amendment's guarantee of freedom against the Government's power to restrict that freedom in the name of national security. The Supreme Court did not hold that the First Amendment gave an absolute right to publish anything under all circumstances. Nor did The Times seek that right. What The Times sought and what the Court upheld, was the right to publish these particular documents at this particular time without prior Governmental restraint.

The crux of the problem lay indeed in this question of prior restraint. For the first time in the history of the United States, the Federal Government had sought through the courts to prevent publication of material that it maintained would do "irreparable injury" to the national security if spread before the public. The Times, supported in this instance by the overwhelming majority of the American press, held on the contrary that it was in the national interest to publish this information, which was historic rather than current operational nature.

If the documents had involved troop movements, ship sailings, imminent military plans, the case might have been quite different; and in fact The Times would not have endeavored to publish such material. But this was not the case; the documents and accompanying analysis are historic, in no instance going beyond 1968, and incapable in 1971 of harming the life of a single human being or interfering with any current military operation. The majority oof the Court clearly recognized that embarrassment of public officials in the past—or even in the present—is insufficient reason to overturn what Justice White described as "the concededly extraordinary protection against prior restraint under our constitutional system."

So far as the Government's classification of the material is concerned, it is quite true, as some of our critics have observed, that "no one elected The Times" to declassify it. But it is also true, as the Court implicitly recognizes, that the public interest is not served by classification and retention in secret form of vast amounts of information, 99.5 per cent of which a retired senior civil servant recently testified "could not be prejudicial to the defense interests of the nation."

Out of this case should surely come a total revision of governmental procedures and practice in the entire area of classification of documents.

Everyone who has ever had anything to do with such documents knows that for many years the classification procedures have been hopelessly muddled by inertia, timidity and sometimes even stupidity and venality.

Beyond all this, one may hope that the entire exercise will induce the present Administration to re-examine its own attitudes toward secrecy, suppression and restriction of the libertries of free man in a free society. The issue the Supreme Court decided yesterday touched the heart of this republic; and we fully realize that this is not so much a victory for any particular newspaper as it is for the basic principles of freedom on which the American form of government rests. This is really the profound message of yesterday's decision, in which this newspaper rejoices with humility and with the consciousness that the freedom thus reaffirmed carries with it, as always, the reciprocal obligation to present the truth to the American public so far as it can be determined. That is, in fact, why the Pentagon material had to be published. It is only with the fullest possible understanding of the facts and of the background of any policy decision that the American people can be expected to play the role required of them in this democracy.

It would be well for the present Administration, in the light of yesterday's decision, to reconsider with far more care and understanding than it has in the past, the fundamental importance of individual freedoms—including especially freedom of speech, of the press, of assembly—to the life of the American democracy. "Without an informed and free press," as Justice Stewart said, "there cannot be an enlightened people."

[From The Washington Post, July 1, 1971]

THE PENTAGON PAPERS: FREE—AT LAST

"Our democracy depends for its future on the informed will of the majority, and it is the purpose and the effect of the First Amendment to expose to the public the maximum amount of information on which sound judgment can be made by the electorate. The equities favor disclosure, not suppression. No one can measure the effects of even a momentary delay."

This passage from the ruling of U.S. District Court Judge Gerhard Gesell on June 21, 1971, comes close to summing up our own views in the case of the United States Government vs. The Washington Post—and, frankly, we would have preferred to leave it at that. Instead, the issue moved up to the Supreme Court and yesterday the government's plea for a restraining order against this newspaper and The New York Times was dismissed by a vote of 6-to-3. Perhaps the best way we can express our gratification with the outcome is to refer you to page one where we are resuming publication today of material from the Pentagon papers, otherwise known as the "History of U.S. Decision-Making Process on Vietnam Policy." That we are again free to print this material is an undoubted gain if only because to have remained under restraint would have been an immeasurable loss not for us alone, nor for the press alone, but for the public, and for the country, and for the democratic processes: *It is the purpose and the effect of the First Amendment to expose to the public the maximum amount of informatioon on which sound judgment can be made by the electorate.*

But it has to be added that from the beginning of this unprecedented confrontation between press and government, the issue has not only been *what* we could print but also *when*. So it cannot be forgotten now that for a period of more than two weeks, in the case of The Times, and ten days in the case of The Post, and for shorter spans in the case of the Boston Globe and the St. Louis Post Dispatch, newspapers in this country, abiding by court orders, have, in effect, been prevented by government from publishing certain material. It is not enough to say that the material in question was historical (and therefore hardly urgent) because even history, freshly authenticated and in compelling detail, has the capacity to shape contemporary events. Another time we might be dealing with information of far greater urgency and *no one can measure the effects of even a momentary delay.*

It can hardly be said, then, that yesterday's Supreme Court opinion, together with six separate concurrences and three separate dissents, effectively comes to terms with the tormenting issue at the heart of this dispute—the government's right of prior restraint of the press. It does not resolve the dilemma posed by the First Amendment's protections of the press, on the one hand, and the government's undoubted right to protect security on the other. For what the court majority seems to be saying, without attempting in this space to take into account the many conflicting conclusions stated by all nine justices, is that the government failed to make its point—*not* that a point was not necessarily there to be made. Some justices saw merit in the government's argument, as to the facts, and others were at pains to suggest that the government's point might better be made in a different way—through criminal penalties for publication of at least some parts of this material.

So there is not all that much comfort, let alone clearcut law, to be found in yesterday's outcome, though in fairness to the Court and to the government, the affair of the Pentagon papers was an exceedingly difficult case on which to rest broad principles of law; it involved a breakdown of government security of such scope and magnitude that relief from the courts, in any practical sense, was probably never within the government's reach. It seems doubtful, in short, that we will see its likes again, and this says several, in some ways contradictory, things to us, not least of which is that the losses and gains on both sides can best be measured, not in theoretical law, but in real and practical terms.

We were dealing here, presumably, with 7,000 pages of classified material, some of it rated exceedingly sensitive. So it is not entirely surprising that the courts should have been reluctant to dismiss the government's plea out of hand—although the District Court here did just that. On the other hand, the sheer bulk of the material and the manifest insensitivity, in any real sense, of so much of it, necessarily undermined the government's argument, which came down in the end to a plea for highly selective restraints by the courts against only a small portion of the whole. Out of this process, perhaps, may come a positive boon in terms of a thorough re-examination of the classification procedures of the government; for even the government's counsel, as well as the administration, conceded along the way that the existing practices result in massive over-classification of material, for far too long a time.

But the real lesson of this affair, in practical terms, lies elsewhere, or so it seems to us, for what we have been witnessing over the past two weeks has been a belated and very nearly frantic effort by the government to remove from the public domain what should never have been lost—and under circumstances that are quite unlikely to repeat themselves. It has not been often in our history that a newspaper has found itself in possession of so prodigious an amount of classified material, and has begun to publish it, with a clear statement of what it had in hand, and a plain forewarning of what was still to come; such an opportunity for prior restraint does not normally present itself. And neither, for that matter does the government often bundle together quite such an extraordinary load of classified material and leave it lying around quite so negligently.

The very uniqueness of this affair, in other words, has grossly distorted the realities, which are that the government has a very broad grant of authority to conduct its activities in secret, and enormous power to preserve its essential secrets, and an impressive record of doing so. That it failed to do so in this case was never an argument, in our view, for suspending the First Amendment rights of the press or for limiting the prerogative of the press to exercise its own judgment in the handling of these documents. Still less was it an argument for denying the public its right to be informed.

[From The Washington Post, June 27, 1971]

THE PRESS AS ADVERSARY

(By William Greider, a Washington Post Staff Writer)

The struggle is older than the republic—government men telling newspaper men not to print something, warning that national security was endangered, and newspaper men ignoring the advice at their peril, even before they had the First Amendment to protect their freedom.

Gen. George Washington complained about leaks harmful to the Continental Army, although he did not seek any injunctions.

"It is much to be wished," Washington wrote in 1777, "that our Printers were more discreet in many of their Publications. We see almost in every Paper, Proclamations or accounts transmitted by the Enemy, of an injurious nature. If some hint or caution could be given them on the subject, it might be of material Service."

Gen. Sherman, during the Civil War, proposed the ultimate solution. He arrested one of Horace Greeley's battlefield correspondents from the New York Herald, charged him with spying and prepared to shoot him. President Lincoln's intervention saved the reporter's life, but it did not alter Gen. Sherman's opinion of the profession. When Sherman heard that three correspondents were killed by artillery, the general remarked, "Good, now we shall have news from hell before breakfast."

A SPECTACULAR LEAK

At the outset of World War II, President Franklin D. Roosevelt ordered an investigation of the Chicago Tribune and the Washington Times-Herald for a truly spectacular leak—one which makes the current flap over Vietnam policy papers seem pallid by comparison. On Dec. 4, 1941, three days before the attack on Pearl Harbor, both of those newspapers printed the U.S. government's secret war mobilization plans. Despite the air of crisis and considerable fuss, the Tribune was neither enjoined nor indicted.

Frank C. Waldrop, who was then political and foreign editor of the Times-Herald, wrote of the conflict-in-purposes some years afterwards when political passions had cooled:

"We saw it as simple truth that Mr. Roosevelt was out to lie the United States into war with Germany. And after we published, there were those who saw it as simple truth that we were deliberate traitors and intentional agents of the Nazis."

The truth in these matters, as Waldorp observed years later, is never quite so simple. Committed to isolationism, the Chicago Tribune and Times-Herald editors who broke the secret war plans believed the revelation might save Americans from being drawn into a long war in Europe in which they felt America did not belong.

The documents were leaked, however, by someone with the opposite purpose—"a general of high renown," according to Waldrop, who regarded war in Europe as inevitable but feared the United States was ill-prepared. The general felt the "Victory Program," once published, would mobilize American public opinion in favor of greater armaments.

The editors, of course, did not know that war was only three days away. Neither did the general whose only purpose was bigger appropriations for the Army Air Corps. Nor did the isolationist senator, Burton K. Wheeler of Montana, who delivered the secret papers to the Tribune.

FDR ordered the Army and the Justice Department to investigate. The attorney general thought the Espionage Act had been violated. Yet nothing happened; the matter was allowed to drop quietly.

Perhaps, it was because the "Victory Program" dealt primarily with Europe and became moot when Japan attacked in the Pacific. Or, as Waldrop suggests, perhaps FDR himself closed the case when he discovered that one of his best commanders was the source of the leak.

The final irony, established years later by historians, was that this enormous breach of security by two newspapers had virtually no impact on events. When the German commanders read the U.S. plans to raise an army of 10 million men, they immediately urged Hitler to close the Russian front and shift their defenses to the Mediterranean and Western Europe. Hitler ignored their warnings.

A SERIES OF SHOWDOWNS

Over the years, the adversary relationship between press and government has been defined by occasional showdowns such as these—just as another important benchmark in the meaning of "freedom of the press" has been drawn by the current litigation over whether the press can print classified Pentagon documents on the origins of the Vietnam war.

The sporadic clashes, more than the ordinary harmony, provide the meaning for these words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Now history records that the first newspaper publisher in America, one Benjamin Harris, was a bigot, an opportunist, an all-purpose scoundrel who also had bad news judgment. Some would insist, no doubt, that the tradition flourishes still.

Nevertheless, what Harris started in Boston in 1690 with the first edition of "Publick Occurrences Both Foreign and Domestic" was an historic departure—an unauthorized newspaper, printed without the consent or prior approval of the local government. It lasted one issue.

As media historian John Tebbel has recounted, the Bay Colony put Harris out of business, not because he was virulently anti-Catholic or because he "leaked" official secrets. The trouble was that Harris concocted his own secrets—wild stories about Indians and allied nations which were sure to damage the King's diplomatic relations.

Since nobody dreamed that a publisher would print such stuff without the government's approval, it was universally assumed that Harris's stories, true or false, were officially certified. To prove the contrary, the government had to seize the edition and destroy it.

There was a lesson in that—for the second publisher in America. When the Boston News-Letter appeared, it proclaimed in bold type: "Published by Authority," meaning that the content met the prior approval of the government.

THE 'RADICAL' FRANKLINS

The exceptions however, defined the future. James Franklin, Ben's older brother, started a monthly in 1718 called the New England Courant and, in his very first issue, attacked the venerable and powerful preacher Cotton Mather (because Mather advocated inoculation). Franklin was arrested. When he persisted in his independence, the colonial council later issued a sweeping decree prohibiting him from printing anything "except that it first be supervised by the Secretary of his province."

His younger brother Ben took over the paper and continued to dissent in print from the official viewpoint. Later, the brothers parted and Ben Franklin went to Philadelphia, where he edited his own newspaper so brilliantly under this credo:

"If all printers were determined not to print anything till they were sure it would offend nobody, there would be very little printed."

As the colonial government and its interests diverged more and more from the people who were governed, the idea of free and independent newspapers became more crucial. The most celebrated conflict was the criminal indictment for libel in 1773 against John Peter Zenger, who printed in his New York Weekly Journal what everyone already knew—that the royal governor of New York was a lazy lecher.

The law and the case precedents were all against Zenger, but his lawyer got him off with revolutionary eloquence addressed to the jury. He attacked: "Men who injure and oppress the people under their administration, provoke them to cry out and complain, and then make that very complaint the foundation for new oppressions and prosecutions."

The idea persisted, despite threats and intimidation from the King and his agents. By the start of the Revolution, "patriot papers" were operating throughout the colonies—"publishing in the front room and sedition in the back," as Tebbel described them. The Boston Gazette office—where the Tea Party was probably planned—was high on the British list of places to capture when the fighting began.

Out of this tradition, the First Amendment established the broad protection from government supervision which newspapers claim and which is tested periodically in conflict. In the abstract principle, the main check upon newspapers would be the reading public, the free marketplace of ideas, and all that. In practice, the government has sometimes indeed had to protect the press from the public: probably more newspapers have been closed down by angry mobs than by federal marshals.

The idea of many, competing editorial voices survived the great trial of the republic's early years when, as always, the press endangered the limits of freedom by its own excesses. George Washington grumbled, but did not use official power against the newspaper which greeted his Farewell Address with the remark: "If ever a nation was debauched by a man, the American nation has been debauched by Washington."

When Federalist papers directed the same sort of venom at President Thomas Jefferson, he complained too, but stood by the principle that he had advocated: "No government ought to be without censors and where the press is free, no one ever will. If virtuous, it need not fear the fair operation of attack and defense. Nature has given to man no other means of sifting out the truth either in religion, law or politics."

In that spirit, President James Madison did not suppress the Federal Republican in Baltimore when it attacked him during the War of 1812, although the newspaper was widely accused of treason—and a mob destroyed it.

LIMITS REMAIN

The great legal questions which have flowed from this principle of free expression have, generally speaking, broadened that freedom progressively through the years—decisions which made it easier for newspapers to get information from the government, made it harder for people and, especially politicians, to sue newspapers for libel, and liberalized the legal definitions of obscenity and subversion to the point where it is difficult to prosecute a publisher for either.

But limitations remain. Newspapers have been closed by government action, though not by the kind of limited injunction the Justice Department has been seeking against printing specific material in The New York Times, The Washington Post and the Boston Globe. If not closed, they have been threatened or penalized. Like the current episode, the most climactic clashes developed over protecting national security.

During the Civil War, President Jefferson Davis and his Confederate generals were faithful readers of the Yankee press, gleaning details of enemy troop movements (presumably, Union generals also followed dispatches from the Press Association of the Confederate States of America which covered the war for 43 dailies in the South).

Gen. Sherman blamed his setbacks on newspaper leaks (newspapers, for their part, reported that the general was insane). Lincoln issued a sweeping order reminding the legion of battlefield correspondents that they could be court-martialed for espoinage if their reporting aided the enemy. Some newspapers characterized the Commander-in-Chief as "a slang-whanging stump-speaker" and "half-witted usurper" and "mole-eyed."

Besides the press-security conflict on the battlefield, the government dealt more severely with homefront disloyalty—the pro-slavery Copperhead newspapers which made mischief throughout the war.

The Chicago Times was under a seizure order issued by Gen. Burnsides, then reversed by President Lincoln (the excitement was credited with reviving the paper's failing circulation). The Philadelphia Evening Journal was suppressed; so was the Christian Observer. A New York grand jury attacked the disloyalty of five local newspapers and the editor of the Ohio Statesman was indicted, but died before his trial.

In 1864, the New York World and the Journal of Commerce were closed down by troops for two days after they printed a bogus presidential proclamation announcing a new draft call of 400,000 men. The New Orleans Picayune, which reprinted the phony story, was closed for two weeks.

Some of the same questions arose during World War I and the government employed a pressure tactic which folded some publications without violating the contemporary interpretation of the Constitution—revoking their mailing privileges. More than 75 papers felt this threat from the Post Office Department; some of them succumbed and legal challenges failed.

In covering the war, a "voluntary censorship" was accepted by the newspapers to get accreditation for their correspondents. Generally, it worked, although The Washington Post and the Hearst newspapers, among others, were accused of breaking the rules on several occasions.

During World War II, the pattern was similar. Most conventional newspapers learned to live with "voluntary censorship," but the national security was invoked against the eccentric, like Father Charles E. Coughlin's right-wing

"Social Justice," closed down after he was threatened under the 1917 Espionage Act. Some 30 publications were indicted for disloyalty, according to Frank Luther Mott, journalism's authoritative historian. Others lost their postal permits.

Col. Robert R. McCormick's Chicago Tribune, bitterly against American intervention and on mutually venomous terms with the President, had the most celebrated confrontations. Besides printing the U.S. war plans before the war had started, the Tribune was accused of leaking the fact in 1942 that the United States had broken the Japanese naval code—a feat which won the Battle of Midway and promised future naval victories until its revelation.

The accusation was based on the Tribune's detailed account of the battle—which was so complete the government claimed it could only reveal to the Japanese that their code was broken. The newspaper always denied the charge and a federal grand jury in Chicago investigated the incident, then dropped it. In hindsight, Pentagon secret-keepers acknowledged in 1954 that the Japanese did not find any significance in the Tribune's original story, and were not even alerted by the political flap surrounding it. The lesson, according to Pentagon officials, was that once a serious leak occurs, it may be better to ignore it.

UNEXPLORED QUESTIONS

Whatever else may be said about him, the late Col. McCormick was more consistent than some of his fellow publishers on one point—his deep suspicion of government interference with the press. The Chicago Tribune championed the cause in 1927 of an obscure Minneapolis publication called The Saturday Press, threatened with a court injunction putting it out of businss as "malicious, scandalous and defamatory."

The legal test which followed, Near v. Minnesota, was financed by the colonel and other publishers, providing the one clear Supreme Court precedent for the current controversy over prior restraint. In that 1931 decision, the Supreme Court held that Minnesota could not regulate a newspaper the way it might penalize a dairy that sells bad milk or a stockbroker who defrauds his customers.

"The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct," the court declared. "Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."

The Supreme Court, however, noted that even that rule is not absolute. It suggested some exceptions when a government might reasonably seek an injunction to prevent a publication: to avoid obstruction to its recruiting program or the revelation of troop-movement schedules, or to protect the community against incitement to riot or the violent overthrow of the government.

In just the last few years, a new reading of the First Amendment has been developed by some legal scholars which puts modern newspaper management on the defensive. The theory holds that "freedom of the press" belongs to everyone, not just the people who own the newspapers, and the crucial test is whether everyone's viewpoint is given fair access to the news columns. That departure raises deep and largely unexplored questions about who controls the printing presses and whether monopoly ownership inhibits the freedom protected by the First Amendment.

Last week, the judges were deciding whether the "top secret" documents from the Vietnam policy study qualify as exceptions to the First Amendment, as cited in the Near decision. Ironically, both sides have cited a 1968 opinion written by an appellate judge in Washington—now Chief Justice Warren Burger.

The government argues that Judge Burger's decision recognized that prior restraints on the press are permissible in some circumstances. But the newspapers point to another declaration by the same judge:

"A free, open society elects to take calculated risks to keep expression uninhibited."

[From the Columbia Journalism Review, Sept.–Oct. 1971]

THE 'STATE SECRETS' MYTH

By Max Frankel[1]

"THE GOVERNMENT'S COMPLAINT . . . COMES WITH ILL GRACE BECAUSE GOVERNMENT ITSELF HAS REGULARLY . . . VIOLATED THE CONDITIONS IT SUDDENLY SEEKS TO IMPOSE. . . ."

The Government's unprecedented challenge to the *Times* in the case of the Pentagon Papers cannot be understood without an appreciation of the manner in which a small and specialized corps of reporters and a few hundred American officials regularly make use of so-called classified, secret, and top secret information and documentation. It is a cooperative, competitive, antagonistic, and arcane relationship. I have learned over the years that it mystifies even experienced professionals in many fields, including those with Government experience, and including the most astute politicians and attorneys.

Without the use of "secrets" there could be no adequate diplomatic, military, and political reporting of the kind our people take for granted, either abroad or in Washington, and there could be no mature system of communication between the Government and the people. That is one reason why the sudden complaint by one party to these regular dealings strikes us as monstrous and hypocritical—unless it is essentially perfunctory, for the purpose of retaining some discipline over the federal bureaucracy.

I know how strange all this must sound. We have been taught, particularly in the past generation of spy scares and Cold War, to think of secrets as *secrets* —varying in their "sensitivity" but uniformly essential to the private conduct of diplomatic and military affairs and somehow detrimental to the national interest if prematurely disclosed. By the standards of official Washington—Government and press alike—this is an antiquated, quaint, and romantic view. For practically everything that our Government does, plans, thinks, hears, and contemplates in the realms of foreign policy is stamped and treated as secret—and then unraveled by that same Government, by the Congress, and by the press in one continuing round of professional and social contacts and cooperative and competitive exchanges of information.

The governmental, political, and personal interests of the participants are inseparable in this process. Presidents make "secret" decisions only to reveal them for the purposes of frightening an adversary nation, wooing a friendly electorate, protecting their reputations. The military services conduct "secret" research in weaponry only to reveal it for the purpose of enhancing their budgets, appearing superior or inferior to a foreign army, gaining the vote of a congressman or the favor of a contractor. The Navy uses secret information to run down the weaponry of the Air Force. The Army passes on secret information to prove its superiority to the Marine Corps. High officials of the Government reveal secrets in the search for support of their policies, or to help sabotage the plans and policies of rival departments. Middle-rank officials of government reveal secrets so as to attract the attention of their superiors or to lobby against the orders of those superiors. Though not the only vehicle for this traffic in secrets—the Congress is always eager to provide a forum—the press is probably the most important.

In the field of foreign affairs, only rarely does our Government give full public information to the press for the direct purpose of simply informing the people. For the most part, the press obtains significant information bearing on foreign policy only because it has managed to make itself a party to confidential materials, and of value in transmitting these materials from government to other branches and offices of government as well as to the public at large. This is why the press has been wisely and correctly called the Fourth Branch of Government.

I remember during my first month in Washington, in 1961, how President Kennedy tried to demonstrate his "toughness" toward the Communists after they built the Berlin wall by having relayed to me some direct quotations of his best arguments to Foreign Minister Gromyko. We were permitted to quote from this conversation and did so. Nevertheless, the record of the conversation was then, and remains today, a "secret."

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[1] Max Frankel is Washington bureau chief of the New York *Times*. His comments are adapted from an affidavit filed in the Pentagon Papers case. The complete file of *Times* legal briefs and supporting documents, edited by *Times* general counsel James C. Goodale, is available from Arno Press, Inc., at $75 per set.

I remember a year later, at the height of the Cuban missile crisis, a State Department official concluding that it would surely be in the country's interest to demonstrate the perfidy of the same Mr. Gromyko as he denied any knowledge of those missiles in another talk with the President; the official returned within the hour and let me take verbatim notes of the Kennedy-Gromyko transcript—providing only that I would not use direct quotations. We printed the conversation between the President and the Foreign Minister in the third person, even though the record probably remains a "secret."

I remember President Johnson standing beside me, waist-deep in his Texas swimming pool, recounting for more than an hour his conversation the day before, in 1967, with Prime Minister Kosygin of the Soviet Union at Glassboro, N.J., for my "background" information and subsequent though not immediate use in print, with a few special off-the-record sidelights that remain confidential.

I remember Secretary of State Dean Rusk telling me at my first private meeting with him in 1961 that Laos is not worth the life of a single Kansas farm boy and that the SEATO treaty, which he would later invoke so elaborately in defense of the intervention in Vietnam, was a useless instrument that should be retained only because it would cause too much diplomatic difficulty to abolish it. Similar dealings with high officials continue to this day.

We have printed stories of high officials of this Administration berating their colleagues and challenging even the President's judgment about Soviet activities in Cuba last year. We have printed official explanations of why American intelligence-gathering was delayed while the Russians moved missiles toward the Suez Canal last year.

Respect for sources and for many of the secrets prevents a truly detailed accounting. But I hope I have begun to convey the very loose and special way in which "classified" information and documentation is regularly employed by our government. Its purpose is not to amuse or flatter a reporter whom many may have come to trust, but variously to impress him with their stewardship of the country, to solicit specific publicity, to push out diplomatically useful information without official responsibility, and, occasionally, even to explain and illustrate a policy that can be publicly described in only the vaguest terms.

This is the coin of our business and of the officials with whom we regularly deal. In almost every case, it is secret information and much of the time, it is top secret. But the good reporter in Washington, in Saigon, or at the United Nations gains access to such information and such sources because they wish to use him for *loyal* purposes of government, while he wishes to use *them* to learn what he can in the service of his readers. Learning always to trust each other to some extent, and never to trust each other fully—for their purposes are often contradictory or downright antagonistic—the reporter and the official trespass regularly, customarily, easily, and unselfconsciously (even unconsciously) through what they both know to be official "secrets." The reporter knows always to protect his sources and is expected to protect military secrets about troop movements and the like. He also learns to cross-check his information and to nurse it until an insight or story has turned ripe. The official knows, if he wishes to preserve this valuable channel and outlet, to protect his credibility and the deeper purpose that he is trying to serve.

The Government's complaint against the *Times* in the present case comes with ill grace because government itself has regularly and consistently, over the decades, violated the conditions it suddenly seeks to impose upon us—in three distinct ways.

First, it is our regular partner in the informal but customary traffic in secret information, without even the pretense of legal or formal "declassification." Presumably, many of the "secrets" I cited above remain "secret" in their official designation.

Second, the Government and its officials regularly and customarily engage in a kind of *ad hoc, de facto* "declassification" that normally has no bearing whatever on considerations of the national interest. To promote a political. personal, bureaucratic, or even commercial interest, incumbent officials and officials who return to civilian life are constantly revealing the secrets entrusted to them. They use them to barter with the Congress or the press, to curry favor with foreign governments and officials from whom they seek information in return. They use them freely, and with a startling record of impunity, in their memoirs and other writings.

Third, the Government and its officials regularly and routinely misuse and abuse the "classification" of information, either by imposing secrecy where none is justified or by retaining it long after the justification has become invalid, for simple reasons of political or bureaucratic convenience. To hide mistakes of judgment, to protect reputations of individuals, to cover up the loss and waste of funds, almost everything in government is kept secret for a time and, in the foreign policy field, classified as SECRET and SENSITIVE beyond any rule of law or reason. Every minor official can testify to this fact.

Obviously, there is need for some secrecy in foreign and military affairs. Considerations of security and tactical flexibility require it, though usually for only brief periods. The Government seeks with secrets not only to protect against enemies but also to serve the friendship of allies. Virtually every mature reporter respects that necessity and protects secrets and confidences that plainly serve it.

But for the vast majority of "secrets," there has developed between the Government and the press (and Congress) a rather simple rule of thumb: the Government hides what it can, pleading necessity as long as it can, and the press pries out what it can, pleading a need and right to know. Each side in this "game" regularly "wins" and "loses" a round or two. Each fights with the weapons at its command. When the Government loses a secret or two, it simply adjusts to a new reality. When the press loses a quest or two, it simply reports (or misreports) as best it can. Or so it has been, until this moment.

Some of the best examples of the regular traffic I describe may be found in the Pentagon Papers that the Government asks us not to publish. The uses of top secret information by our government in deliberate leaks to the press for the purposes of influencing public opinion are recorded, cited, and commented upon in several places of the study. Also cited and analyzed are numerous examples of how the Government tried to control the release of such secret information so as to have it appear at a desired time, or in a desired publication, or in a deliberately loud or soft manner for maximum or minimum impact.

Examples of my point are so numerous that despite the great bulk of the papers, we were able to locate more than a dozen different kinds of such passages in less than an hour. They include not only regular, daily articles but also major contemporary analyses of government decision-making at several key stages of the Vietnam war, right after the Cuban missile crisis, and shortly after the invasion of Cambodia. They include major journalistic investigations of secret institutions, like the Central Intelligence Agency. They combine known facts, pried-out secrets, and deliberate disclosures of secrets. They are recognized within the profession and among readers as the most valuable kind of journalism and have *never* been shown to cause "irreparable" harm to the national security. They have occasionally prompted investigations inside the Government to determine the sources of information, the possible presence of disloyal or dissenting officials, or the existence of information not previously given any weight or credibility by higher authority. None of these articles could be fairly described as less "sensitive" or more innocuous than the materials now challenged. None of them ever produced a legal challenge or a request for new legislation.

Samples of the second kind of traffic in secrets—the *ad hoc, de facto* (but by no means authorized, official, or "legal") declassification of documents—are numerous and voluminous.

George Christian of Austin, Tex., former press secretary to President Johnson who had free admission to all foreign and domestic discussions involving the President, at any level and in any forum, published his memoir in 1970. It includes seventy pages of narrative on the decisions to end the bombing of North Vietnam in late 1968, with many direct quotations of the President and other officials, many unflattering references to our allies in South Vietnam, and a great deal of detailed information, all still highly classified, about the secret negotiations with North Vietnam in Paris. This book, entitled *The President Steps Down,* actually covers a period more recent than that discussed in the Pentagon Papers, and at a much higher level of government and secrecy.

Recently, a book containing secret documents from members of the Joint Chiefs of Staff about the very same period covered by the *Times'* materials was published. The book, entitled *Roots of Involvement,* by Marvin Kalb and Elie Abel, includes telegram exchanges between General Westmoreland and General Wheeler in early 1968. We are advised that these texts were taken from privately circulated analyses and histories of phases of the war by leading military commanders, still on active duty.

Theodore C. Sorensen's *Kennedy,* written within a year of the death of President Kennedy, reveals dozens upon dozens of actions, meetings, reports, and documents, all still treated as "classified" by the Government and unavailable for more objective journalistic analysis. Sorensen treated the Kennedy-Khrushchev correspondence as private, to protect future channels of communication with Soviet leaders, but the most "secret" of these letters, during the Cuban missile crisis, were fully revealed in two subsequent books, one by Elie Abel and one by Robert F. Kennedy. Sorensen also observes that while Kennedy was still alive he invited Professor Richard Neustadt into Government archives for a contemporary analysis of decision-making of the "Skybolt" affair, the secrets of which were later revealed by the professor in a public acount of this minor-missile crisis with Britain.

Arthur Schlesinger, Jr., kept notes in the White House for his history of the Kennedy years entitled *A Thousand Days.* Roger Hilsman, an intelligence officer and then Assistant Secretary of State for the Far East, poured his files and secrets into a quick memoir entitled *To Move a Nation.* John Bartlow Martin, special ambassador during the Dominican Republic invasion of 1965, wrote *Overtaken by Events,* recounting numerous confidential messages and communications. Chester Cooper, a CIA official involved in Vietnam policy for two decades, left the White House to produce what was probably the most complete and best-documented history until the Pentagon Papers became available to the *Times. The Secret Search for Peace in Vietnam,* by David Kraslow and Stuart Loory of the Los Angeles *Times,* remains to this day the most thorough newspaper (and book) account of the diplomacy surrounding the war—through channels still deemed "live."

As the *Times* indicated in the first of its articles about the Pentagon study, it is a massive history of how the United States went to war in Indochina. Its 3,000-page analysis, to which 4,000 pages of official documents are appended, was commissioned by Secretary of Defense Robert S. McNamara in 1967 and completed in 1968, by which time he had been replaced by Clark M. Clifford. The analysis covers a historical record, as the *Times* said, from World War II to May, 1968—the start of the peace talks in Paris, by which time President Johnson had set a limit on further military commitments and revealed his intention to retire. We said that "though far from a complete history, even at 2.5 million words, the study forms a great archive of government decision-making on Indochina over three decades."

Moreover, the material was treated by the *Times* as a historical record that was of importance not only to our daily readers but also to the community of scholars that we have long served with a record of events. Our presentation was subjected to the most careful editing so that our report would remain faithful to the Pentagon record itself.

The *Times* found the history to be concerned primarily with the decision-making process in Washington and the thoughts, motives, plans, debates, and calculations of the decision-makers. I have seen no materials bearing on future plans of a diplomatic or military nature. The *Times'* interest throughout, like that of the study itself, in the words of our opening line, was in "how the United States went to war in Indochina."

The Pentagon Papers published by the *Times* and a bureaucratic history and analysis of the interaction of events and policy decisions are an invaluable historical record of a momentous era in our history. We cannot believe they should be suppressed.

[From the Columbia Journalism Reader, Sept.–Oct. 1971ᶜ]

WHERE WE STAND, A LEGAL VIEW

By Thomas I. Emerson [1]

IT WAS A LANDMARK DECISION, SAYS A LEGAL SCHOLAR—OF COMPARABLE IMPORTANCE TO THE JOHN PETER ZENGER CASE. BUT TO WHAT EXTENT WAS IT AN ADVANCE?

Do you regard this as a particularly unusual period in press-government relations?

In one sense, yes. In legal theory, the press probably has more protections now than it has ever had. But in terms of the social climate and the attitudes of the Administration, there is probably more pressure on the press than at any time since World War I.

Historically, the press has been subject to very considerable controls. At the end of the eighteenth century, shortly after the Constitution was promulgated, the Alien and Sedition Acts were passed and then used to a large degree against newspaper editors. Prior to the Civil War, Abolitionist newspapers were not allowed in the South. During the Civil War there was considerable interference with the press: Lincoln and his generals closed several newspapers, deprived papers the use of the mails, and enforced intensive censorship of Copperhead newspapers. Then, in World War I a German-language newspaper in St. Louis was prosecuted under the Espionage Act on charges of printing false and misleading reports and slanting the news on military operations.

I think such restrictions would clearly be impermissible as Constitutional law now stands. *The whole development of the First Amendment, which really began only in 1919 in Supreme Court decisions arising out of World War I,* has given the press a much more secure position.

Would you describe the cases that began the modern era of the First Amendment?

The initial cases arose out of *the Espionage Act of 1917, which prohibited conduct that would tend to create insubordination in the armed forces.* The Act was applied to inhibit criticism of the war. Gradually, as time went on, the Supreme Court shifted, and particularly with the beginning of the Hughes Court the Justices were willing to uphold the right to criticize the war and the Government generally. The area of speech protected by the First Amendment expanded quite substantially in the 1920s and 1930s, but was then set back somewhat by the decision in the Smith Act cases of 1950-51. But since then it has again progressed through cases such as Julian Bond's, which indicates that any expression, no matter how critical of the war it may be, is protected by the First Amendment. So I think that in theory, the newspapers have a pretty strong Constitutional grounding.

Of course, there are many ways to influence and control the press other than by criminal prosecutions. And one now gets the distinct feeling that the Government is attempting to exercise control. I think of the speeches of Vice President Agnew; the New York *Times*-Washington *Post*-Boston *Globe* case; actions by the FCC under the new chairman; the Coldwell subpoena case; and various other indications that the Administration seems to be willing to apply pressures on the press of a character and intensity that I think have not been applied for more than a half-century.

Would you trace the roots in law of the New York Times case?

In the period shortly after the printing press was introduced in England, a series of laws and regulations brought into being a very elaborate system of censorship; not only did everything that was published require advance approval either by ecclesiastical or secular authorities, but also the number of printing presses was limited, the number of printers was limited and licensed, there was a whole system of advance censorship of anything printed. It was against this that John Milton made his famous speech in Parliament in 1646 that was reprinted and published as *Areopagitica.* After the laws expired it became accepted as part of British law that no advance censorship, no advance approval be required. The sedition laws still prohibited printing material critical of the Government, but the Government could not prevent publication in advance even of material that could constitute an offense. The theory was that a system of advance censorship is much more restrictive than post-publication prosecutions.

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[1] Thomas I. Emerson, Lines Professor of Law at Yale, is author of *Toward a General Theory of the First Amendment, The System of Freedom of Expression* and co-author of *Political and Civil Rights in the United States.*

That was the situation at the time the First Amendment was adopted as part of the Bill of Rights in 1791. The Court on several occasions has said that the main purpose of the First Amendment was to guarantee that British censorship laws would never be applied in this country. When the prior restraint issue first came up, in the Hughes Court in 1931, it was called *Near vs. Minnesota,* which involved the so-called Minnesota Gag Law. That law provided that any newspaper which printed scurrilous and defamatory material could be subject to an injunction, and it was applied to a Minneapolis newspaper that printed an attack on the city administration. The Court, for the first time facing a situation somewhat comparable to the British censorship laws, held that the obtaining of an injunction against publication was a violation of the First Amendment; that one of the principal purposes of the First Amendment was to prevent a system of advance censorship. The Court thus incorporated into American Constitutional law the doctrine of no prior restraint.

The Court did say there were some exceptions to the doctrine. But the only exception it had allowed prior to the New York *Times* case was one permitting movie censorship boards to screen a film in advance for obscenity. And it clearly indicated it was talking only about films.

What influence do you believe the Court's 1971 decision will have on the freedom of U.S. news media?

The result was certainly favorable to a free press. Put the other way, a contrary result would have been a disaster. It would have made the press subject to a very considerable extent of advance restriction. It would have changed the whole relationship between the press and the Government. The outcome was a sound outcome. On the other hand, the legal theory that the Court adopted is, I think, cause for concern.

Only three Justices came out strongly against a system of prior restraint—Justices Black, Douglas, and Brennan, and Brennan would make some very narrow exceptions. Black and Douglas apparently permitted none. Justice Marshall probably would go along with them, but actually he based his opinion on a different ground—on the ground that Congress had denied this power to the President, and the Court therefore didn't get into the question. But if you assume there were four who would vigorously apply the doctrine of no previous restraint, nevertheless there were five whose opinions seriously undermined the doctrine against prior restraint. Certainly the three dissenters would have made exceptions, but also Justices Stewart and White announced that any anticipated publication which raised an immediate danger to national security would be grounds for an injunction, and the dissenting judges apparently would have gone at least that far.

Now, there are two legal problems there. One is that the exception which is made—that you can have advance restraint of a newspaper if the Government proves a grave and immediate breach of national security—is a very wide-open exception: very broad, very vague, covering a large amount of territory that would probably allow the Government to obtain an injunction in most cases where any issue of national security was raised. It would certainly be far more restrictive than the previous situation was considered to have been.

There is also a second problem. That is that even if the courts ultimately interpret the concept of "grave and immediate breach of national security" rather narrowly, the very application of the rule will constitute a system of prior restraint. The Government can come in and allege a grave and immediate breach of national security; the Court will then issue a temporary restraining order; publication will be held up while the Court looks to see whether there is a breach of national security; and the whole process of applying the rule will itself be a system of prior restraint. So in legal theory the press is in a rather vulnerable situation if the Stewart-White doctrine is adopted. Of course, the Court hasn't decided that, but that was certainly the implication.

Presumably the circumstances of the New York *Times* case would not arise very often: it is rather unlikely that a newspaper would have such a massive collection of documents to publish at one time. Similarly, the press by now presumably has learned that it would not be enjoined if it already had published something, and presumably it wouldn't tell the Government in advance what it had. So as a practical matter the press may be able to protect itself in spite of the rule that the Court seemed to be laying down.

"PRESSURE OF A KIND NOT APPLIED IN A HALF-CENTURY . . ."

On the other hand, if one assumes that a newspaper publishes classified material on several occasions over a period of weeks, or maybe a month; the Government might well then come into court and say, "We don't know exactly what the newspaper is going to publish next, but they have displayed a pattern of publishing classified materials. We don't know what their sources are, but they must have some source, and we want to enjoin them from printing more classified material."

That is an extension of the New York *Times* facts, and an extension of the theory of the case, but not much of an extension. A court might well say, "If publication of material that would cause grave and immediate injury to the national security can be prevented when the Government knows about it in advance; if the Government is pretty sure, because the newspaper has done it in the past, that more is coming out, what is there to prevent us from enjoining the newspaper from publishing any more classified material?" At that point you have a system of prior restraint that could be even more restrictive than the rule of the New York *Times* case. In other words, once you take a position that the rule against prior restraint doesn't apply in a national security situation, then it is not a very large step to say that if a newspaper has sinned once, the Government can prevent it from sinning again.

Are you suggesting, then, that even though Congress might bring about a change in government classification policies, this wouldn't necessarily protect the press in a severe test?

The Court certainly did not take the position that anything that is classified cannot be published. It did take the position that it would examine material to see whether what was about to be published would be a grave and immediate breach of national security. So the classification system by itself is not decisive. But as a factual matter, that pushes the Court in a direction of suppression because if it is something that the Government has classified then it is likely that publication could be represented as a breach.

One commentator has pointed out that suppression for even two hours, let alone two weeks, can make moot the dissemination of something urgent.

Any delay is serius—certainly a delay long enough for a court to look at material. In addition, the court has to hold a secret proceeding—which is what it did in both the *Post* and the *Times* cases. The Government's argument is that in order to persuade the Court that this is a serious breach of national security it will have to tell all the facts as to why, and therefore the very process of proving its point wil cause a breach of national security unless the hearing is in secret. So you have the Court holding secret proceedings from which the public is excluded. Besides that, the Government said, "No one can be permitted to come to these proceedings unless he has a security clearance." So the Government could determine what lawyers and what members of the press would be allowed to participate in the hearing. In other words, the very process of deciding in advance gets you into secret judicial proceedings, and that is a very serious thing in a democratic society.

In this case, did the Government ask for secret proceedings that would exclude the newspapers?

Yes. It asked the Court for secret proceedings, and it asked counsel for the newspapers to name the persons they wanted to be present at the secret proceedings, and then they cleared those persons in Washington. Only those persons cleared by the Government were admitted to the secret proceedings. So the Government even had control of who appeared. The newspapers' counsel could attend, if they got clearance—but they had to get clearance. Third parties such as the American Civil Liberties Union weren't admitted. If they had been, they would have needed clearance, too.

In addition, the Government submitted two briefs in each of the cases. I represented twenty-seven Congressmen who filed a brief as *amici curiae.* We served our brief on the Solicitor General, as is customary. He is supposed to give us a copy of his brief. He gave us a copy of his public brief, but would not give us a copy of his private brief. So there were secret briefs which were available only to the Court, not to the public.

Has this ever been done in our history in a case involving the press?

Not that I know of. There have been instances in espionage cases involving state secrets, in which there has been limited access to materials, but those have been very, very few. Even there, the defendant can't be convicted on the basis of anything that isn't submitted in the record, so the Government has to disclose the material or drop the prosecution.

What else was noteworthy about this case?

At least one other aspect: that the Court really did nothing to advance the doctrine of the right to know. In this case there were two components of the right to know: the general public's right to know, and also the legislature's, the Congressional right. Now that is a very important area of First Amendment rights, an area that is just beginning to be developed in law. Nothing could be more important to a democratic system than the right of citizens to all information on which to base decisions. Any democratic society is going to have to develop some legal principles in that area.

Could Congressional action help here?

Of course the Freedom of Information Act—the Moss Act—is directed toward supporting the right to know, and many states have passed statutes making the proceedings of boards, commissions, and state agencies open to the public. There has been the beginning of a movement by statute supporting the right to know. But it is rather feeble. The federal Freedom of Information Act exempts all national security matters, and many of the states have extensive exemptions. It's just a beginning, but it is a beginning, and people are commencing to realize the importance of it. It certainly would have been given an impetus if the Court had been able to say something about it.

Would you place this case on a level with the John Peter Zenger case in its implications for journalistic freedom?

I think it was of comparable importance to the Zenger case. I would say it's probably more important than the *New York Times vs. Sullivan* libel case, and on a par with the Smith Act case *(Dennis vs. the United States)*, and the case involving the Internal Security Act *(Communist Party vs. United States)*. It is truly a landmark decision.

Would you comment on recent cases of subpoenas of journalists' notes and film?

Obviously this is an exceedingly important matter. If the Government can obtain information about sources and about material that the reporter doesn't use, his sources of information can be materially curtailed, and the way a story is investigated and researched could presumably be changed. The reporter wouldn't keep notes, and people he talked to wouldn't be as free. It would clearly have a very serious effect.

Until recently the law has afforded very little protection to a reporter in this area. The law started from the point that the Government was entitled to any information which it could otherwise legally obtain through the judicial process, that it was the duty of all citizens to give information to the Government that was relevant to some legal issue or some legislative issue. The exceptions to that were very narrow—husband-wife, doctor-patient, a few other confidential relationships were the only ones recognized.

The press, when called upon to produce information that it felt would violate confidences, usually has refused, and in a few cases reporters have gone to jail for it. But by and large the press has persuaded the courts not to force the issue, and as a practical matter the courts weren't interested in tangling with the press.

Since the Government has forced the issue, the courts seem to be modifying their position somewhat. In the Caldwell case, for instance, the Ninth Circuit court held that the Government would have to show compelling reasons why it needed the information; that the reporter would not even have to appear before the grand jury unless the Government could show that it couldn't get the information elsewhere. But the concept of "compelling reasons," like the concept of "grave and immediate breach of national security," is so broad that the courts would have great leeway in applying it, and the consequence would be that no one would know what his rights were. The reporter wouldn't know how far he could go, and the person talking to the reporter wouldn't know how far he could go. A whole chilling effect would occur. A rule that is too vague is almost worse than no rule at all. I would hope that the Supreme Court, when it decides the Caldwell case, would come out with some very specific and restrictive rule.

Where do the news media stand in other area such as libel law?

Libel is an illustration of development of First Amendment doctrine beneficial to the press. Originally the law of libel grew up independently of the First Amendment, and although it promised a good deal it never delivered much. It was pretty hard to win a lawsuit and collect money, but the legal position of the press was very vulnerable. When libel issues arose in a political context with the civil rights movement in the Sixties—that is, when Southern opponents of the civil rights movement sued the New York *Times* and the broadcasters for libel, based really on political criticism—the Court had to face the problem of how to reconcile libel laws and the First Amendment. In doing so, the Court went quite far in protecting the press, laying down the rule that criticism of public officials, even though false, was justified unless actual malice was proved—definite realization that a statement was false, and a desire to publish it whether it was false or not. That rule has been extended not only to public officials but to public figures, and most recently, in the *Rosenbloom* case, extended further to apply to any matter of public concern.

I think that even the "actual malice" restriction is too broad; I agree with Justices Black and Douglas that leaving the issue of malice up to a jury reopens the whole question and deprives the press of a great deal of protection which it otherwise would have. Nevertheless, as applied so far the rule has been a major protection. Even the newest Court appointees went along in extending the *Times* doctrine to public isues.

Where do we stand in assuring broadcast media First Amendment protection?

There now are two main problems. One is a noticeable tendency by the Federal Communications Commission to restrict broadcasting in various ways. The Commission has adopted, or shows signs of adopting, stricter rules about "offensive" or vulgar material. The chairman has officially announced that that is what he would like to do. That could easily lead to interference with political commentary. Another aspect is the FCC's attempt, subsequently modified, to limit songs that deal with drug problems.

The Federal Communications Bar is quite worried about the likelihood that the FCC may press rather far in the direction of censorship, which could tend to political censorship. I think the courts would probably block any formal overt action in that direction, but the FCC operates unofficially to a large extent, and it can make an impact without revoking somebody's license and thereby posing a clearcut legal issue. It's a question of the broadcasters standing up to the FCC and not letting it go too far.

The other main problem in broadcasting regulation is the application of the Fairness Doctrine, the equal-time doctrine, and other FCC regulations which concern the variety of material that comes over the air. That is extremely important. The whole system of freedom of the press and expression depends on having access to a variety of viewpoints, and the viewpoints that come over the air are quite narrow in scope.

The FCC is presently considering a revision of the Fairness Doctrine. My feeling is that the revision should be very strongly in favor of the Government requiring stations to open their facilities to more viewpoints. I think that because radio and TV are limited facilities, the efforts of the Government to permanently promote greater variety of expression through the fairness rule and similar doctrines would be consistent with the First Amendment.

In recent weeks some commentary, including commentary from the legal profession, has seemed rather hostile to the kind of journalistic freedoms you have been discussing. What might the news media do to create understanding of the stakes involved?

I would say one of the main things that the media can do is to educate the public to the significance of the whole system of free expression. The idea of a free press and freedom of expression is a rather sophisticated concept for a politically mature people, one that we have worked out extensively in the last forty or fifty years but which only a limited group understands and realizes the import of. The natural inclination, as Holmes said long ago, when you don't like what a fellow is saying is to shut him up. I think that there has to be great effort made to have a really full understanding of it, and I think the news media have an important obligation there. I think the New York *Times* case has opened up the possibility of making people aware of what the role of the press is; that its role isn't simply to take handouts given by the Government; it's for the people.

The major problem with the system of freedom of the press today is the inability of many points of view to find an outlet. That is a very serious problem. I think that it is important for the media to be aware of that, to anticipate it, to try to take account of it. In other words, just as I think the Government ought to subsidize an opposition to itself, in a sense monopolistic elements in the communications industry should subsidize some opposition to themselves. I think it would be a much healthier and ultimately more successful system.

THE FIRST AMENDMENT AND BROADCASTING

[Speech to the Illinois Broadcasters Association, October 13, 1971]

WILL BROADCASTING SURVIVE?

By Lee Loevinger

It is indeed an honor to be asked to speak to the convention of a broadcasters association. However, the honor at this point in our history is a little bit like being appointed navigator of the luxury liner, the steamship Titanic. To say that broadcasting is facing troubled times is true but trite. We are all facing troubled times, and perhaps all times seem troubled to those living in them and confronted by their problems. But cold analysis suggests that the troubles of this period for commercial broadcasting may be terminal.

The situation of broadcasting can best be described simply by noting the number, variety and nature of the problems confronting it. Even to list all of these fully would unduly extend this discussion so I shall simply mention some of the more important burdens which the government has recently inflicted upon broadcasting. These include: the limitation of prime time network programming; new and very large FCC fee charges; shifting and increasingly strict renewal standards; a proposed requirement for announcements inviting complaints; increasing pressure to attain some vague unattainable ideal in children's programming; the requirement for reviewing and judging of record lyrics; the prohibition against local CATV ownership; greatly increased line charges for program transmission and interconnection; pressure and demands for free time for political broadcasts; increasing requirements for reporting and record keeping; the loss of advertising revenue resulting from the prohibition against cigarette advertising and the increasing attack upon other broadcast advertising; the escalating costs of program production; demands from OEO and an apparently limitless number of minority groups for programming directed to their special interests; wage and price controls; and all of the economic problems growing out of the uncertain and depressed conditions which have confronted business recently.

Television tends to get the headlines and to attract public attention so that it sometimes appears that the problems of broadcasting are really television problems. This is an illusion. The basic problems confronting television also confront both AM and FM radio-broadcasting and are the same for all the broadcasting media. For example, the two problems that I shall mention as most significant are the problems of license renewal and attacks on commercials. These affect television and radio in precisely the same fashion and equally. Up to the present time the competing applications for licenses have been filed against television stations. However, as militant activists discover the cost of establishing and operating television stations and the difficulty of raising that much money by selling love beads or underground newspapers they will begin to look for alternatives. Radio is an obvious and desirable alternative. It provides a voice that reaches the public just as television does, and in some respects more widely and effectively. Radio reaches the whole population, perhaps more completely than television. It can operate during power blackouts. Radio receivers are cheaper to buy and more portable than television receivers. Radio stations are cheaper to own and much cheaper to operate than television stations. Thus it is inevitable that those seeking a medium to carry their voices to the community will soon turn to radio. As soon as a precedent has been set in television competing applications will start to come in against radio application renewals.

With respect to commercials the Fairness Doctrine and all the other rules applicable to television commercials apply equally to radio commercials. The protests against commercials and the demands for counter-commercials and anti-commercials involve radio as well as television. The zealous partisans who so earnestly oppose advertising and demand time for anti-commercials have not overlooked and will not neglect radio.

There is only one economic boat for broadcasting. Radio and television are in the same boat together. If one end sinks, both ends sink.

The burdens, troubles and difficulties confronting broadcasting are unprecedented in number, variety and magnitude. They confront all broadcasters and are equally threatening to radio and television and to large and small broadcasters.

Nevertheless it is necessary to have a sense of proportion and to judge the relative importance of these difficulties. If the roof on your house is leaking, that's certainly bad. But if your house is burning down, that is a crisis.

Some problems are unpleasant, expensive, or oppressive but nonetheless tolerable. Examples of these are the increase in FCC fees, the increasing burden of record keeping and responding to government inquiries and the increasing competition and threat of competition from such sources as cable or CATV, cassettes and Pay-TV.

There are other problems which appear burdensome but which must be recognized as arising from necessary responsibilities and duties and the adjustment to changing social conditions. These include the cost and difficulty of recruiting and training the disadvantaged and the minority groups, the measures necessary to eliminate and prevent any racial, religious, or sexual discrimination and the need to survey community interests more closely. Whatever burden these problems impose must be accepted by broadcasters and the duties arising from these obligations must be fully discharged.

There are, however, two current issues which are basic and vital both to broadcasters and to the general public. These are: first, the right of a broadcaster who complies with all laws, regulations and legal standards to retain his license and to continue broadcasting; and, second, the right of broadcasting to compete economically with other media.

These issues are vital because without a license a broadcaster cannot operate and without revenue a broadcaster cannot exist.

The importance of these issues to the national and public interest is not so obvious but nonetheless basic. Broadcasters have no special right to make a profit or to serve their own economic or social interests. If broadcasting were a public utility it would have a right to make a profit, but the amount of profit would be subject to government control. However, the Communications Act makes it clear that broadcasting is not to be treated as a public utility. Broadcasters are under no duty to disregard economic considerations or to forego profit making but they are not entitled to throw the mantle of public interest over these activities.

However, the two issues of the right to continue to operate and the right to compete economically are vital and paramount because they affect not only broadcasting but also the basic public interest in free speech and a free press. The dependence of the public upon broadcasting as a source of news and views has been investigated and reported frequently and is too well known to require documentation now. The ability of the public today to learn news and views of national and international affairs depends largely on a free and independent broadcasting system. This has been recognized by both Congress and the Supreme Court. In the Red Lion case the Supreme Court said: "The Communications Act is not notable for the precision of its substantive standards * * * But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment * * * It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 385, 390 (1969).

Earlier, in the WDAY case, the Court said: "The legislative history * * * of the [Communications Act] both prior to its first enactment in 1927, and subsequently shows a deep hostility to censorship either by the Commission or by the licensee. * * * Thus, expressly applying this country's tradition of free expression to the field of radio broadcasting, Congress has from the first emphatically forbidden the Commission to exercise any power of censorship over radio communication." Farmers Union v. WDAY, 360 U.S. 525, 528, 529–30 (1959).

The court has also said that the term "censorship" as commonly understood and as used in the Communications Act means "any examination of thought or expression in order to prevent publication of objectionable material."

Despite these and other ringing declarations in favor of free speech the freedom and even existence of broadcasting is now being threatened by actions of the courts and the Commission. On January 23, 1969 a three-member majority of a four-member quorum of the FCC held that the license of WHDH (Boston) would not be renewed and its channel would be given to a competing applicant, because the licensee owned a newspaper and the competing applicant did not. There were unusual and distinguishing circumstances in this case but the majority expressly refused to rely upon them as a ground of decision. One member of the majority emphasized that the principle of this case applied to all license renewal proceedings, and that a licensee seeking renewal was in precisly the same position as a new applicant. On reconsideration, the majority affirmed that this principle applied to all renewal proceedings, said that the past record of the licensee, although favorable, gave it no credit toward a renewal and held that past precedents recognizing the right of license renewal gave no protection to the licensee in this case.

A bill to reverse this decision was introduced by Senator Pastore in the Senate and about 100 Congressmen in the House and hearings were held.

On January 15, 1970, the FCC by a 6 to 1 vote issued a policy statement that where a license renewal applicant could show a past record of substantial service without serious deficiencies he would be entitled to a license renewal as against the challenge of a newcomer. (22 FCC 2d 424).

This was challenged in the U.S. Court of Appeals for the D.C. Circuit by the Citizens Communication Center and by Black Efforts for Soul in Television, and on June 11, 1971 the court set this policy statement aside. The Court of Appeals held that there must be comparative hearings whenever a licensee is challenged by another applicant at renewal time. The court went on to say that the FCC policy was unreasonably weighted in favor of the licensee, that the Communications Act says nothing about a presumption in favor of licensees seeking renewal, and that past decisions of both the FCC and of that court had improperly reflected a bias in favor of incumbent licensees. The court said that the Commission should consider only *superior* programming service in renewal applications and that the Commission should define both quantitatively and qualitatively what constitutes superior programming service.

In other subsequent cases the same court has reversed the FCC and has held that broadcast licensees may not refuse to accept and broadcast commercials because they are controversial within the Fairness Doctrine and that commercials for gasoline and automobiles are controversial and require that free time be given under the Fairness Doctrine for counter-commercials or anti-commercials. In another similar case, the FCC has held that institutional advertising by an oil company, viewed in the light of its total advertising program in all media, raised controversial issues regarding the desirability of the Alaska pipeline under the Fairness Doctrine. It is not yet clear how broad these rulings are and whether they will be applied to all product commercials, but those interested in preserving the American system of free broadcasting must assume that they do.

Broadcasting as a mass medium and a technique of communications will unquestionably survive for the indefinite future. It is so effective that it will undoubtedly be utilized increasingly unless and until some more efficient technique is developed. However, the system of free and independent broadcasting that we have developed in the United States may be radically changed or totally destroyed within the near future if these trends continue.

Thus these rulings vitally affect the public interest. The right to secure a license renewal, and thus to continue operating is made subject to the FCC's judgment as to programming, which obviously means that programming must be shaped to gain the approval of the FCC and its staff.

Commercials are the sole source of broadcasting income and, therefore, are literally the economic life blood of broadcasting. However, no sensible advertiser will purchase advertising on a medium which is required to present attacks upon his advertising claims if anyone is interested enough to dispute them. It is a matter of common observation today that there are no advertising claims which go unchallenged by someone. Advertising for things as innocuous as breakfast foods and hair spray has been attacked and demands have been made upon broadcasters for the right to respond to and attack such public service commercials as recruiting spots for the U.S. Army and pleas for contribution to the United Givers Fund. In these circumstances the economic ability of a broadcaster to survive is entirely subject to the control of the FCC. Such power in a government agency destroys the right of free speech, which is one of our most fundamental constitutional principles.

There is a long historical background to demonstrate this. The American Declaration of Independence charged the British King with "a history of repeated injuries and usurpation, all having the indirect object of establishment of an absolute tyranny . . ." The facts submitted in support of this charge included the fact that the King made judges dependent on his will alone "for the tenure of their offices and the amount and payment of their salaries." To guard against such usurpations and tyranny the U.S. Constitution provided that judges should hold office during good behavior and that their salaries should not be diminished during their continuance in office. Thus it was recognized that security of tenure and of economic livelihood was indispensable to independent judgment.

The FCC itself asserts a relationship between economic interest and broadcasting performance. The economic interests of broadcast licensees are required to be disclosed and are subject to searching scrutiny and analysis by the FCC on the theory that such interests may have some influence on the broadcast performance of a licensee.

Is it not obvious that the power to exercise economic control over broadcasting enterprises involves the power to control the conduct and performance of those enterprises?

Is it not apparent that an enterprise which is wholly dependent upon the favor and whim of a government agency for its right to continue in operation and existence at intervals of three years can exercise no real freedom or independence?

Of course, the judges and the commissioners of the FCC piously, and no doubt sincerely, protest that they do not intend to censor broadcasting speech or reporting. Indeed, those who most vigorously push rigorous control protest the loudest. But the FCC is constantly engaged in examining program content, including news broadcasts, as well as documentaries, editorials, and other expressions of opinion under the Fairness Doctrine, in comparative proceedings, and in license renewal procedings. In the WHDH proceeding—which now has renewed vitality—the Commission opinion commented on the licensee's "failure to editorialize" and on the manner of its reporting news of certain publications of a State commission. In the WQAD (Moline) case the Commission members publicly debated the character and quality of the programming in deciding a challenged renewal application.

In these circumstances and with broadcast licenses subject to renewal essentially at the unfettered discretion or whim of the FCC and its staff every three years no broadcaster can possibly be independent or free of government control or influence in his programming, news reporting or editorial expression. If the Commission, or several Commissioners, are displeased with a broadcaster because of his programming, news reporting, or editorial expressions, they need not overtly censor, but can readily find legally acceptable reasons for failure to renew the license. With license renewal possibly depending on the vote of a single Commissioner, the views, prejudices and whims of each Commissioner become a matter for assiduous research, study and cultivation by every licensee.

Those concerned about American broadcasting should note that in every major country of the world except the United States the government controls broadcasting.

Great Britain is a great and democratic country. The basic broadcasting system in Great Britain is BBC, which is a government agency controlled by the Postmaster General. In 1954 the British Parliament set up the Independent Authority as a competitor of the BBC. However, the ITA board is appointed by the Postmaster General and a few years ago the head of ITA was moved to BBC by the Postmaster General.

In France the entire broadcasting system is operated and controlled by the government and run out of a central facility in the heart of Paris. The effect of this can be illustrated by recent history. A few years ago there were riots in the streets of Paris with students from the Sorbonne tearing up paving blocks to build fires and barricades that were being used in a battle with the police. No mention of this was heard at the time on the French broadcasting system. The French people did learn of the student riots through radio and television from Luxembourg. This small country, about the size of the District of Columbia, operated broadcasting stations on the American plan, which is to say, supported by commercial advertising and programmed to please and reach the largest popular audience. Many of the programs are taken from the American commercial networks. Since the government is a partner in the Luxembourg broadcasting operation and thus shares the profits it has not yet undertaken to exercise any power of control or censorship over the programming or news.

Without reviewing the details of broadcasting systems of other countries, it can be asserted that the American system of commercial broadcasting is unique in the world, both in its scope and efficiency in providing programs of public interest and in its freedom and independence in presenting news and ideas free of government influence or control.

Those who feel confident that it can't happen here should reflect thoughtfully on recent events. The first field of regulation by the federal government in this country was that of railroad transportation. Over the years the railroads have been regulated and controlled by a government agency with essentially the same legal standards and objectives as those set for the FCC. After about 80 years of such operation the railroads had become unprofitable and inefficient to the point that they were ready to abandon passenger transportation. As a result the government established AMTRAK, a federal corporation which has now taken over the operation of virtually all passenger transportation from the proprietary railroad corporations.

You haven't heard of FEDCAST—yet. But if the trends in government control of broadcasting continue for only a few more years you will hear of it. FEDCAST will be the federal corporation set up to take over the operation of all commercial broadcasting stations after their economic viability has been destroyed by federal rules choking off advertising and their freedom of programming has been constricted to the scope desired by those in control of the FCC.

This will happen, almost to a certainty, unless something is done to prevent it. The question is what can be done to prevent this. The most plausible answer at the present time appears to be legislation. The precise form, substance and timing of the legislation cannot be specified and will undoubtedly be the result of extensive consideration and compromise in the course of the legislative process. However, I venture to suggest that the basic principles which should, explicitly or implicitly, be embodied in Congressional action should be these.

1st. There should be a declaration and recognition that broadcasting is both an indispensable news source for the public and a major entertainment and advertising medium. The freedom and independence of broadcasting as a journalistic medium is vital to the public interest. The entertainment and advertising functions provide an essential economic foundation for the journalistic function and its free and independent exercise.

2nd. Broadcasting has the same protection and rights under the First Amendment as newspapers and other mass media.

3rd. The FCC has the right to act concerning or to consider broadcast programming only with respect to specified legal categories, which probably should be: (a) obscenity; (b) lotteries; (c) incitement to riot or insurrection; (d) possibly criminal libel; (e) the rule of Section 315 with such limitations as Congress may make; and (f) either a Fairness Doctrine strictly defined by statute or, as a complete substitute, the statutory right of access suggested and described by Mr. Whitehead, Director of OTP, in his excellent IRTS speech of October 6th.

4th. The FCC should be clearly forbidden to forbid or discourage or require or encourage or consider or attempt to influence in any way, directly or indirectly, any other kind or character of programming.

5th. The FCC should have no authority to supervise or review the content of commercial broadcast advertising and any Fairness Doctrine should not apply to broadcast commercials except to those by or on behalf of a political candidate or advocating, opposing or commenting on a political issue.

6th. The FTC should have the same authority to examine broadcast commercial advertising and take action regarding misleading or deceptive advertising as it does with respect to advertising in any other medium.

7th. Broadcast license renewal should not be granted, denied or conditioned on anything broadcast or not broadcast except with respect to broadcast material which the FCC has been specifically authorized to control or consider.

8th. It should be recognized as in the public interest for broadcast licensees to have such freedom and independence as results from security in their right to continue to hold their licenses so long as they comply with all laws and valid regulations. Consequently in proceedings for license renewal it should be presumed that a licensee who has complied with the laws and regulations and thus operated in the public interest is entitled to renewal and that the application of any other person for the same channel or frequency should not force the FCC to hold a hearing or be considered competitive until the presumption has been overcome.

The NAB has decided that as a matter of principle legislation to protect the right of license renewal is necessary and desirable and has appointed a task force to work on securing such legislation. No specific legislative proposal has been drafted and the NAB has not yet considered or approved any particular legislative proposal or approach. What course the NAB and its Task Force may ultimately formulate and follow I do not venture to predict. However it appears that it will take some time to formulate legislative proposals and organize support for them. Specific proposals probably cannot be introduced until January 1972 and there may be a long and difficult fight to secure enactment. But the principle of the right to renewal as a foundation for a free and independent broadcasting system is basic and must have legislative recognition.

All state associations and all broadcasters must understand that we are today fighting for the survival of the American system of free and independent broadcasting. The interest of broadcasters in their business in this instance coincides with the public interest in free speech and free and independent broadcasting journalism. Therefore, broadcasters and broadcasting associations must take and push the initiative and must work as long as necessary to secure appropriate legislation—as if their lives depended upon it—because they do.

However, broadcasters must also recognize that there are many in this country to whom free speech and a free press are merely abstractions and that there are others who say that these are simply slogans which the establishment uses to protect itself against the just demands of the people. Argument alone will not eliminate these concepts or persuade these opponents. There must indeed be argument and explanation but there must also be action. Broadcasting, which speaks to the poor, the disadvantaged and the oppressed as no other medium ever has, must also listen and respond to the demands and needs of the poor, the disadvantaged and the oppressed. As broadcasting should not be subject to pressures or demands from any agency of government, it must be voluntarily responsive to pressures and demands from all segments of the public.

Broadcasting has done a far better job than any of its critics have yet understood in serving and in responding to the demands and needs of the poor and the disadvantaged. This is illustrated by the recent survey showing that broadcasting as an institution is regarded by the black community as more fair and more sympathetic than any other American institution, including the Supreme Court, Congress, the newspapers and the government. The public, including the disadvantaged minorities, must be told that broadcasting is being subjected to an attack which will diminish, not increase, its ability to serve them and to satisfy their demands and needs. Congress, too, must be made to understand that protection of the freedom and independence of broadcasting is not simply a boon to broadcasters but is an important contribution to the public interest and to the preservation of the American social and political system and of American values.

For the last half-century broadcasting has lived an exciting and tumultuous but not particularly perilous existence. As one who has been given the honor of appointment as navigator of the great and unsinkable Titanic I have the duty to inform you that all of you have been passengers on the ship. As broadcasters you have just finished your pleasure cruise on the Titanic. Now you must sink or swim.

NATIONAL ASSOCIATION OF BROADCASTERS

REMARKS OF FRANK STANTON, VICE CHAIRMAN, COLUMBIA BROADCASTING SYSTEM, INC., APRIL 11, 1972

For the moment, let it suffice that never in my career have I been more deeply moved than by the eloquent approbation you have bestowed upon me. Never have I felt more generously rewarded for responding to the call to duty.

And this is why.

One year ago, almost to the day, two agents of the House Special Subcommittee on Investigations appeared in my office at ten o'clock in the morning. They served me with a subpoena demanding an array of materials used in the preparation of the CBS News investigative report, "The Selling of the Pentagon," including film ad tape outtakes which were never broadcast. This was to mark the beginning of a bitter dispute which culminated three months later on the floor of the House of Representatives. Around the controversy swirled confusion, both as to motive and as to principle, traces of which still linger—unfortunately.

So deep running were the issues and of such paramount importance were the principles at stake that I would like to take this occasion to put in simple perspective the reason CBS pursued the course which we felt duty and honor commanded. Fully conscious of the seriousness of the action, we refused to comply with the unprecedented demands of the subpoena which we felt to constitute an infringement of the First Amendment and hence to be unconstitutional. Not in any spirit of defiance, not out of hostility, not to hide anything, did we make this decision. Our sole motivation was resistance of what we believed to be a ". . . government invasion of one of the country's oldest and most fundamental freedoms."

On that ground alone we took our stand.

Pointing to the chilling effect of not only the subpoena but of the investigation itself, we noted that "if newsmen are told that their notes, films and tapes will be subject to compulsory process so that the government can determine whether the news has been satisfactorily edited, the scope, nature and vigor of their news gathering and reporting activities will inevitably be curtailed." The vital question was—and is—whether news and editing judgments shall continue to be made independently by a free press—and whether the letter and spirit of the Constitution could possibly contemplate distinctions between print and broadcast journalism.

On July 13, the House debated whether CBS and I should be cited for contempt of Congress for refusing to yield the subpoenaed materials. The dialogue was heated, ofter acrimonious. But in the end the First Amendment prevailed. The Dean of the Congress, Emanuel Celler, Chairman of the Judiciary Committee, reflected the sense of the majority: "The First Amendment," he said, "towers over these proceedings like a colossus and no esprit de corps and no tenderness of one member for another should force us to topple over this monument to our liberties; that is, the First Amendment. . . . There may be no distinction between the right of a press reporter and a broadcaster. Otherwise, the stream of news may be dried up."

The stream of news, happily, has not dried up. And I am moved and appreciative that your thoughts of me, on this occasion, have centered on the need for broadcasting to be free, and on the duty to meet and overcome any threat to that freedom. As part of the free press we have been constantly aware that this freedom proved time and time again to be the salvation of this republic from excesses and abuses, social, economic and political.

Neither we nor the printed press before us came easily upon that freedom. From the earliest days of our nationhood, the press has fought repeatedly to assert and maintain its freedom, turning back assaults by those who, whether for cynical or for lofty reasons, sought to suppress or restrict it.

Ours, of course, is not by any means the only repository of the tradition of free inquiry in our nation. The inquiry function of Congress, subject to constitutional limitations, is essential to its basic role of effective law making. For decades the House Interstate and Foreign Commerce Committee has made important contributions to the growth of both radio and television—and certainly it will continue to do so. The conflict which arose with it on a journalistic issue was unfortunate indeed, and it is a great pity that the issue could not have been resolved short of a First Amendment fight.

The defense of basic freedoms is a never-ending process—and it is important for us to realize that we are most in danger of losing them when we are most complacently sure that they are safe. The vitality and character of this nation of self-governing people would inevitably be eroded by any diminution of the freedoms of its journalism. You cannot have a self-governing people without having a fully informed people—a people free to know, free to discuss and free to draw their information from media which are themselves free to report. If media are held accountable to government for what they report and how they report it, you cannot have the informed debate and decision making which are the lifeblood of our nation.

The central act of a democracy is the choice, by the people, of its leadership. The essential ingredient in the electoral process, an informed electorate, became increasingly difficult to achieve as our nation expanded across a continent, as it grew towards a population of over 200 million, as its internal character and external relationships became infinitely more complex and its density was caught up in a speed of events that vastly reduced tolerable margins of error. Moreover, many of the old limitations of our political procedures became more hazardous—convention decisions made far from the sight and hearing of voters in the secrecy of smoke-filled rooms, for example, and candidates who were seen or heard during campaigns by only the tiny sprinkling of voters before whom they could appear in person.

More than any other factor, broadcasting with its directness, its immediacy and its ubiquity, changed all that. The electorate could be witnesses at nominating conventions. The voters could hear and, later, see for themselves the candidates seeking their votes. When radio began covering the conventions in 1924, the nominating process was released from the private domain of the political operators; a million and a quarter receiving sets all across the land were tuned in directly to the convention halls. From that point, the people were no longer dependent on what they were told about the proceedings: the people could hear for themselves, and they could make their decisions based upon direct access to the events and personalities of the campaign.

Slogans and hearsay gave way to direct exposure of candidates to the electorate, with a significance that is easily gauged. In the last election before the dawning of the broadcast era, in 1920, only 43.5 percent of eligible voters went to the polls, as compared to 64 percent in 1960, when suspension of the equal-time restrictions to permit the Kennedy-Nixon debates made possible the fullest use of broadcasting as yet in history.

But the effect of broadcasting upon the democratic experience has gone far beyond elections. The monumental events of this century—depression, wars, uneasy peace, the birth of more new nations in two decades than had occurred before in two centuries, undreamed of scientific breakthroughs, profound social revolution—all these were made immediate intimate realities to Americans through, first, the ears of radio and, later, the eyes of television. No longer were the decisions of the American people made in an information vacuum, as they witnessed the towering events of their time that were bound to have incisive political repercussions.

As broadcasters we can take pride in the role we have played in all this. We have not been blind to our responsibilities. Even our severest critics must concede that. Each of the broadcast media became, within the first generation of its existence, the first source of news to most of our countrymen. It has been this freedom from government intervention or control that has made possible the monumental achievement of U.S. broadcast journalism and is the primary condition of its survival.

Survival of broadcast freedom is not so often a matter of dramatic resistance as it is of constant watchfulness and quiet determination. The threat is not always direct or frontal. No one proclaims himself for government control of program content, whether news, entertainment or advertising. In fact, we have all come to recognize, as the first sign of proposals that would have the ultimate effect of government control, the protesting words from the proposer: "I am against censorship, I am against government control, *but* . . ."

You are familiar with the current inventory of existing and proposed restrictions on the freedom of broadcasting to do its job—which is to serve the American people in the same context of freedom that has given this nation the most varied and most effective communications media the world has ever known. If this roster of requirements and restraints had been applied to the printed media throughout our history, the freedom of all our institutions, and indeed of the American people themselves, would long since have been an abandoned dream of the Constitution-makers.

Consider the implications of only some of these restrictions, real or suggested:

The equal-time provision—Section 315—constantly crippling the most constructive use of broadcasting in the electoral process;

compulsory access to the air, which would strip the licensee of the responsibility for what he broadcasts, even though he is held accountable for it;

tortured applications of the fairness doctrine, reducing to an absurdity any valid concept of fairness to the listener and viewer;

the ban on broadcast advertising of lawful products whose advertising is permitted in all other media;

the compulsory allocation of broadcast time for "counter-advertising" which would destroy one of the mainsprings of our economy;

the establishment by government of arbitrary quantitative formulae for program content for times of day or segments of the audience—the ultimate example of Big Brother dividing the entire population into rigid, fixed categories.

Combined with the constant threat of investigation that hangs over broadcasting alone among the media, these restrictions are all the more insidiously erosive—insidious because the purposes put forth to justify the restraints and strictures are usually well-intentioned. "The greatest dangers to liberty," Justice Brandeis once said, "lurk in insidious encroachment by men of zeal, but without understanding."

Though there will be times in the future, as there have been in the past, when we will have resolutely to contest such encroachments, we must remember that the most eloquent defense of freedom is its wise and uncompromised use. This calls for not only courage and a steady sense of responsibility to the people rather than to the government, but also the capacity and willingness to welcome and heed fair criticism.

We are no more immune to error than is government or any other institution. If we do not recognize this—if we become too preoccupied with preserving old ways just to prove that we were right—then our obligation to explore new frontiers, to seach for new opportunities and to advance our standards of service will go by the board.

In short, we must be willing to admit error when error occurs. And in this connection we readily admit that "The Selling of the Pentagon," which was at the center of the controversy referred to earlier, was not flawless. CBS News conducted exhaustive studies over a long period of time not only of the factual basis of "The Selling of the Pentagon" but also of the way the reporting and editing processes of broadcast journalism could be improved. Out of such study emerged updated operating standards for news and public affairs broadcasts and renewed recognition that such standards must reflect a constant zeal for improvement. We must be willing and prompt to change when change is in the public interest. We must prove, by our actions rather than our words, that the way of freedom is more than the pale afterglow of ancient visions of the good society. Freedom must be the determining, lasting condition in which the institutions of our society, including broadcasting, are strong and healthy and best capable of fulfilling their mission.

I would like to believe that, after nearly half a century, the incredibly dynamic and constructive history of broadcasting has proved this conclusively. But conclusiveness is not a luxury visited upon free institutions. And today there are once again simering in Washington rumors of new investigations of broadcast journalism—its methods and its reporting. Once again, I am sure that, if this happens, the rationale will be a high-minded search for the facts. Once again the perilous truth will be that it is the search itself, and not its findings, whatever they might be, that does violence to the whole thrust and intent of the Constitution, by exposing broadcast journalism to harassments from which the First Amendment specifically protects printed journalism. And once again it will be the needs of the people which will suffer—unless all of us in broadcasting stand our ground.

We can do this with the incontrovertible awareness that broadcasting has made massive contributions to the strengthening of the democratic proposition in this country and that it has added immeasurable richness to the lives of our countrymen.

In accepting your generous citation today, I do so not with any sense of personal achievement but with profound gratitude that I have been permitted to share with you in what broadcasting has accomplished for the cause of enlightened freedom.

SUBPOENAS, OUTTAKES, AND FREEDOM OF THE PRESS; AN APPEAL TO MEDIA MANAGEMENT

(Remarks by Commissioner Nicholas Johnson to Washington Nieman Fellows, February 12, 1970)

United States District Attorneys across the country—presumably responding to the President and his Justice Department—have recently issued broad and sweeping subpoenas to numerous national newspapers, magazines and television networks. The media are being ordered to produce reporters' notes, correspondence, telephone call memoranda, and un-edited tapes and film—known in the television business as "outtakes." They are offering little but verbal resistance to these demands. The materials subpoenaed will apparently be used to prosecute persons who, among other things, have criticized the government.

We are also reading reports that, on several occasions, the government has disguised its agents as reporters to spy on other reporters in Vietnam who have criticized the military. Back in this country they are being used to gather evidence on citizens with "suspicious" political beliefs.

Black Panther organizations, long convinced that the predominantly white press was merely a "tool" of the government anyway, can now point to the media's response to this wave of government subpoenas as confirmation of their charges.

Reports indicate that local and state police and government officials throughout the country are following the Justice Department's lead with enthusiasm. They, too, view reporters' confidential notes and film as a new source of information for criminal prosecutions. And the local media owners often seem even less able and inclined to resist than the powerful national organizations.

I believe this wave of government subpoenas, together with other manipulations of the press, have placed the freedom and integrity of this country's news media in serious jeopardy.

The press in America has had a long and honorable tradition of protecting confidential news sources. Reporters have gone to jail or risked citations for contempt of court, rather than disclose names or other information given to them in trust. These traditions are essential to the full and open reporting all of us take for granted in this country. Surely it is too late to resurrect the 17th Century English Star Chamber tactics of suppression, intimidation and secrecy.

The United States Supreme Court has written that the First Amendment protects, not just the right of the press to speak, but the right of the people to *hear*. It protects our rights to *receive* information, as well as the right of the newsmen to gather and write about it. The Court has said, "Those [first amendment] guarantees are not for the benefit of the press so much as for the benefit of all of us."

Yet what will happen to freedom of news gathering—and therefore the public's access to vital information—if news sources know that the material they give in confidence can be subpoenaed by the government for use in public courts of law? The answer, I think, is clear: sources of news information will dry up. And newsmen know this better than anyone else.

In 1967, spokesmen for the *Wall Street Journal* estimated that 15% of the stories carried were based on information received in confidence. The *Christian Science Monitor* thought its percentage was as high as 33% to 50%. Sterling Noel, managing editor of the *Baltimore News American*, said: "Confidential sources for news stories are among the most widely used by all experienced newsmen, and particularly those covering politics and government agencies." Dale Belles, Jr., editor of the Gary *Post-Tribune* observed: "In a city like Gary, privilege of confidence enables us to keep the public informed as to how its business and law are being administered." Randall E. Shew, managing editor of the Ithaca *Journal*, felt: "Many investigations leading to exposure of misuse of publi ctrust never would have been started if the source of original information had not been assured that he would be protected by the newspaper." Gordon Pates, managing editor of the San Francisco *Chronicle*, reported: "An absolutely staggering number of news stories, political and non-political, arise from information received in confidence." And Robert Notson, executive editor of the Portland *Oregonian*, thought an average of a dozen stories a year of a "serious expose type" stemmed from confidential information: "In no other way can much evil-doing be brought to light for the benefit of the public. Possibility of contempt procedures [for reporters' refusal to divulge information or sources] can act as a prior restraint on news publication."

The practice of government subpoenas of news reporters' notes (on film or paper) will deter people from offering news to reporters in confidence; will prevent the media from exposing corruption in government and private circles; and may allow the government, once it learns the identity of the informant, to retaliate against the person with inside knowledge.

Already many residents of our large city ghettos fear and suspect members of the news media. The National Advisory Commission on Civil Disorders (Kerner Commission Report) concluded that "most Negroes distrust what they refer to as the 'white press'" and "see the newspapers as mouthpieces of the 'power structure.'" This is central to its findings that "the communications media, ironically, have failed to communicate."

Just a few weeks ago, following what it called the CBS "capitulation" to the Justice Department's subpoenas, the Black Panther Party handed out flyers in front of the three network offices buildings in New York, stating:

> The interests of the U.S. government and those of the people who run media corporations are identical. . . . Employees of CBS and other media corporations can no longer ignore the fact that their executives have turned them into police agents.

Such expressions only corroborate the scene in *Medium Cool* in which similar feelings were voiced. A young black is addressing a television cameraman and soundman. He says:

> You can't just walk in out of your arrogance and expect things to be like they are, because when you walked in you brought LaSalle Street with you, City Hall, and all the mass communications media. And you are the exploiters. You're the ones who distort and ridicule and emasculate us. And that ain't cool.

Now the Panthers feel they have proof of these charges.

Recently the Justice Department also subpoenaed the notes of a *Fortune* magazine writer about James Ling, head of Ling-Temco-Vought, to use against him in an antitrust proceeding. I am sure the Panthers will watch with cynical interest whether the *Fortune* branch of Time-Life will give as little protection to the confidentiality of Mr. Ling's statements as its *Time* branch provides the Panthers.

The growing suspicion of ghetto residents and others that members of the press are working as informers for the government will do more than cut off reporters, and therefore the country, from the news. It may even subject reporters to the grave and omnipresent threat of physical danger. Recently the International Alliance of Theatrical Stage Employees Cameramen's Union has asked for increased protection in covering riots and civil disorders because of these kind of risks. Perhaps, if the costs of providing such protection become high enough, we can then expect management to react on the more fundamental free speech issues. But at the present time even threats to the physical well being of their own employees are not sufficient to move these financiers to effective legal action to resist the barrage of Justice Department subpoenas which has apparently existed for several years.

The Justice Department has either forgotten or ignored Supreme Court Justice Brennan's warning that First Amendment freedoms are "delicate and vulnerable," as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. What I am afraid we are witnessing in this country is a move by the government which may stem the free flow of information and news to the public. It is shocking and saddening that the establishment press is so willing to acquiesce. The media have vast financial and legal resources at their command. The country could only benefit if they were to resist government encroachments upon their independence and defend, in court, their absolute first amendment right to refuse such subpoenas. Any criminal lawyer worth his salt will immediately go into court and vigorously raise *every* conceivable defense to protect his client. I think we are entitled to at least as much from the owners of the press when *our* First Amendment rights are concerned. Despite a practice lasting several years, however, the monolithic news media have yet to file *one* motion of resistance in court. Why have they been so silent?

It is time that the people of this country are told that *their* freedom of the press is not being staunchly defended against government encroachment by the established media. Many of our leading purveyors of news—*Time*, *Life*, CBS and numerous individual stations—have already complied with Justice Department subpoenas, publicly offering nothing but token resistance. Has the press, traditional watchdog for our First Amendment freedoms, fallen asleep? Who will defend this vital right if not the press itself?

If sketchy newspaper accounts are accurate, we have learned that the Justice Department has on numerous occasions used subpoena powers to order delivery of notes and other information by reporters for use in criminal prosecutions. Here is a list of certain actions that have been made public. How many more there are we may never know.

During the lengthy trials following the Chicago Democratic Convention demonstrations, the local news media—especially broadcast stations—received repeated subpoenas for news film. Reporters said the practice was "an almost daily burden of nearly unmanageable proportions. 'We are treated as evidence gatherers for the law.' " *(Broadcasting*, Feb. 9, 1970, p. 58.)

Following the "Weathermen" incident in Chicago, October 1969, the U.S. Attorney demanded that Chicago's four daily newspapers, its TV stations, and *Time*, *Life* and *Newsweek* magazines, turn over films, photos and files on the incident. *Time* and *Life* apparently complied; *Newsweek* is trying to protect confidential informants; and the newspapers are apparently willing to turn over information that the government cannot get elsewhere. *(Washington Post*, Feb. 4, 1970, p. A-4.)

After the Chicago police raid on the Chicago Black Panthers, December 1969, "blanket subpoenas" were again issued to the Chicago media, according to *Chicago Sun-Times* editor, James Hoge. Apparently the Chicago media have not vigorously or publicly resisted. *(Washington Post*, Feb. 4, 1970, p. A-4.)

In connection with the Government's prosecution of David Hilliard, West Coast Black Panther leader, for allegedly threatening the President, the Justice Department issued on January 8, 1970, a subpoena for all CBS video tape (including "outtakes," the unused portions of the interview' made in connection with the "60 Minutes" program on the Black Panthers broadcast January 6, 1970. According to indications from CBS News President Richard Salant, CBS's initial response was to supply the requested material. *(Broadcasting*, Feb. 2, 1970, p. 55.)

Apparently unsatisfied with even this broad subpoena, the Justice Department—this time in conection with the Secret Service and the FBI—issued a second subpoena against CBS on January 26, 1970, demanding records of all correspondence, memoranda, notes and telephone calls made in connection with the "60 Minutes" Black Panthers program, including material relating to the CBS interview with Eldridge Cleaver, the Panthers' minister of information, made in Algeria. This second subpoena covered materials from mid-1968 to 1970. A CBS legal spokesman said they might go to court if a "really solid" freedom-of-the-press question were raised, but indicated he wanted to reach an accommodation with the federal authorities. Richard Salant indicated CBS might help supply government with information in limited cases, even though it "might hurt journalistic functions." *(Broadcasting*, Feb. 2, 1970, p. 55.) CBS now says it may challenge subpoenas in "appropriate" cases and Salant has now expressed his personal opposition to the subpoena procedure. *(Washington Post*, Feb. 4, 1970, p. A–4.)

The Justice Department recently subpoenaed all the notes and tape recordings of *New York Times* reporter Earl Caldwell, made with Black Panthers during interviews dating back to the start of 1969. *(Washington Post*, Feb. 6, 1970, p. A–4.) At last report, the Justice Department had "postponed indefinitely" its subpoena of Caldwell. *(Washington Post*, Feb. 11, 1970, p. A–14.)

The executive editor of the *Washington Post* reported that twice in the past two years the *Post* has been asked to supply photographs for use in criminal actions. The *Post* refused both requests. *(Washington Post*, Feb. 4, 1970, p. A–4.)

In 1968, following the April 1967 civil disorders in Washington, D.C., the Justice Department subpoenaed newsfilm and news photographs of TV stations and newspapers. After conferences between Justice and the stations, some of the film was viewed at the stations. *(Broadcasting*, Feb. 9, 1970, p. 60.)

On October 2, 1969, the Justice Department subpoenaed all the notes of *Fortune* magazine reporter John McDonald on an interview with James Ling, head of Ling-Temco-Vought, in connection with an antitrust proceeding, as well as McDonald's tape recordings, documents furnished by Ling, and "the successive drafts" of McDonald's article before it was published. While *Fortune* was considering the request, officials from the Justice Department visited Time's headquarters and appropriated the written material. Now, four months later, Justice has publicly apologized. *(New York Times*, Feb. 10, 1970.)

Film shot by WBAL-TV, Baltimore, Maryland, cameramen of the "D.C. Nine" raid on the offices of Dow Chemical last year in Washington, D.C. was subpoenaed and introduced as evidence at trial. *(Broadcasting*, Feb. 9, 1970, p. 60.)

At the trial of the "Catonsville Nine," a group accused of burning draft files in Baltimore, air film as well as "outtakes" were subpoenaed and used at trial. *(Broadcasting*, Feb. 9, 1970, p. 60.)

It is clear from these incidents (and perhaps other that have not yet been disclosed) that the government's practice of ransacking the minds and memories of the press is established, long-standing, and widespread. Robert Ferrante, news director for WBBM-TV, Chicago, stated that the government began asking for on-the-air film before the 1968 Democratic Convention. But "after the convention the government attorneys began to ask for the out-takes in addition to the on-the-air pieces." "Time and time again we have been asked on short notice to supply film," Mr. Ferrante said. "The situation is totally out of hand."

Over a year ago I said:

> At least I think my own position is fairly clear. Suppose the FCC was about to order a national network to produce news film that was taken by its cameramen but not used over the air—what are called "outtakes" in the trade. I would urge my colleagues that we do so as a matter of propriety. . . . I am pleased the Commission has not voted to pursue such a request. In an [earlier] opinion I "urge[d] that this Commission should constantly be on guard against actions of government—especially this agency—that might impede 'robust, wide-open debate' or 'aggressive news coverage and commentary.'" (Statement to the National Commission on the Causes and Prevention of Violence, Dec. 19, p. 38.)

I have fought for this position constantly as challenges to press freedom arose. I have often been disheartened by the weak positions of media management. But never during my tenure as an FCC Commissioner have I seen such serious threats to the integrity of the news media as I think we have witnessed from certain departments of government during the past few months.

The government's actions already have begun to have their impact on news media as I think we have witnessed from certain departments of government during the past few months.

The government's actions already have begun to have their impact on news freedom. Walter Cronkite recently said: "There have been two cases already this week where officials have refused to talk off the record for fear that their remarks would show up in court." Robert Ferrante of WBBM-TV has recommended that all film and recording tape outtakes be erased or destroyed 12 hours after the film was aired. *Broadcasting* magazine just reported (Feb. 9, 1970, p. 60) that one unidentified station "already is destroying unused tape recordings."

The reporters for media interests have generally condemned *all* requests for confidential reporters' notes and information. Several dozen *Wall Street Journal* reporters signed a petition asking their management not to put them in "the role of a government investigator or lend unintentional support to political organization as these other news organizations have done" [apparently a reference to compliance by CBS, *Time*, *Life* and *Newsweek* with Justice Department requests]. Walter Cronkite of CBS said, "A news source is going to be very careful about talking to a reporter when he thinks it may end up in a court of law. What official is going to talk off the record when a reporter's notebook can be laid open in court? Our people cannot be informed if we have to work under those conditions." Chet Huntley of NBC viewed the trend as "dangerous business." And Frank Reynolds of ABC warned, "We've got to make it very clear we're not defending our right to broadcast, but the people's right to know."

The outrage of the professional reporters has been loud and articulate. But what has been the response of media management? Many of the major publications and networks appear to have (1) supplied portions of the requested information, or (2) used the rhetoric of condemning "indiscriminate" use of subpoenas while (3) offering to "negotiate" the details of what they will give to the government. *Broadcasting* reports (Feb. 9, 1970, p. 60) that "most stations, while reluctant to admit it, are supplying outtakes of film and tape and reporters' notes as well as on-the-air materials if they are on hand." CBS has announced it would comply with the Government's demands; however, it condemned "broad unrestricted" access to reporters' notes, notebooks and other materials not published, and declared its intention to contest such requests in "appropriate" cases. As of yet, however, apparently no such cases have arisen.

Recent incidents of television media acquiescence to government demands leaves one with the uneasy feeling that the networks, at least, will not do much fighting for freedom of the press. In November 1969, for example, Vice President Agnew criticized the television networks for their few and faltering attempts at analysis and explanation of President Nixon's Vietnam speech. The network heads responded with eloquent statements of determination to resist government commands. Yet a few weeks later when the President again spoke on Vietnam, there was no "analysis" at all; network silence was deafening. *TV Guide* saw it, and put it bluntly:

> Vice President Spiro T. Agnew's scolding of the networks apparently had the desired result: after President Nixon's Dec. 8 press conference, there was no criticism whatever from the commentators who followed him.
>
> Recently Vice President Agnew modestly reflected, "Sometimes when I look around at the tube from time to time, I think I have had a modicum of success." Indeed he has.

When CBS censored the requests of Carol Burnett and Elke Sommer that viewers send "Peace Letters" to Mrs. Martin Luther King, *Variety* magazine speculated that the network was being "hypersensitive to anything which might upset the White House."

I do not know whether these incidents, and media management's acquiescence to government subpoenas, are part of a larger pattern—with other, still undisclosed forms of media-government cooperation. But I do know that the chill which has spread, and is continuing to spread, over the news media has not been eased by the positions taken by media management.

Perhaps the full implications of what could happen in this country can be seen more clearly in the light of recent experiences in other countries. In South America, newspapers have been seized and newspaper executives arrested. In Turkey, one non-journalist was sentenced to jail for an essay submitted in a contest advocating socialism. In Greece, a new law imposes fines of more than $4,000 and long prison terms for articles "likely to undermine the public confidence" in the government and for publishing headlines, photographs, or drawings "which do not accurately represent the context of the report or deliberately mislead the reader." In Russia, writers have been publicly ridiculed and even jailed for "ideologically immature" works that "blacken" Soviet achievements. The newspaper *Soviet Russia* recently warned against admitting to the ranks of writers and journalists "young writers whose ideology is not yet formed." "What is important," the newspaper continued, "is not only how a writer writes, but what he writes about . . . , how party-minded his literary stand is."

Meanwhile, back in this country, the United States Information Agency (USIA) has produced and released for foreign distribution films boosting the Nixon Administration's Vietnam policy while, at the same time, it has blacklisted as "undesirable" books that might be "misunderstood" or prove "offensive" to foreign readers—books such as *Beyond Vietnam* by former U.S. Ambassador to Japan Edwin O. Reischauer ("didn't fit in with our purposes"), *The Triumph* by John Kenneth Galbraith ("counterproductive"), *Freedom and Order* by Henry Steele Commanger, *The Negro and the City* by the Editors of Fortune magazine ("a few injurious articles mar an otherwise acceptable book"), *Tell Me How Long the Train's Been Gone* by James Baldwin, *The Center: People and Power in Political Washington* by Stewart Alsop ("not beneficial to the program"), and *In Dubious Battle* by John Steinbeck ("unsuitable for use in the program").

During the past few days, Attorney General John Mitchell has announced his regrets at "any implication that the Department of Justice is interfering in the traditional freedom and independence of the press." However, he has promised that the Justice Department will henceforth "reach a compromise acceptable to both parties" when it wishes to examine photos, films, or reporters' files for use in criminal prosecutions.

Like Vice President Agnew, the Attorney General has reassured us that his Department's actions are "not censorship"; but, like the Vice President's speech, the "censorship" comes from the mere threat. It is, alas, a tried and true technique of all those who would wish to "control" the content of the news media to announce loudly and clearly that their actions are "not censorship," while at the same time *acting* to bring the press under their influence. This was almost precisely the position of the USSR when imposing censorship in Czechoslovakia in August 1968. Whether or not the government's recent actions be *called* "censorship," they have clearly had that result. It is no secret that police forces and other agencies of government all over the country have often looked upon the press with displeasure—for reports criticizing their operations, or attacks on the competency of government officials. Now they have been encouraged by the actions of the Justice Department to initiate their own fact-finding forays into the files and notes of newspaper reporters, sampling information given in confidence an dusing such of it (publicly or privately) that suits their purposes. This trend cannot be stopped by a few assurances that the Justice Department subpoenas were "not censorship." The damage has been done. It may take many, many years of *actions* of reassurance to remove the apprehensions brought about by the words and actions already unleashed.

News reporters, who have the day-to-day job of collecting and disseminating accurate and untainted information to the people, must now fear government "intimidation," an abuse of the trust built up between them and their confidential sources of information, and the drying up of important news material. Rather than come to their defense, however, media management has generally announced its intention to cooperate with the Justice Department in any "reasonable" requests. Is it not clear that a policy of cooperation with "reasonable" Justice Department requests is every bit as bad as an agreement to turn over all reporters' files on confidential interviews? What reporter, ahead of time, can know which portions of his notes the government and management will subsequently view as information which is "reasonably" within government demand? Management's cooperation policy will mean that no reporter will dare to give his sources assurances that their material will be kept in confidence; sources will refuse to talk; and reporters will refuse to take any information which might be within the reach of government subpoenas.

What accounts for news management's depressing eagerness to cooperate with the government's "reasonable" demands? The answer, I think, goes to the heart of government-press relations in this country. I regret to say it, but the press too often believes it is in its *economic* and *political* interests to establish "cordial" working relations with the government.

Thus, while the Administration criticizes the *content* of the media (and the Vice President even makes faint references to ownership patterns), it is quick to spring to the defense of the *economic* interests of television and newspapers. Thus, when the Assistant Attorney General for Antitrust indicated his opposition to the newspaper industry's monopoly authorization bill (the so-called "Failing Newspaper Act"), he was reversed by the White House, and the Administration sent the Commerce Department to support the bill. When the trade press reported that the FCC was prepared to oppose the Pastore Bill (S.2004) by a six-to-one vote, President Nixon appointed two new Commissioners (one of whom was on public record against the Bill), the agency's position on the bill was substantially altered, and it ultimately adopted a "policy statement" granting much of what the industry had urged Senator Pastore to enact into law. The FCC's action was seemingly designed as an "appropriate" response to Congressional interest, to avoid the "need" for legislation; yet when Senator McIntyre introduced legislation to split up some of the more offensive concentrations of media control in America, the FCC demonstrated no such response to Senatorial concern, and the President's "Director of Communications" announced that he opposed that legislation.

How sad that media management seems so willing to sacrifice so much for corporate greed. *Variety* magazine put it nicely when describing the broadcasters' eagerness to accept censorship over "violence" in TV programming if the government would protect them through the Pastore Bill:

> It has been made clear here, in a number of ways, that the ordinary broadcaster—the publisher of the airwaves—is willing to surrender still more of his First Amendment freedom for the promise of a perpetual license to do business. At gunpoint, and given the choice of "your money or your life," the ordinary citizen promptly yields up his money. Not so the broadcaster. (*Variety*, March 26, 1969, p. 74.)

The same forces are apparently at work in media management's willingness to negotiate its reporters' film and notes with Attorney General Mitchell.

No one has charged a "deal," and I do not. But the results are very much the same as if there were a government-media agreement that the media will take care of the Administration's image, if the Administration will take care of the media's balance sheets. This may be sufficient for the media's hired financial hands in the corporate board rooms, but what of the working reporters—or, more important, what of the needs of the American people for a free-swinging, couageous press committed to independent and investigative journalism? If the media have sold out the freedom of the press, then we will all pay a high price indeed.

Professor Jerome Barron has charged, accurately I believe, that the broadcasting industry has primarily invoked the First Amendment's protections "for completely commercial and non-ideological ends." Broadcasters, for example, have been willing to fight the FCC's insistence upon anti-smoking advertisements all the way to the Supreme Court on First Amendment grounds. Yet the industry has never filed even one *amicus* brief before the FCC in behalf of a broadcaster—such as the Pacifica stations—threatened with sanctions for the pure speech-content of his programming. One *Broadcasting* magazine editorial even gratuitously recommended to the FCC that the constitutional protections of free sueech *not* be extended to a Pacifica station for a poem it broadcast. And now the broadcasting industry's response to Justice Department subpoenas has been to "negotiate" demands to both parties' "mutual satisfaction."

There are similar dangerous trends in our society: Government agents have reportedly disguised themselves as reporters or cameramen—even on the steps of the Supreme Court—not to cover the news, but to gather information on the political beliefs of those against whom possible prosecutions might be brought. Government undercover agents, most recently in Vietnam, have also disguised themselves as members of the press—some believe to spy on other reporters who wrote articles critical of the government's "Vietnamization" policies. Now the Justice Department has acted in ways that will convert the reporter himself into a government agent, whose notes and private thoughts will be kept constantly on tap, their contents to be negotiated with the government on "reasonable" demand—in exchange for political and economic protection. What will happen to the integrity of, and public confidence in, the press of this country if this policy is not immediately reversed?

I believe we are entitled to know the extent to which the networks and broadcasting industry have already "cooperated" and "negotiated" with government prosecuting attorneys by turning over to them information in a manner that will jeopardize open channels of communications in this country. I believe we must all appeal to the leaders of the broadcasting industry to put aside their self-serving lust for corporate profits and power politics—at least long enough to defend those precious freedoms of a free press upon which all of us are so utterly dependent.

BROADCAST NEWS AND THE FAIRNESS DOCTRINE

(By Corydon B. Dunham)

(An address before the Practicing Law Institute's seminar on Business and Legal Problems of Television and Radio by Corydon B. Dunham, Vice President and General Counsel, NBC, February 27, 1971)

The law's protection of private rights—such as in defamation—presents no substantial problem for news broadcasters. Truth is a defense and the trend is to provide greater freedom for news reporting provided it is not malicious.

The Fairness Doctrine of the Federal Communications Commission is quite another matter. What this does in a sense is to give the government the right to edit news programming in the name of the public interest. In the past five years, the government has moved its surveillance deeper into the news operations of stations. Government inquiry into news programming has become accepted and commonplace. There is a government presence in the station's newsroom.

Viewed from an historical perspective, we cannot help but see that the Fairness Doctrine has two characteristics significant to the relation between the government and the press:

1. It is a government standard—not a journalist's standard.
2. It is enforced by a government licensing system applied by the government—not by newsmen.

Two other aspects—both throwbacks to an earlier age—heighten the Doctrine's impact:

1. The newsman must answer when the government inquiry is made.
2. Truth is no defense.

It is no criticism of the courts, the Commission or the Commission staff to observe that these aspects of the Commission's Doctrine are regressive. But the fact is that television journalism has come under a shadow of expanding government regulation.

The television news broadcast by local stations and networks is the public's primary source of information. The potential for harm to news coverage and to the public's ability to know what's going on is there. Mere inadvertence by the government under the Fairness Doctrine system could result in a gradual stilling of those voices which are the most provocative, the most informative, the most critical of government—and the public is the loser.

Thus, in carrying out its obligations, the broadcaster faces two fundamentally inconsistent bodies of law—the Supreme Court's view of the need for press freedom from legal inhibitions and the Commission's Fairness Doctrine. The paradox is that both bodies of law have as their touchstone the public interest in the free flow of information and the full discussion of public affairs, but their basic assumptions are different. Their practical effects are different.

Defamation is a judicially developed body of law. In drafting the *Times* overlay, the Court takes as its starting point the First Amendment. Freedom of the press is mandated by the Constitution. Actions for libel have an inhibitory tendency and should, therefore, be limited. But in this as in other Freedom of the Press cases, the Court looks also to the basic policy underlying the Amendment.

That policy is the need of the individual in an open society for access to views and ideas on public issues and of information about the state of the nation, the operation of government and the conduct of public officials and figures. The media are the necessary marketplace of ideas. Basic to the Court's reasoning is the assumption the First Amendment policy will be better effectuated by freedom than by legal strictures or inhibitions. Only this week the Court has again decided to expand the newsman's protection against libel suits unless malice can be shown.

The materials constituting the Fairness Doctrine are the product of administrative decision making. The Commission takes as its starting point the public interest standard of the Communications Act. If the public interest is furthered by the airing of diverse views, then licensees should broadcast the desired contrast. And what better way to assure that they do so than by legal requirements and regulatory guidelines.

The Commission implements these regulations by recurring Commission inquiry of its licensees. This is not compelled by the *Red Lion* decision. If it were, it would seem a radical departure by the Supreme Court from its First Amendment stance in other Freedom of the Press cases. The expansion of Commission regulation over the television press flows not from court decision or experience with television news media as irresponsible, but essentially from the regulatory nature of the Commission's Doctrine—regulation begets regulation.

Commission decisions do reflect an awareness of a constitutional dimension but it must be the nature of any regulatory commission to believe that full discussion will be better effectuated by regulation than freedom.

This crucial difference is one I think may not be fully appreciated by either courts or administrators. The effect of the Fairness Doctrine can be fully as chilling on reporters and their media employers as the possibility of actions for money damages for libel. Perhaps more so. Reporters and editors are reasonably adept in spotting possible defamation and avoiding it, while getting the story in print. Truth is always a defense. Fair comment is privileged. The Supreme Court has long been sympathetic to the newsman's role. Most important, it has accepted that isolated mistakes are the price of a free and vigorous press.

It is rather different to ask newsmen to develop a sang froid about violating the Commission's Doctrine; where truth is irrelevant, there is no privilege and the Doctrine imposes affirmative requirements which are not news requirements.

News people must become more apprehensive about it. This result ought to concern everyone and certainly those of us who are lawyers for broadcast news. This is where I think lawyers have not done their job adequately. We have, by and large, failed to educate the Commission to the real and detrimental impact that their Fairness Doctrine procedures can have on the functioning of individual reporters, editors, cameramen and all the other individuals who make up a broadcast news operation.

Any government agency, as an institution, cannot help but develop blind spots that make it hard to see the adverse impact of a regulation that has laudable objectives.

In most cases of regulation by administrative agency, the burden is usually financial. In the case of information flow, the burden is not so much one of economics; it is that ordinary, quite typical and accepted regulatory procedures—successful when applied to transportation, oil and gas production and distribution, and securities—can have bad side effects indeed when applied to thought and communication. Negative sanctions can deter harmful behavior, but they rarely induce fearless reporting or robust debate.

Imagine, if you will, a system under which your State Bar Association would call on you to explain why you tried a case in a certain way, called or did not call a witness, wrote a contract paragraph in a certain way—all because it received a letter of complaint from a participant, witness, spectator or casual reader. The problem is not really whether you made the right judgment but rather the continual apprehension that what you are doing at any given moment may have to be explained at some subsequent date to a review board which, by the way, has the right to take away your license. Would this make you bolder and more courageous—or less so?

At least here, lawyers would be judging the work of lawyers. The Fairness Doctrine is not that newsmen judge the work of newsmen. I would guess that lawyers and administrators do not make good journalists. But somehow we have let ourselves believe that as lawyers we are competent to judge the work of newsmen although we would hesitate without expert assistance to judge the work of engineers, artists, doctors, etc. Certainly, we would never alow newsmen to judge lawyers if legal sanctions were involved.

News coverage presents an even more aggravated situation. Put apart the need for speed and the difficulty of covering a breaking news story. Your news reports must necessarily show some people differently than they see thmselves. Since news deals with change, it must necessarily antagonize both those who are opposed to change and those who are for it, but demand more, faster. So the opportunity for complaint-triggered review by government commission increases, the better you do your job. Is this a prior restraint? I think so.

Does the Fairness Doctrine work this way?

A Commission inquiry to a licensee is apparently prompted in most cases by a complaint originating outside the Commission itself. A member of the Commission's very limited staff forwards the complaint, generally about a news or public affairs program, to the licensee for its response. The licensee must then state whether a controversial issue is involved, what that issue is, whether or not the various points of view on that issue have been presented and when and what they are. The Commission's staff then decides whether, on this statement from the licensee, the broadcaster was reasonable in what it did.

This all sounds rather modest and even, to some, reassuring. But the difficulty is that to answer that inquiry from the agency, an investigation must be conducted within the news organization as to all the elements involved. The complaint itself may be a narrow one but to answer it requires a review of all broadcast matter over a period of time on that subject to show that all points of view have been covered. And the newsman must explain the issue and why he reported it the way he did. Beyond that a member of the Commission staff may—quite understandably—see a controversial issue where the newsman saw a factual presentation; he may see the point of view as different from what the broadcaster believed it to be; he may feel other points of view could have been presented—and decide against th broadcaster on any of these grounds. But even if he decides for the broadcaster, what has the impact been on the newsman?

The hazard for a station news operation is this: the more significant the change being reported, the more important that society learn of it; the more distrubing or unusual or provocative the change, then the more likely the report will be to trigger viewer complaints—either about the point of view broadcast, or that a more generally held point of view wasn't given the same or greater prominence. Good journalism thus becomes an occasion for government investigation.

The television journalist naturally turns in defensive reaction to the lawyers. But our advice to him must reflect requirements of the Fairness Doctrine, not the standards of professional journalism or requirements of news coverage. We must tell him that in the development of the news story or news program, the expression of any point of view carries with it a Fairness Doctrine obligation concerning other significant points of view, whether or not they are newsworthy, or all that pertinent to news coverage. We must tell him too, that if a complaint is made, the Commission may see the points of view presented and issues discussed as being different from what he thought they were.

Avoidance of news about vested interests, minorities, errors in government. will promise less government inquiry. A blander form of journalism becomes more attractive, and the result of such a government premium under Gresham's Law is uredictable—but not obvious. It may not be even noticed—the public, of course, does not see the provocative film which winds up on the cutting room floor.

My point is not that this is an intended result under the Fairness Doctrine regulation. Quite the contrary. The stated objective of the Fairness Doctrine is more provocative news coverage and a broader flow of information to the public. But the Fairness Doctrine has a basic infirmity—it is a government standard enforced by a government agency upon the press.

The experience of earlier societies and of contemporary closed societies more than demonstrates the inhibiting effect on the press of a government licensing system. This experience is what led to the First Amendment. The Fairness Doctrine when applied to news must be seen as a regression.

Let me give you the opinion of a working newsman, NBC's Bill Monroe, who is more familiar with Washington than most because that's where he works. In a recent comment, he points out that the government requiring television stations and networks to be fair in dealing with issues and elections is something that sounds reasonable. But the concept of government as a referee of news coverage is alien to the concept of a free press:

> "The newspaper editor and the television editor have the same basic instincts about what is fair and what isn't. The newspaper editor can go ahead and make his decisions on the basis of his own conscience. But the television editor has got to think also about what the FCC rules are, how those rules fit a particular case and what the FCC might think about it. And the Federal Communications Commission is not a board of independent journalists. It's a seven-man commission appointed by the President. It has a Democratic majority when President Johnson is in the White House and a Republican majority under President Nixon. So it is a board with a certain political tone to it that is guiding television editors on certain decisions in areas where no government body would dare tell newspaper editors what to do. Under these circumstances, is television a free element of a free press? No sir, it is not."

Mr. Monroe goes on to note:

> "Sometimes members of the FCC make speeches urging broadcasters to go in for bold, creative journalism. When they make such speeches, I'm sure they mean them. But the system they're a part of works in the opposite way, because the FCC has no way to reward you for bold, controversial journalism. All it has is a way to harass you. And you can be almost certain that, if you engage in hard-hitting, investigative journalism, you will make important people in one faction or another mad, they will complain to the FCC, the FCC will ask you for an explanation, and you'll have to spend as much time on a carefully researched and prepared document of explanation as you did on the original news project."

When we balance the public's right to know with the value of the Commission's inquiry, it would seem more in keeping with our historical tradition for the Commission to dismantle that part of the Fairness Doctrine apparatus that regulates television news. News reports should not be subject to editing by the government.

At the least, the Doctrine should be modified in its implementation. Overregulation is denying broadcast news the breathing space the Court has stated is essential for the press to play its constitutional role.

The Commission should refrain from acting upon complaints about isolated instances of alleged imbalance or unfairness. Its inquiries should be limited to documented allegations charging a pattern of bias, a practice of one-sided discussions.

I don't believe the Commission sees itself as required to pursue every viewer complaint about news operations. The Commission itself, for example, abandoned the Personal Attack Doctrine on hard news coverage. Would not regulation by the Commission's own standards be more affirmative if confined to allegations of a pattern of behavior? It should look for basic fairness on an overall basis.

This would also reduce the danger of inadvertent regulation from Commission inability to gauge the impact of its raised eyebrow. Increasingly critics of the Commission have observed the hazards of such indirect censorship.

The Commission should not require its licensees, in effect, to justify news coverage upon receipt of a complaint objecting to some particular news report. The usual procedure, however, now appears to be just that. Only after the broadcaster has supplied the requisite justification does the Commission then say that editorial judgment is not a proper subject for its inquiry—that such an inquiry is "inconsistent with our concept of a free press," or that the inquiry would involve the Commission "much too deeply in broadcast journalism."

Just eliminating the minute analysis of news programs to determine whether the material complained of is indeed a view on a controversial issue or an objective report of the facts would free the energies of all involved for more useful tasks. Fairness would not suffer. It is the rare, exceptional broadcaster who does not feel an obligation to report all significant views. The vast majority would strive for overall balance in any event. They merely want to be permitted to do their daily job of gathering the news, editing, organizing and presenting it without the ever-present threat that every decision may be scrutinized and dissected.

Lawyers have a special responsibility to see that the press stays strong, that its work stays free of government surveillance and regulation, that its reporters do not have reason to be apprehensive about legal strictures, so that people can learn what's going on.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION,

WASHINGTON, D.C.

FCC 71-623, 63540, Docket No. 19260

In the Matter of The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act.

NOTICE OF INQUIRY

Adopted June 9, 1971; Released June 11, 1971

By the Commission: Commissioner Robert E. Lee absent; Commissioners Johnson and Wells concurring and issuing statements.

I. INTRODUCTION

1. The purpose of this Notice is to institute a broad-ranging inquiry into the efficacy of the fairness doctrine and other Commission public interest policies, in the light of current demands for access to the broadcast media to consider issues of public concern. It is important to stress that we are not hereby disparaging any of the *ad hoc* rulings that we have made in these areas. Rather, we feel the time has come for an overview to determine whether the policies derived largely from these rulings should be retained intact or, in lesser or greater degree, modified. We have divided the inquiry into four parts: (i) the fairness doctrine generally; (ii) access to broadcast media as a result of the presentation of product commercials; (iii) access generally for discussion of public issues; and (iv) application of the fairness doctrine to political broadcasts. Obviously, these parts overlap. Indeed, each is an aspect of the underlying problem of access. Interested parties may address any or all these aspects, or they may structure their comments in accordance with their own definition of the problem.

2. Several issues to which we direct particular attention have been the subject of recent Commission decisions in which both the legal and policy considerations have been treated in depth. We will not here repeat the extensive majority and minority opinions. Rather, we refer interested parties to the cited cases where they will find full treatment of the pertinent policy matters here under review.

3. We stress that we are interested in fundamental policy—not in a re-hash of legal considerations nor in recommendations of statutory revision. Thus, this Commission cannot abandon the fairness doctrine or treat broadcasters as common carriers who must accept all material offered by any and all comers. The Communications Act is explicit in these respects (see Section 315(a) and Section 3(h)) and we take the Act as a "given" from which this inquiry necessarily proceeds. Furthermore, there are court appeals pending on several disputed legal decisions will, of course, be appropriately taken into account in the course of this proceeding.

4. This Notice thus deals with Commission-made policy—derived from the Act and from the standards set down therein. But, in view of the broad nature of these standards, there can and must be considerable leeway in both policy formulation and application in specific cases. The goal is clear: to foster "uninhibited, robust, wide-open" debate on public issues (*New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270). That is the profound, unquestioned national

commitment embodied in the First Amendment. The basic issue we pose here is whether Commission-made policies indeed promote that goal to the maximum extent. Or, are there revisions or even entirely new policies that would serve it more effectively?

5. Finally, by way of introduction, we note that promotion of the goal cited above must be consistent with the "public interest in the larger and more effective use of radio" (Section 303(g)). It is most important to note in this connection that, to a major extent, ours is a commercially-based broadcast system and that this system renders a vital service to the nation. Any policies adopted by this Commission in the areas covered in the present inquiry should be consistent with the maintenance and growth of that system and should, among other appropriate standards, be so measured. We urge all interested parties to keep this pragmatic standard centrally in mind in forwarding specific comments and proposals. Proposals that in the short run might afford great insight into public issues but in the long run might tend to undermine the existing broadcast system—e.g., nothing but informational programming in a debate format—would not, in this view, serve the public interest.

II. THE FAIRNESS DOCTRINE GENERALLY.

6. The fairness doctrine has evolved over some forty years as the guiding principle in assuring to the public an opportunity to hear contrasting views on controversial issues of public importance. Enunciated as early as 1929 by the Federal Radio Commission,[1] the fairness doctrine was most fully fleshed out in the *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949), and has been sustained by the Supreme Court as within the Commission's statutory authority (Section 315(a)) and in full accord with the First Amendment. *Red Lion Broadcasting Co., Inc.* v. F.C.C. 395 U.S. 367 (1969).

7. The fairness doctrine is grounded in the recognition that the airwaves are inherently not available to all who would use them. It requires that those given the privilege of access hold their licenses and use their facilities as trustees for the public at large, with a duty to present discussion of public issues and to do so fairly by affording reasonable opportunity for the presentation of conflicting views by appropriate spokesmen. The individual licensee has the discretion, and indeed the responsibility, to determine what issues should be covered, how much time should be allocated, which spokesmen should appear, and in what format. Only in the case of personal attacks or an editorial taking sides among competing candidates is there a specific requirement as to the person to whom the station must make time available. And even this exception rests not upon an individual's right to be heard but, rather, upon the proposition that the public's right to be informed will be best served if the person attacked or the candidate opposed presents the contrasting viewpoint. The guiding premise, as the Supreme Court put it, is not "an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish" but rather "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . . ." *Red Lion Broadcasting Co., supra*, at p. 390. Indeed, it is this right that goes far to explain the amount of spectrum space devoted to broadcasting.

8. With the exception of the personal attack and political editorializing rules, it has not been found necessary to formulate detailed and definitive guidelines for licensees applying the fairness doctrine in their day-to-day operations. Rather, the doctrine has been refined case-by-case in particular and concrete situations. See *Applicability of the Fairness Doctrine to Broadcast Licensees* (Fairness Primer), 29 F.R. 10415 (1964).[2] We by no means denigrate this manner of proceeding. It has in its broad effect served the nation well, and Commission rulings have been realistically and thus, we believe, soundly based. But, at the same time, it does seem to us desirable to take the longer view that an overall inquiry affords—thus permitting all interested parties to be heard and not just those involved in specific complaints. It has been about

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[1] See ***Great Lakes Broadcasting Co.,*** 3 F.R.C. Annual Rept. 32 (1929), reversed on other grounds 37 F. 2d 993 (C.A.D.C.), ***certiorari dismissed,*** 281 U.S. 706.

[2] We have outstanding one Notice of Proposed Rulemaking in the fairness area. See Docket No. 18859. That Notice deals with a specific proposal, however, and not the broad overview here contemplated.

twenty-two years since we issued our 1949 *Report on Editorializing*, *supra*, and we think it is time for another overview. If our policies are sound, they should have stood the test of time and application. If they are not sound—if they unreasonably restrict the journalistic functions of boardcasters or permit broadcasters unreasonably to restrict access—then corrective action is called for. Indeed, in the personal attack and political editorializing fields, we pledged that we would act promptly if we were shown that in actual operation our policies did not promote the fundamental purposes of the First Amendment. 22 Fed. Reg. 11531, 11532; 33 Fed. Reg. 5363, 5364. This also is the thrust of the Supreme Court's opinion in *Red Lion* (395 U.S. at pp. 392–93).

9. This part of the inquiry thus gives broadcasters and all other interested parties the opportunity to advance their ideas, concerning the fairness doctrine generally, for improving, refining, or even drastically revising Commission policies. They may direct their attention to any aspect of the policies set out in the Fairness Primer or in more recent cases. We cite the following as just a few examples of important issues in this area:

(i) How have the personal attack and political editorializing rules worked in actual practice? Should they be revised in any way to achieve their stated goals?

(ii) Has the fairness doctrine in fact promoted the "more effective use of radio" in the discussion of controversial public issues, or has it served to inhibit wide-open debate? (In this connection, we also direct attention to our processing policies—see *Fairness Primer*, 29 F.R. at p. 10416; *Letter to Hon. Oren Harris*, FCC 63–851; and *Letter to Mr. Allen Phelps*, 21 FCC 2d 12 (1969)).

(iii) Should the *Cullman* rule, 40 FCC 576 (1963), which lays down the principle that the right of the public to hear contrasting views on significant public issues is so important that licensees must make time available without charge if necessary—be expanded or restricted, or otherwise refined?

10. We repeat: these are examples only. All intersted parties are invited to frame their own questions in addressing the strengths and shortcomings of the fairness doctrine generally.

III. ACCESS TO THE BROADCAST MEDIA AS A RESULT OF CARRIAGE OF PRODUCT COMMERCIALS.

11. This aspect of the inquiry is prompted by a recent court decision and several complaints in which very broad-ranging policy questions appeared to be raised—questions that reach beyond the concrete situations involved. Thus, we deal first with the policy questions raised in the opinion of the Court of Appeals for the District of Columbia Circuit in *Retail Store Employees Union v. F.C.C.*, Case No. 22, 605, decided October 27, 1970. We refer specifically to the issues raised in Part III of the opinion.[3] The factual setting is simply stated: a department store (Hill's) had access to a station's facilities (WREO) to present frequent advertisements of the standard commercial nature (". . . extolling the virtues of Hill's stocks, bargains, and services and on that basis urging listeners to patronize the various Hill's outlets"—pp. 2–3, Sl.Op.). The employee union at the store decided on a strike and boycott to gain its bargaining objectives. It sought to support the boycott by purchasing time for one-minute announcements stating that there was a strike at Hill's and urging listeners to respect the picket lines. These bare facts are sufficient to pose the basic issue: namely, does the union have a right to purchase time for its spots in these circumstances?

12. In view of its holding on another matter not relevant here, the Court did not resolve the above issue. But it did indicate that the issue ". . . deserves

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[3] The court noted that unlike the issue in Part II of the opinion, the issues in Part III do not call into question the renewal of license of the station involved and, therefore, the Commission might wish to separate those issues from the license renewal proceedings (n. 50, Sl. Op.). We think that such separation is clearly appropriate and accordingly have done so. See Order released April 26, 1971 in *Radio Enterprises of Oh*, *Inc.*, FCC 71–401.

We also note that the *Amalgamated Meat Cutters* case, 25 FCC 2d 279 (1970), raises the same basic issue, and for that reason we requested its remand from the Court. The parties to the two above proceedings should accordingly address themselves in this proceeding to the questions raised by the Court in *Retail Store*.

fuller analysis than the Commission has seen fit to give it" (part A, p. 20, Sl. Op.). The Court then noted (part B, p. 20, Sl. Op.):

> "Central to the Union's argument on this point is the proposition that, in urging listeners to patronize Hill's Ashtabula Department Store, Hill's advertisements presented one side of a controversial issue of public importance. Hill's copy, of course, made no mention of the strike or boycott, or of the unresolved issues between the Union and the store. But the advertisements did urge the listening public to take one of the two competing sides on the boycott question—they urged the public to patronize the store, i.e., not to boycott. It seems to us an adequate answer to tihs argument merely to point out that Hill's copy made no specific mention of the boycott. In dealing with cigarette advertising, the Commission has recognized that a position represented by an advertisement may be implicit rather than explicit . . . ."

The Court noted a further analogy to the *Cigarette Advertising* ruling—that here also there is an established Congressional policy involved. In this instance, the policy is even-handedness in labor-management relations in which both Union publicity and Hill's commercials might be viewed as weapons of "economic warfare." In the Court's words (part C, pp. 21–22):

> "If viewed in this light, it could well be argued that the traditional purposes of the fairness doctrine are not substantially served by presentation of advertisements intended less to inform than to serve merely as a weapon in a labor-management dispute. But the fairness doctrine, as we have pointed out, is only one aspect of the FCC's implementation of the statutory requirement that broadcast stations operate to serve the public interest. [Footnote omitted.] The public policy of the United States has been declared by Congress as favoring the equalization of economic bargaining power between workers and their employers. [Footnote omitted.] It is at the very least a fair question whether a radio station properly serves the public interest by making available to an employer broadcast time for the purpose of urging the public to patronize his store, while denying the employees any remotely comparable opportunity to urge the public to join their side of the strife and boycott the employer. If the Union's claim is to be rejected, we believe this question should be dealt with by the Commission."

13. The Court noted that it had not attempted a full canvass of all the issues involved but had merely indicated some of the principal questions to be answered. In the circumstances, we believe that an overall inquiry is the best way to proceed, thus allowing for maximum participation and maximum opportunity for sound policy formulation. The issue has been posed here in terms of *Retail Store* but, clearly, it has wider ramifications. The issue really is the right of access, if any, to the broadcast media to respond to product commercials.

14. Two of the Court's basic considerations—that product commercials can carry implicit messages and that pertinent national policies should be taken into account—have very wide applications indeed. For example, we might consider the national policy of avoiding environmental pollution (see National Environmental Policy Act of 1969, 83 Stat. 852, Section 101(a)). As we indicated in our *Letter to Mr. Soucie*, 24 FCC 2d 743 (1970), appeal pending sub nom. *Friends of the Earth* v. *F.C.C.*, Case No. 24556, C.A.D.C., a great number of products commonly advertised over the broadcast media have pollution consequences: cars because of their gasoline engines; gasoline itself; airplanes; detergents; and, indeed, every product that is normally packaged in a non-biodegradable container. Commercials urging use of these products or services thus can be argued to raise implicit ecological questions. Other product commercials, similarly, could be argued to raise significant national policy questions: commercials promoting the use of aspirin, tranquillizers, soporifiers, etc., on the ground that they indirectly promote overuse of drugs generally and thus might lead to harmful, illegal drug use; commercials depicting women in a manner charged to be offensive to the national policy of equal rights and equal treatment of the sexes; etc.[4]

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[4] There is also the issue raised by armed forces recruiting announcements, both commercial and of a public service nature, see, e.g., the policy issues considered in such recent rulings as *Letter to Mr. Albert A. Kramer*, FCC 70–596, and *Letters to Mr. Donald A. Jellinek*, FCC 70–595.

It is not necessary to list more examples. The contention is that, almost without exception, product commercials can be argued to raise some significant, controversial issue—and as public awareness grows, so, too, does the occasion for making such arguments. On the other hand, the Court notes in *Retail Store* (Sl. Op., pp. 21–22, n. 67) that the ". . . Commission repeatedly emphasized that its holding in [*Cigarette Advertising*]—that stations broadcasting cigarette advertisements must regularly provide free time if necessary for the presentation of arguments opposing cigarette smoking—was limited to cigarette advertising. . . ." The Court further stated that this holding was based on the ground that "the implicit and explicit messages normally carried by advertising do not concern controversial issues of public importance." (Sl. Op., p. 21).

In this connection, we also note that the Court in *Banzhaf* v. *F.C.C.*, 405 F. 2d 1082 (C.A.D.C., 1968), certiorari denied, 396 U.S. 842 (1969), pointed out that cigarettes were ". . . in fact the product singled out for special treatment which justifies the action taken" and emphasized that ". . . [its] cautious approval of this particular decision does not license the Commission to scan the airwaves for offensive material with no more discriminating a lens than the public interest or even the public health."

15. *Free time.* On the important issue of extending the *Cigarette Advertising* ruling to cover all product commercials,[5] we set out our position in *Letter to Mr. Soucie, supra*, and in *Complaint of Alan F. Neckritz and Lawrence B. Ordower*, FFC 71–526, released May 13, 1971. We specified in those rulings and will not here repeat our reasons for believing (i) that most product commercials are distinguishable from cigarette advertising and (ii) that, in any event, it would not serve the public interest to hold that for nearly every product commercial the licensee must make free time available—on a virtually daily basis, in a set ratio, in part during prime viewing hours—for counter-commercials informing the public why they should not purchase the product or services in question. In *Neckritz*, the Commission majority indicated its view that the advertisements for Chevron advanced a claim for product efficacy, that this is not the same as arguing a position on a controversial issue of public importance, and that it "would ill suit the purposes of the fairness doctrine, designed to illumine significant controversial issues, to apply it to claims of a product's efficacy or social utility." We indicated in *Neckritz* the desirability of an overview of the policy issues involved, and we here invite interested parties to address such issues as the following:

(i) Ought there be some public interest responsibility beyond that of fairness to carry material opposing or arguing the substance of product commercials? If so, should time be afforded free or only on a paid basis?

(ii) What account should be taken of the Court's observation (in *Retail Store*) that spot announcements may not add substantially to public knowledge and, on the other hand, that repetition is a significant factor to be considered?

(iii) What should or must be the licensee's area of discretion in this entire matter—and is there some workable standard for distinguishing various categories or commercials, some of which would give rise to fairness or public interest duties and some of which would not?

(iv) Finally, what would be the predictable effect of any new policy adopted here on the carriage of product advertisements and thus on the continued growth and health of the commercial broadcasting system?

16. *Paid time.* This brings us to the heart of the inquiry posed by the *Retail Store* decision—namely, the right of paid access to inform the public why a product or service advertised over the station's facilities should not be purchased. The Court in *Retail Store* posed the issue in terms of a national policy for equalizing economic bargaining power between workers and employers, and we have noted that other national policies might be pertinent in other circumstances. The broad issue posed is whether

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[5] In *Letter to Mr. Soucie* and the *Neckritz* ruling, we pointed out that there can be product commercials that do deal directly with controversial issues of public importance. In such cases of course the fairness doctrine, including the *Cullman* principle, is clearly applicable.

fairness and/or the public interest standard[6] imposes a kind of "equal opportunities" obligation on the broadcaster—that is, if he sells time for the promotion of products and services, must he also sell time to others, to consumer and public interest groups for example, who wish to argue against public use of these products or services? We call for comment, pro and con, on the policy implications and the pragmatic effects of this equation.

17. *Alleged false and misleading advertising.* We direct the attention of interested parties to Commission policy in the area of advertising that is alleged to be false and misleading—as, for example, in the recent *Chevron* case. *Complaint of Alan F. Neckritz and Lawrence B. Ordower*, FCC 71–526, released May 13, 1971. The Commission majority held that the *Letter to Mr. Soucie* was applicable and that to prohibit such advertising in advance of a pending Federal Trade Commission ruling would be a case of "sentence first, verdict later." It also stated that the issues raised were of such broad-ranging importance as to warrant an overall inquiry; and the present proceeding is in part responsive to that finding. We thus specifically raise the question whether the public interest calls for any revision or refinements in existing Commission policy with respect to false and misleading advertising, or allegations thereof, and whether we might lay down new policy guidelines for the benefit of broadcasters and the public alike.

18. The foregoing by no means exhausts the possible issues that are involved in the area of product commercials. We have simply raised those that appear to us to be of the greatest current importance. We stress again that we hope to evolve or reaffirm policies that are fair to all concerned, that promote the commercial broadcasting system, and above all that serve "the public interest in the larger and more effective use" of the broadcast media.

IV. ACCESS GENERALLY TO THE BROADEST MEDIA FOR THE DISCUSSION OF PUBLIC ISSUES

19. It has also been urged that, quite aside from the fairness obligation of broadcasters, there is a right of access—at least on a paid basis—for all those wishing to express a viewpoint on a controversial public issue. The Commission has rejected this blanket claim on the ground that there is neither Constitutional nor statutory right for any individual or group to present their views, and that as a matter of policy it would not serve the public interest to act as if there were. See, e.g., the *Democratic National Committee* ruling, 25 FCC 2d 216 (1970), appeal pending, *Democratic National Committee* v. *F.C.C.*, Case No. 24,537, C.A.D.C.; *Business Executives' Move for Vietnam Peace* v. *F.C.C.*, Case No. 24,942, C.A.D.C. The legal issues are thus before the Court, and the policy issues are sharply pointed up in the majority and minority opinions of the Commission. We request comment on the question whether there is any feasible method of providing access for discussion of public issues outside the requirements of the fairness doctrine. More specifically, we ask that comment be addressed to the differing problems raised by paid and free time; the specific standards that should be followed for determining the basis on which time is to provided, if such a course is recommended; the effect of any such new procedure on the licensee's general responsibility to the public; and the impact of such procedure on the licensee's duties under the fairness doctrine. The essential purpose of this part of the inquiry is to ascertain, if possible, the general patterns of licensee practice as to access on a paid or sustaining basis (e.g., for discussion of controversial issues generally or of ballot issues; for fund solicitation generally or for parties or committees organized around ballot issues), and whether it would be appropriate for this Commission to lay down criteria or guidelines for these purposes. If so, what would they be? Or, are the problems in this area so varied that decisions should be left to the judgment of thousands of licensees and, in cases of complaint, to the adjudicatory process? In other words: should we reaffirm present Commission policy and practice?

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[6] In *Retail Store*, the Court noted that the purposes of the fairness doctrine might not be advanced by presentation of the boycott advertisements but nevertheless raised the question whether the public interest did not require such presentation. See also *Banzhaf* v. *F.C.C.*, *supra*, where the Court, in affirming our *Cigarette Advertising ruling*, held that the Commission's action was based in fact on the public interest standard. The issue posed here is thus not one of trying to fit concepts into the fairness mold but, rather, what the public interest calls for.

V. APPLICATION OF THE FAIRNESS DOCTRINE TO POLITICAL BROADCASTS

20. The Fairness Primer contains a number of rulings concerning the application of the doctrine to political broadcasts. There have been a number of important recent rulings in this area. As examples, we point to such rulings as the *Letter to Mr. Nicholas Zappic*, 23 FCC 2d 708 (1970); the *Republican National Committee* ruling, 25 FCC 2d 283, 299–301, 739 (1970), appeal pending, *CBS* v. *F.C.C.*, Case No. 24,655, C.A.D.C.; *Complaint of Committee for the Fair Broadcasting of Controversial Issues*, 25 FCC 2d 283. 294–298 (1970). The first two set forth a quasi-equal opportunities approach—namely, that if a licensee sells or gives time to one political party, it should sell or give comparable time to the rival party, but that the Cullman principle is inapplicable here. The last cited case declined to extend the equal opportunities concept to such appearances by public officials as Presidential Reports to the nation—although it did hold, on the particular facts, that time for one uninterrupted presentation should be afforded to opposition spokesmen. We request comment on such relevant questions as the following: whether the quasi-equal opportunities approach should be restricted, expanded, or left alone, with a specific description of the feasibility and effect of any proposed revision on the underlying policies of the statute (see Section 315(a)). We recognize, of course, that actions by the Congress will be decisive in this area and that many statutory amendments are presently under consideration. If Congress does act, Commission policies will be appropriately revised.

VI. CONCLUSION

21. We have gone at some considerable length into the ranges of problems that have led us to propose this comprehensive overview. But interested parties will doubtless be able to suggest additional questions and variations on those we have raised. We welcome every approach. In view of the considerations discussed above (in para. 5), however, we urge that every comment be specific with reference to the practical effect of any proposals put forward.

22. It may also turn out that a further inquiry, narrowing the focus of consideration, would be useful. If we determine that new rules are appropriate, there will of course be a further opportunity to comment. It is also possible that the material submitted in response to this Notice will permit the adoption of a new policy statement without further proceedings, just as it is possible that no changes in present policy will be found to have merit. The response to this Nation will be largely determinative of our future course of action. In any event, we intend to employ special procedures and perhaps a select staff in this highly important inquiry.

23. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules and Regulations, interested parties may file comments on or before September 10, 1971, and reply comments on or before October 25, 1971. Comments may be filed as to any or all parts of the inquiry and should clearly delineate the focus of consideration. In accordance with the provisions of Section 1.419 of the rules, an original and 14 copies of all comments, replies, briefs, and other documents shall be furnished the Commission. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

24. Authority for this inquiry is contained in Sections 4(i), 303, 307, 3 315(a), and 403 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION*
BEN F. WAPLE
Secretary.

FAIRNESS DOCTRINE NOTICE OF INQUIRY

[In re Notice of Inquiry into the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act]

Concurring Opinion of Commissioner Nicholas Johnson.

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* See attached statements of Commissioners Johnson and Wells.

It is becoming increasingly clear that the Fairness Doctrine, rather than serving as a means of satisfying legitimate demands for access, is increasingly functioning as an "Unfairness Doctrine" by legitimizing broadcaster frustration of those demands. See, *e.g.*, my dissenting opinions in *Chevron F–310*, FCC 71–526 (May 12, 1971); *Friends of the Earth*, 24 F.C.C. 2d 743, 452 (1970); *Democratic National Committee*, 25 F.C.C. 2d 216, 230 (1970); *BEM*, 25 F.C.C. 2d 242, 249 (1970); *Armed Forces Recruitment Messages*, 24 F.C.C. 2d 156, 158 (1970); *Robert Scott*, 25 F.C.C. 2d 239, 240 (1970); *Dorothy Healey*, 24 F.C.C. 2d 487, 495 (1970). Indeed, there is not a scintilla of hope in this discouraging line of cases that the FCC majority has the slightest intention of ever opening up the public's airwaves to the public under any set of circumstances. It has denied access to United States Senators, *14 Senators*, 25 F.C.C. 2d 283, 305 (1970), businessmen prepared to pay for commercial spot time that was available, *BEM*, *supra*, and citizen groups attempting to reply under the fairness doctrine to "commercials" that *do* argue "controversial issues of public importance" *Chevron F–310*, *supra* (which the Commission once said *could* raise fairness obligations, *Friends of the Earth*, *supra*). It is hard to imagine any more appealing set of cases than these.

Moreover, given the timing of this "Notice of Inquiry," one cannot help but wonder whether the majority is not trying to affect the outcome of currently pending cases. Several of the cases mentioned above are now on appeal before the U.S. Court of Appeals. E.g., *Chevron F–310, supra, appeal docketed sub nom Alan F. Neckritz v. U.S.A. and F.C.C.*, No. 26,335, 9th Cir., May 24, 1971; *Dorothy Healey, supra, appeal docketed sub nom Dorothy Healey v. F.C.C. and U.S.A.*, No. 24,630, D.C. Cir., September 16, 1970; *Friends of the Earth, supra, appeal docketed sub nom Friends of the Earth v. F.C.C.*, No. 24,556, D.C. Cir., August 19, 1970; *D.N.C., supra, appeal docketed sub nom Democratic National Committee v. F.C.C. and U.S.A.*, No. 24,537, D.C. Cir., August 13, 1970; *Armed Forces Recruitment Messages, supra, appeal docketed sub nom G. I. Association et al v. F.C.C. and U.S.A.*, No. 24,516, D.C. Cir., August 7, 1970; *BEM, supra, appeal docketed sub nom Business Executives Move for Vietnam Peace v.* F.C.C. and U.S.A., No. 24,492, D.C. Cir., July 31, 1970.

One can only hope that the Commission will not represent—and that the Courts will not accept—this hollow gesture of a "Notice of Inquiry" as the basis for altering or postponing the Court's decisions in these cases. (1) There is no reason whatsoever to believe the Commission majority is likely to change a position that has been so forcefully and repeatedly stated in such extreme cases. (2) I am fearful that this "Inquiry" may well have the serious national consequences—whether intended or not—of leaving the law in its current state of uncertainty and inequity through the 1972 Presidential election. (3) Those who now have cases on appeal, or who may be coming before the Commission in the near future, are entitled to the prompt rendition of justice on their complaints.

Needless to say, the law couldn't be any worse than it now is; it is unlikely the Inquiry will do much more harm. On the assumption that it will not affect the case-by-case resolution of these conflicts by the Commission and the Courts, therefore, I concur in the issuance of this Notice of Inquiry.

CONCURRING STATEMENT OF COMMISSIONER WELLS

With some reservations I concur in today's action. While I recognize that acting on an overall legislative basis is a perfectly legitimate alternative to our past practice of evolving the fairness doctrine on a case by case basis, I believe that the latter is the best way to proceed in this sensitive area. Our practice of reviewing the licensee's judgment for reasonableness in concrete factual situations has been effective. It is difficult to try to legislate fairness for all situations, and I doubt that we can define with significantly more precision the position that has emerged from our several recent decisions. But because of the majority's desire to review the entire doctrine after this long passage of time, I concur in this inquiry.

Commissioner Johnson's concurring statement requires some comment. Unlike Commissioner Johnson, I do not disparage the recent cases which he finds so objectionable. I believe that they are correct and reflect sound policy. I am particularly concerned by the implication in his statement that today's action is not seriously undertaken, but is some kind of tactical maneuver designed to influence pending appeals of Commission decisions.

There is no mystery as to why this inquiry was undertaken. It has been under consideration for some time, and the reasons have already been given in several prior Commission actions. One reason is the *Retail Store* decision which necessitated Part III of the Inquiry. We also said in *Neckritz* that we would undertake a broad ranging inquiry. The Chairman, in an April speech to the National Association of Broadcasters, stated that it was time for another review of the fairness doctrine—that since the 1949 Report, we had been proceeding on an ad hoc basis and, after 22 years, it was time to look again at the whole subject—to let all interested persons participate in this important policy formulation, not just those involved in particular cases. To obtain such an overview is the sole purpose of today's action.

Certainly no one suggests that it will somehow obviate court review. On the contrary, the notice recognizes that pending cases will be decided, and expressly states that the decisions in these cases will be taken into account in this proceeding. Furthermore, there is not the slightest thought that other cases coming before the Commission in the near future should be denied prompt consideration. We shall certainly act on these cases in line with our established processes.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

Docket No. 19260, Phase Two

In the Matter of The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act.

To: The Commission.

COMMENTS OF

COLUMBIA BROADCASTING SYSTEM, INC.

ROBERT V. EVANS,
JOSEPH DEFRANCO,
RALPH E. GOLDBERG,
Its Attorneys.

Of Counsel: J. Roger Wollenberg, Joel Rosenbloom, Stephen A. Weiswasser.
DECEMBER 20, 1971.

Columbia Broadcasting System, Inc. (CBS) submits herewith its comments in the second phase of the Commission's fairness doctrine inquiry—dealing with the fairness doctrine generally (including the personal attack rules) and the applicability of fairness doctrine principles to political broadcasters.

The subject to which this inquiry is addressed may well be the single most important and far-reaching matter now pending before the Commission. The oft-stated goal of the fairness doctrine is to secure "the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning . . . vital and . . . controversial issues. . . ." *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249 (1949). The question raised in this proceeding is one of the proper roles of government and the broadcast press in securing that public right. There can be no more fundamental problem for a free society which has come to rely upon broadcasting more than any other medium as a source of information on public affairs.

The outlines of the problem are set by the Supreme Court's decision in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). That decision permits a form of government regulation which has never been thought appropriate for other press media. It does not, however, give the Commission "a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech." *Id.*, at 395. Nor does it validate Commission action which involves government censorship or "the official government view dominating public broadcasting." *Id.*, at 396.

The problem is thus to reconcile the kind of government regulation which the fairness doctrine in practice entails with the vigorous pursuit of its calling by a free broadcast press. In the comments which follow, we show that the Commission's course in recent years has been hostile to independent broadcast journalism—that the Commission has too often come to assume the wholly inappropriate (and we believe unwanted) role of editor-in-chief of the nation's views. We propose certain steps designed to held extricate the Commission from this role and to restore the balance between broadcaster freedom and government responsibility.[1]

I. THE OPERATION OF THE FAIRNESS DOCTRINE GENERALLY

The danger of government domination is inherent in any attempt to apply the fairness doctrine. For any enforcement of its basic restriction on broadcaster discretion necessarily involves governmental review of the very stuff of journalism—the determination of what should be covered and what coverage should be provided. "[O]fficial prescription in detail or in quantity of what the press must say can be as offensive to the principle of a free press as official prohibition." *Banzhaf* v. *FCC*, 405 F.2d 1082, 1103 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

The Commission itself has refused to act as a "national arbiter of the truth" on the ground that government review of the editorial decisions of broadcasters for consistency with "some precise line of factual accuracy" would be "inconsistent with the First Amendment."[2] Review of those same editorial decisions for consistency with a precise rule of balance prescribed by a national arbiter of fairness can have equally destructive consequences for the journalistic enterprise. For "a policy of requiring fairness, statement by statement or inference by inference, *with constant Governmental intervention to try to implement the policy*, would simply be inconsistent with the profound national commitment to the principle that debate on public issues should be 'uninhibited, robust, wide-open' (*New York Times* v. *Sullivan*, 376 U.S. 254, 270." *National Broadcasting Co.*, 25 F.C.C.2d 735, 736–37 (1970).

In its traditional articulation, the fairness doctrine recognizes the need to limit Commission intervention and respect the discretion of the broadcast journalist. Thus, when the Commission reviews a station's performance under the doctrine, "the action of the station in carrying or refusing to carry any particular program is of relevance *only* as the station's actions with respect to such program fits into its overall pattern of broadcast service." *Report on Editorializing by Broadcast Licensees*, *supra*, 13 F.C.C. at 1255 (emphasis supplied). Moreover, "the question is necessarily one of the reasonableness of the station's actions, not whether any absolute standard of fairness has been achieved." *Ibid.* In passing upon complaints, "the Commission's role is not to substitute its judgment for that of the licensee . . ., but rather to determine whether the licensee can be said to have acted reasonably and in good faith." *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598, 599 (1964). Thus, in principle, the doctrine eschews any effort by the Commission to dictate the definition or treatment of controversial issues or, more generally, the manner in which the fundamental goal of public information is to be achieved.

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[1] As indicated, these comments do not attempt to deal with every problem that might be thought to be related to the fairness field. Thus, we do not repeat here our comments and reply comments in Docket No. 18859 on the Commission's proposals to implement certain particularized aspects of the fairness doctrine, but merely ask that the Commission consider those comments as part of this more general inquiry.

As to those applicability of the fairness doctrine to political broadcasting, we have heeded the Commission's statement that it is not interested "in recommendations of statutory revision." For example, we do not argue here in support of CBS' long-standing and wellknown view that the equal opportunities requirements of Section 315 of the Communications Act should be repealed.

Similarly, we note here our disagreement with the recent ruling by the Commission's staff that the *Cullman* doctrine—requiring presentation of views on public issues contrasting with those in paid broadcasts even if spokesman willing to purchase time for that purpose are unavailable—applies to the sale of time for the expression of positions on ballot issues. *Letter to Mrs. W.T. Emmet*, October 26, 1971 (Ref. No. 8330; C10–1108). However, full development of our view that this ruling creates an unwarrented intrusion of the fairness doctrine into the financing of ballot issue campaigns would trench on questions presented in *Business Executives Move for Peace* v. *FCC*, D.C. Cir., Nos. 24,492 and 24,537, decided August 3, 1971, which have not finally been resolved in light of the possibility of review by the Supreme Court. The same questions are involved in the third phase of this inquiry—Access Generally to the Broadcast Media for the Dicussion of Public Issues. We think it appropriate to reserve further comment for that phase of the proceeding.

[2] *Complaint Concerning the CBS Program, "The Selling of the Pentagon,"* 30 F.C.C.2d 150, 152 (1971), citing *Complaints Concerning the CBS Program, "Hunger in America,"* 20 F.C.C.2d 143 (1969); *Network Coverage of the Democratic National Convention*, 16 F.C.C.2d 650 (1969).

In practice, however, there has been an erosion of these principles, an increase in the Commission's willingness to second-guess broadcaster judgments and an ever-expanding demand that those judgments be justified and explained. In recent years, the Commission has increasingly sought to apply the doctrine by ruling on individual complaints, rather than weighing the licensee's "overall pattern of broadcast service" at the time an application for renewal of license is considered. See *Letter to Hon. Oren Harris*, 40 F.C.C. 582 (1963).

Having separated consideration of particular complaints from the renewal process and undertaken to direct specific relief in individual controversies, the Commission gradually has come to focus less upon the overall reasonableness of licensee performance and more upon the achievement of what it (and a reviewing court) will regard as fair in some absolute sense. In consequence, the Commission has taught individuals and groups discontented with the treatment afforded by broadcasters to resort immediately to Commission processes, not only as a means of testing broadcaster judgments, but also as a means of obtaining access for themselves. And the result has been a multiplicity of inquiries and rulings addressed to licensees during the course of each license term.[3]

As Chairman Burch recently observed, "in the fairness area, the bond of theory and implementation has come unstuck. . . ." *Complaint of Wilderness Society (Esso)*, 31 F.C.C.2d 729, 734 (1971) (concurring opinion). This result is apparent in both the substantive standards applied and the procedures utilized. Although the two are inter-related, we discuss them separately as a matter of convenience in exposition. Thereafter, we set forth our views on the minimum steps needed to reverse the process.

A. The Substantive Standards Applied

Determination by the Commission of whether a broadcaster has made reasonable efforts to achieve fairness has not traditionally depended upon a weighing of minutes and seconds or lines of copy devoted to different sides of an isue. Increasingly, however, more recent fairness rulings by the Commission or its staff have come to turn upon just such a process. For example, in *Complaint of Wilderness Society (Esso), supra*, the Commission confronted the question of whether NBC had afforded reasonable opportunities for the discussion of issues relating to the projected Alaska oil pipeline. Its decision apparently relied upon a minute-by-minute analysis of NBC coverage for a substantial period, classifying presentations as "pro" or "anti."[4]

Again, in a letter of January 28, 1971 to Sunbeam TV Corporation, licensee of Station WCKT(TV), Miami, Florida (Ref. No. 8330–K; C6–1075), the Commission's staff found a fairness doctrine violation, relying upon a similar mode of analysis. Thus, the staff weighed a one-hour documentary on legalized gambling (shown the night before a local referendum) which it analyzed as 47 minutes "anti" and 6 or 7 minutes "pro," a thirty-minute program on the same subject (broadcast four days before the referendum) which was "evenly divided between proponents and opponents" and news reports of which "approximately 425 typed lines were devoted to expression of views opposing the legalization of casino gambling whereas approximately 115 lines were devoted to the proponent's views." The staff concluded that "one viewpoint was given heavily predominant exposure in your overall broadcasts" and stressed also the presentation of the allegedly one-sided documentary "on election eve."

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[3] The Commission has also displayed an increased willingness to define issues as being controversial or having public importance and to judge whether broadcast matter not directly addressed to such must be viewed as inferentially commenting upon them, without regard to the judgments of broadcasters on these subjects. Thus, the Commission was previously unwilling to regard broadcast church services as an implicit comment on disputes between theists and atheists. See, *e.g.*, *Mrs. Madalyn Murray*, 5 Pike & Fischer, R.R.2d 263 (1965). More recently, it has held that cigarette commercials not addressed to any question of smoking and health were inferential comments on that public issue. *Television Station WCBS–TV*, 8 F.C.C.2d 381 (1967), *reconsideration denied sub nom., Cigarette Advertising*, 9 F.C.C.2d 921 (1967), *aff'd sub nom. Banzhaf v. FCC*, 405 F.2d 1082 (1968), *cert. denied*, 396 U.S. 842 (1969). (See our comments in the first phase of this proceeding.) Most recently of all, the Commission has held that public service announcements for the United Appeal of Dayton, Ohio, not directed to a local dispute concerning the operation of that charitable fund, were nonetheless to be treated as comments on the dispute which invoked fairness doctrine obligations. *Avco Broadcasting Corp.*, 23 Pike & Fischer, R.R.2d 111 (1971). The Commission has thus expanded greatly the scope of broadcaster activities which it reviews under the fairness doctrine.

[4] *Id.*, at 735, 738–39 (concurring opinion). According to Chairman Burch, in concluding that the fairness doctrine had been satisfied, the Commission found that, excluding the gasoline company announcements thought explicitly to raise this controversial issue, NBC had devoted twice as much time to the anti-pipeline views as to pro-pipeline views, and that, taking account of the commercials in question, the pro-pipeline views received a two-to-one advantage in exposure. *Ibid.*

These are not isolated or aberrant cases.[5] They exemplify, rather, a tendency inherent in any effort by the Commission to go beyond a determination of whether the public has been informed and decide whether there has been an appropriate "balance" in the access afforded to contending forces. And the Commission has more and more undertaken to make just such an effort. For example, in *Committee for Fair Broadcasting*, 25 F.C.C.2d 283 (1970), dealing with Presidential addresses on the Indo-China war, the Commission announced that, where "there has been an extensive but roughly balanced presentation on each side [of an issue] and *five* opportunities in prime time for the leading spokesman of one side to address the nation on this issue," there must be at least "one more uninterrupted opportunity by an appropriate spokesman [for the opposing view] to discuss this issue. . . ." *Id.*, at 297, 298 (emphasis in original).

The Commission could not and did not hold in *Committee for Fair Broadcasting, supra*, that, absent such an opportunity, the American people would have been left uninformed on the views of the President's opponents or on the issue of the war. The Commission had indeed found that, apart from the Presidential speeches, the coverage provided was not only balanced but "extensive." In dealing with a similar question, the United States Court of Appeals for the District of Columbia Circuit later took what amounted to judicial notice that no "live American has been left uninformed about the desirability or undesirability of military service, the draft, or the Vietnam War," and that "these issues have been ventilated *in extenso* for years on (probably) every television and radio station in the land." *Green* v. *FCC*, 447 F.2d 323, 329, 330 (D.C. Cir. 1971).

Clearly, the Commission's attention was not focused on whether the public was informed on the war issue. Indeed, it conceded that there was "some support" in "the 'theory' of the fairness doctrine" for the position that the goals of the doctrine had already been met. 25 F.C.C.2d at 298. It thought, however, that " 'practicalities'—or, stated differently, what is 'reasonable' in the circumstances of five prime time addresses by one side—clearly call for the greater effort by the networks which we have noted above." *Ibid.* Plainly, in *Committee for Fair Broadcasting*, the Commission was motivated not by fairness doctrine considerations but by the notion that it had a duty—as a sort of chancellor of instant fairness equity—to redress what appeared to it as an imbalance in the access afforded contending spokesmen. And the Commission took this action without regard to whether the goal of an informed public had been adequately served without Commission intervention.

If "balance" is to be the goal—and access is to be supplied to redress imbalance—it is all but inevitable that the Commission will analyze fairness doctrine issues in terms of hours and minutes, lines of copy, "uninterrupted opportunity" or some other quantitative or qualitative measure of "opportunities" afforded each side. As the Chairman noted in the *Wilderness Society* matter, a weighing of sheer quantity is only the beginning of the process. 31 F.C.C.2d at 736. The end to which this approach must lead is represented by full-blown "content analysis," conducted in accordance with statistical and scientific procedures purportedly designed to quantify and objectify every conceivable factor that may bear upon the treatment of opposing sides.

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[5] Nor is it material that the WCKT(TV) case involved a ballot issue. Such issues are in many respects like political campaigns, and the Commission has applied a "quasi-equal opportunities" rule to the sale or gift of time to supporters of candidates in such campaigns, as well as to station editorials endorsing or opposing candidates. The Commission has not previously applied such a rule, however, to the journalistic efforts of broadcasters in political campaigns. The WCKT(TV) ruling goes very far in this direction, applying a standard of mathmatical balance to a station documentary, a discussion program and to news reports. Compare *Complaint by Citizens for Responsible Government, Tulsa, Oklahoma*, 25 F.C.C.2d 73 (1970), cited in the WCKT(TV) ruling, where the Commission's staff apparently applied the standards of the political editorializing rule to find a fairness doctrine violation in a ballot issue case where a radio station had provided thirty minute programs expressing the views of proponents and opponents of a proposed city charter, had editorialized 52 times (at 2-½ minutes per editorial) in favor of the charter and broadcast 5 responses of similar length.

Any such effort must involve the Commission in certain minimum steps. First, in every dispute, the *Commission* must define what the relative positions on a particular controversial issue are and identify the person to be viewed as a spokesman for each position. Second, the *Commission* must classify each program or program segment carried by a station or network relating to the issue, in terms of whether it constitutes an expression of "opinion" or "position" or conversely, is "neutral" or "factual." Third, the *Commission* must assign "opinions" or "positions" expressed to the sides determined to exist. Fourth, the *Commission* must decide how each program unit (minute, second or line) devoted to particular positions is to be weighed on a comparative scale—that is, it must take account of such matters as the frequency with which certain views are expressed, the size of the likely audience reached, the prominence of spokesmen on each side and the intensity with which they appear to hold their views, and the degree of editorial control exercised by the licensee. Fifth, the *Commission* must decide how to treat time devoted to programming that is relevant but "neutral."[6]

The Chairman's concurring statement in *Wilderness Society* raises the question "whether a process of categorizing and quantifying presentations, times, and formats, in order to rule on the reasonableness of a licensee's judgment, does not involve the Commission too deeply in day-to-day journalistic practices." 31 F.C.C.2d at 737. We think it plainly must. A licensee faced with the potential of such agency overview must ultimately be forced to devise programming designed to satisfy, not the public, but the standards laid down by the Commission. If the Commission measures fairness by the stopwatch and counts lines, licensees will do so also. If the Commission views "uninterrupted preentations" as critical, so will licensees. And if the Commission forces the expression of particular ideas into categories, licensees will be forced to do the same.

Such a process is utterly inconsistent with anything approximating vigorous journalism. The effort to achieve balanced access inherently tends to ignore material that is not easily identifiable as the expression of a particular side. But it is precisely this kind of material, independent of partisan expressions, that may most illuminate the issues facing the public. Similarly, the replacement of journalistic judgment by mechanical rules of balance necessarily frustrates efforts to inform the public effectively, for it destroys the process of selection and emphasis that is the very heart of any journalistic enterprise. In focusing only on the opportunities of partisans to speak, it ignores the concerns of those who must listen.

In the final analysis, the process we have described all but forces broadcasters to abandon any independent function and to limit themselves to the role of the gate-keeper who provides access to opposing speakers. Such a role may perhaps be adequate to maintain a public park as an arena of free speech in a democratic society. It is wholly insufficient to maintain the vitality of the medium upon which our society uniquely depends for the dissemination of information and the effective communication of diverse views.

B. The Procedures Employed

Over the past eight years, there has been a dramatic 400% increase in the number of fairness complaints received by the Commission.[7] This increase has occurred despite the Commission's efforts to stem the tide by issuing a "fairness primer." *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*. 40 F.C.C. 598 (1964). And the corresponding increase in inquiries and rulings addressed to licensees has occurred despite the Commission's requirement that complainants make a *prima facie* case of unreasonable licensee conduct. *Id.*, at 600; *Allen C. Phelps*, 21 F.C.C.2d 12, 13 (1969).

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[6] The cases we have discussed above are illustrative. In *Wilderness Society*, the Commission found a two-to-one ratio to be reasonable. The staff found a four-to-one ratio unreasonable in *Citizens for Responsible Government* (160 minutes for the charter, 42 minutes against), and a three or four-to-one ratio unreasonable in *Letter to Sunbeam TV Corp.* (62 minutes and 425 lines against legalization, 20 minutes and 115 lines for). The differences in result did not stem solely from the differences in the ratios, but were based on a subjective weighing of factors—such as the frequency and scheduling of appearances—leading to the conclusion that one side did not obtain fair exposure, without regard to whether the public understood the conflicting positions.

[7] See the Commission's Brief in the pending case of *Democratic National Committee v. FCC*, Nos. 71-1637, 71-1723 (D.C. Cir.), p. 36n. 20: "Complaints alleging fairness doctrine violations numbered 1,736 in 1970 and 409 in 1962."

This process has been due, we suggest, partly to the Commission's offer to provide case-by-case relief to individual complainants, but even more to the Commission's movement toward a standard of "absolute fairness" and "balanced access."[8] The chances that a complainant will prevail on the merits become measurably greater if the Commission is prepared to overturn reasonable license judgments about the need to inform the public whenever there is a showing that, regardless of the need, particular views have not been given relatively comparable treatment. The Commission has thus invited a process in which it has become the constant focal point for attempts by organized groups of all kinds and political parties in particular to obtain the kind of access to broadcast facilities which those groups or parties regard as fair. See, *e.g.*, *Committee for Fair Broadcasting, supra*; *Democratic National Committee*, 31 F.C.C.2d 708 (1971).

Increased numbers of letters of inquiry to licensees create a serious possibility of inhibition. As the Department of Justice has stated:

> "[A] continual process of demanding explanations as to why particular news items or programs were or were not shown would come dangerously close to the kind of program censorship which is barred by the First Amendment and Section 326 of the Communications Act.
>
> The Commission has not been given 'supervisory control of programs, business or policy' (*FCC* v. *Sanders Bros.*, 309 U.S. at 475)." Brief for Appellant United States of America in No. 21147, D.C. Cir., *United States* v. *FCC*, p. 108. (ABC–ITT merger case).[9]

Licensees must divert staff, devise procedures and devote substantial time to handling inquiries. Such procedures—if present trends continue—will involve substantial recordkeeping and program timing not necessary to the journalistic process. Indeed, because such procedures will require news personnel to devote time that could be allocated to the preparation for and broadcast of news and public affairs programs, the procedures are hostile to the journalistic process. And these procedures can form particularly serious impediments to the presentation of high quality news programming, where there is usually a need for quick judgment and on-the-spot editing.

For the most significant and controversial issues—the ones covered on a continuing basis—the burden of demonstrating compliance with the fairness doctrine is exceedingly large. For example, in connection with its response to the *Committee for Fair Broadcasting* complaint, CBS prepared an exhibit documenting the coverage of the Indo-China War on the network and WCBS–TV for a six-month period. The exhibit exceeded 100 pages in length and required 240 manhours of work by CBS News Research Department personnel, including three weeks of work by researchers and two weeks of work by the Department's Director. Additional substantial manhours in the preparation of that exhibit were spent by WCBS–TV personnel. And substantial time in evaluating the complaint and preparing the response was spent by CBS lawyers, CBS News executives and other personnel.

Even issues involving lesser coverage can require substantially comparable time for the preparation of responses to Commission inquiries. Staff must still scan the range of news and public affairs programs carried during the relevant period to cull out the material related to the issue being considered. In 1970, for example, the CBS News Research Department devoted well over 1,400 hours to finding the factual material needed to answer fairness doctrine inquiries from the Commission and members of the public. That figure does not include the time devoted to handling informal requests for information. Nor does it include the countless hours spent by News Department personnel (including journalists), lawyers and company executives in evaluating Commission inquiries and preparing responses to them.

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[8] There is no ground for belief that the increase is due to any substantial propensity of broadcasters to behave unfairly. Precise data are difficult to obtain, but we believe that the information submitted by the Commission in 1968 to the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce is reasonably indicative. Between March 1, 1967 and February 29, 1968, the Commission received approximately 1,700 complaints alleging violations of the fairness doctrine or the equal opportunities requirements of Section 315. The Commission found a failure to comply with the fairness doctrine in only sixteen instances. See *Panel Discussion on the Fairness Doctrine and Related Subjects*, Hearings before the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess., Serial No. 90–33, p. 121 (1968).

[9] The Commission has also "recognized that vague complaints about unfairness without substantiation may stifle controversial programming." Brief, *Democratic National Committee v. FCC, supra,* note 7, at 35.

These procedural burdens may be less inhibitory for those with a burning commitment to broadcast journalism and the resources to defend their judgments. The resources available, however, are never unlimited or free from competing demands. And there is danger in any process that repeatedly tests a broadcaster's commitment to journalism by forcing an ever-increasing devotion of those resources to defending yesterday's news judgments. Where the broadcaster invokes the burden himself by robust programming, the temptation not to repeat the process often is a strong one.

For the burden is indeed avoidable. It is a burden that falls most heavily upon those broadcasters who seek to treat the controversial issues of the day in depth and who do not shrink from controversy. Devotion of less time to news and public affairs, or constriction of controversial issue programming, provides an escape from FCC scrutiny. Therefore, as the pressure of inquiries increases, and their scope broadens, the likely result will be an increased number of licensees seeking to avoid confrontation with the government by moving toward the bland and non-controversial or reducing the scope of their news and public affairs efforts.

It is no answer, in this context, to argue that the Commission has the power to compel licensees to give adequate attention to public issues. Even if government can command that a role be played, it cannot command that role's enthusiastic and aggressive performance. Even if it can require broadcasters to devote time to tne discussion of public issues, it cannot by fiat create a willingness to invest in effective and imaginative presentations that will seriously and effectively engage poblic attention, will explore the hard questions partisans often prefer to ignore or will attempt to set partisan views in a perspective that is not itself a product of partisan ideology.

We repeat, moreover, that Commission inquiries take their toll not only of ordinary licensee resources but of the time, the energy and the morale of the journalists responsible for news and public affairs programming. A licensee cannot protect its personnel against a process that effectively requires newsmen to justify and explain their news judgments to a government agency.

We have no ready way to demonstrate the extent to which these procedural burdens on licensees and their personnel have in fact impaired the service which the public might otherwise have received. The effects which concern us most are subtle and slow-maturing. They result from the pervasive attitudes created by an on-going process, and they can easily be masked by the many other factors that bear upon the performance of broadcasting as a journalistic medium.

The danger is nontheless real. As the Commission seeks more and more to dispense instant "fairness" justice in individual situations, that danger grows. The process cannot bode well for the growth of broadcasting as a medium for the effective presentation of robust debate.

II. RESTORING THE BOND OF THEORY AND PRACTICE

There is no obvious, all encompassing solution for the problems we have described. There are, however, a number of steps which can help to establish a more coherent relationship between the Commission's practice and its theory. If implemented, these steps would at least mitigate the evils that have grown from the case-by-case adjudication process.

First, and foremost, the Commission must abjure any effort to weigh or balance the coverage provided contending sides and focus instead upon whether there has been reasonable opportunity for the public to be informed of substantial viewpoints, without regard to any comparative judgments of the treatment appropriate for each viewpoint.

It may be argued that such an approach would leave open the possibility of coverage in ratios of as much as 50 or 100-to-1 and that any such ratio must necessarily reflect a deliberate effort by a licensee to "stack the cards." See. *e.g., Complaint of Wilderness Society, supra,* 31 F.C.C.2d at 737 (concurring opinion). Any policy that places real responsibility on the licensee to make news judgments free of inhibitory governmental surveillance and control is subject to the possibility of such theoretical abuses, but the risk is worth taking.

Even the rare, badly motivated broadcaster is sufficiently aware of the risks of challenge at renewal time and adverse public reaction to tread warily. And in the case of irresponsible and reckless broadcaster conduct, it will be obvious that the coverage provided the disfavored side is unreasonably inadequate on its own terms. No quantitative or qualitative coverage and content analysis will be needed.[10]

We suggest that, if the Commission is to take seriously the duty to refrain from substituting its judgment for that of the licensee, it must recognize that there will be cases that may offend its own notions of what is fair but fail to provide grounds for government interference. The effort to go beyond an inquiry into whether particular points of view have been wholly excluded or given wholly unreasonable treatment (in a non-comparative sense) necessarily involves the Commission in an analytical process that is deadly to a free press.

Second, we urge the Commission to go further than it has in the past to limit the occasions on which it makes inquiry of a licensee. The 1964 airness Primer encourages complaintants to communicate first with the licensee involved. ***Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance***, 40 F.C.C. 598, 600 and note 4 (1964). We suggest that such prior communication with the licensee be required, absent a showing that the matter is urgent and that the dictates of time imperatively and unavoidably demand immediate recourse to the Commission. We suggest also that the complaintant be required to submit the licensee's response (or a showing that the licensee has unreasonably failed to respond) together with a statement of why the licensee's response is thought unsatisfactory.

Many complaints can be and have been resolved without any need for Commission intervention.[11] If a legitimate complaint has been brought to the licensee's attention before the Commission has been called in, the licensee has the opportunity to engage in self-correction more rapidly (and with less concern for the regulatory consequences) than if the inquiry is initiated by the Commission. Ultimately, the public will benefit by a swifter resolution of complaints dealing with continuing issues of public importance.

Third, we urge the Commission to adhere rigorously to the requirement of the Fairness Primer that complainants make a *prima facie* showing of licensee failure to comply with the fairness doctrine*before* any Commission inquiry is made of the licensee. As stated in *Allen C. Phelps*, 21 F.C.C. 2d 12, 13 (1969), this requires the complainant to "(a) specify the particular broadcasts in which the controversial issue was presented, (b) state the position advocated in such broadcasts, and (c) set forth reasonable grounds for concluding that the licensee in his overall programming has not attempted to present opposing views on the issue."

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[10] We note additionally that some of the cases in which the Commission has been moved to engage in the comparative weighing process fall in *sui generis* categories beyond the scope of normal fairness doctrine adjudication. Thus, *Times-Mirror Broadcasting Company*, 40 F.C.C.2d 531 (1962), where the Commission first weighed the "continuous, repetitive opportunity" available to one side against the "minimal opportunity" available to the other, involved effective endorsements of a political candidate and was (in its alternative holding) the source of what is now the Commission's political editorial rule. *Id.*, at 532–33. That rule, as the Chairman has noted, follows something very close to a "quasi-equal opportunities" principle, rather than the policy of the fairness doctrine. *Complaint of Wilderness Society, supra*, 31 F.C.C.2d at 735.

Compare also the "quasi-equal opportunities" rule of *Letter to Mr. Nicholas Zapple*, 23 F.C.C.2d 707 (1970) and its "political party" corollary, created in *Committee for Fair Broadcasting, supra*, 25 F.C.C.2d at 299–301, *reconsideration denied sub nom. Republican National Committee*, 25 F.C.C.2d 739 (1970), *reversed on other grounds sub nom. Columbia Broadcasting System, Inc.* v. *FCC*, D.C. Cir., Nos. 24,655 and 24,659, decided November 15, 1971.

[11] Similarly, we believe that the goals of the personal attack rules can be attained under a procedure which grants licensees substantially greater flexibility and discretion in interpreting and implementing them than is presently permitted. The present rules threaten penalty for licensee failure to identify a personal attack and comply with the seven-day notification and transcript requirment, despite the fact that, by the very nature of the concept, it is not easy to determine whether a personal attack has occurred. See, *e.g.*, *Thomas J. Kenney*, 22 Pike & Fischer, R.R.2d 505 (1971); *Port of New York Authority*, 25 F.C.C.2d 417 (1970); *Robert G. Ryan*, 25 F.C.C.2d 884 (1970). Given the difficulty in determining whether particular words constitute an attack, the Commission should eliminate the seven-day requirement, thereby affording licensees a reasonable chance to make a considered judgement as to whether particular words constitute an attack, and should assume that a licensee who has determined that a personal attack has occured will comply with the affirmative obligations of the rule within a reasonable period.

It is often argued that the complaining member of the public lacks easy access to the precise facts with respect to station or network coverage of an issue, and that it is unreasonable to impose the fact-gathering burden upon them. In large degree, the burden is as great for the broadcaster. Many do not retain verbatim tapes or transcripts of news and public affairs programs. And where such materials do exist, they are not neatly classified or catalogued so as to make it possible to say precisely what coverage an issue (as formulated by a complainant) has been given without extensive sifting aided by the memories of those most involved in particular coverage. In any event, if complainants are required to address themselves first to licensees, licensees in responding to legitimate qustions will have adequate incentives to supply such factual information concerning their planned and actual coverage as is reasonable.

We are under no illusion that adoption of these steps would eliminate the dangers which enforcement of the fairness doctrine holds for broadcast journalism. So long as the government undertakes to review the substance of news judgments, there is a risk of undue intrusion and inhibition.[12] The Commission can, however, go a long way to repair the damage which has been wrought over the past years, to establish standards and procedures that will act as a hedge against government domination and to create a relationship with its licensees that will leave the broadcast press maximum freedom to perform the high functions which the First Amendment commands.

As the Supreme Court has said, "a free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936). This insight, we submit, must be the constant concern of an agency that attempts to enforce fairness.

Respectfully submitted.

COLUMBIA BROADCASTING SYSTEM, INC.

By /s/ Robert V. Evans,
ROBERT V. EVANS

/s/ Joseph DeFranco,
JOSEPH DEFRANCO

/s/ Ralph E. Goldberg,
RALPH E. GOLDBERG
Its Attorneys.

Of Counsel: J. ROGER WOLLENBERG, JOEL ROSENBLOOM, STEPHEN A. WEISWASSER.

DECEMBER 20, 1971.

ABC NEWS,
New York, N.Y., October 26, 1971.

LAWRENCE M. BASKIR, Esq.,
Chief Counsel and Staff Director, Constitutional Rights Subcommittee, Washington, D.C.

DEAR MR. BASKIR: In the course of his testimony before the Senate Constitutional Rights Subcommittee, Mr. Elmer Lower, President of ABC News, agreed to provide the Subcommittee with a list of "Fairness Doctrine" inquiries received from the Federal Communications Commission. I am therefore attaching a list of FCC inquiries relating to the "Fairness Doctrine" which were directed to the ABC networks during the past year.

I would like to point out for your information that the first five inquiries stemmed from the content of radio or television network newscasts or public affairs programming. The last four inquiries on the attached list relate to product commercials or public service announcements carried on our radio or television networks.

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[12] For this reason, we urge the Commission to examine carefully recent proposals to modify or suspend the fairness doctrine in the field of radio. If the goal of an informed public can be achieved without involving the government at all in regulating journalistic decisions, surely the First Amendment requires that such a less inhibiting and less restrictive course be followed.

In submitting this list, I would like to reiterate Mr. Lower's observation that ABC does not consider the number of inquiries received from the FCC during the past year as onerous.

Thank you again for your consideration.

Sincerely yours,

SAM ANTAR.

Attachment.

FEDERAL COMMUNICATIONS COMMISSION FAIRNESS INQUIRY

During the past year, ABC has been a party to the following "Fairness Doctrine" Complaints:

1. *Complaint of John Kleylcin:*
   Re: Alleged anti-firearm commentary of Howard K. Smith.
2. *Complaint of Anthony Martin-Trigona:*
   Re: Radio Network newscast on natural gas shortage (alleged implied comment on need for increased gas rates).
3. *Complaint of DNC:*
   Re: Presidential appearances and specifically 3/22/71 interview of President Nixon.
4. *Complaint of RNC:*
   Re: 4/22/71 appearance of Democratic spokesmen responding to earlier Presidential appearance.
5. *Complaint of F. W. Bromley:*
   Re: "How to Stay Alive" documentary and alleged unfair treatment of animal fats as a cause of heart disease (10/71)
6. *Complaint of Wm. Rogers:*
   Re: Phosphate-based detergent commercials.
7. *Complaint of John DeTar and Rep. John Schmitz:*
   Re: Radio Network "Planntd Parenthood" public service announcements.
8. *Complaint of Center for Auto Safety:*
   Re: Ford "Air-Bag" commercial.
9. *Complaint of Consumers Arise Now:*
   Re: Trash Compactor Commercials.

In addition, ABC was added as a party to a suit in the Court of Appeals by the G. I. Association.

Re: Request of free time to respond to recruitment spots (6/71).

Finally, ABC received a telephone inquiry from the FCC concerning our plans to balance Cavett show on SST issue (3/71).

SECTION 399: THE CONSTITUTION GIVETH AND CONGRESS TAKETH AWAY

THE DENIAL OF FIRST AMENDMENT RIGHTS TO PUBLIC BROADCASTING STATIONS

(By Daniel W. Toohey)*

This article is an opinion: something a public broadcasting station cannot give. Its theme might be taken from the beginning of the *per curiam* decision of the Supreme Court in the celebrated *New York Times Case,*[1] upholding that newspaper's right to print "the Pentagon Papers":

> Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity.[2]

A prior restraint may be defined as any deterrent to expression that operates in advance of publication or utterance. The repugnance of such restraints to those freedoms protected by the first amendment to the United

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* Daniel W. Toohey is a graduate of St. Louis University School of law, and partner in the law firm of Dow, Lohnes & Albertson, Washington, D.C. He is secretary of the Young Lawyers Section, D.C. Bar Association, and a member of the Board of Editors, *Federal Communications Bar Journal.* The author gratefully acknowledges the valuable comments of his colleague Suzanne Meyer.

[1] New York Times Company v. United States, 91 S. Ct. 2140 (1971).

[2] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). Also see Near v. Minnesota, 283 U.S. 697 (1931).

States Constitution predates that document. For example, it was a classic theory of English constitutional law, treated by Sir William Blackstone in his *Commentaries:*

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.[3]

Suffice it to say that the principle that prior restraints of expression are inimical to freedom of speech and of the press is not a novel theory nor a modern radical doctrine. It is a uniquely consistent and well tried maxim of constitutional law. Therefore, when a "system of prior restraint" expressed in clear and unambiguous language turns up in a Federal statute, it may be viewed with a certain astonishment.

Section 399 of the Communications Act of 1934, as amended by the Broadcasting Act of 1967,[4] provides that:

> No commercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office.[5]

What could be clearer? Commercial broadcasting stations can and do editorialize, and endorse or oppose candidates. Noncommercial broadcasters may not—so says Congress.

When the Public Broadcasting bill was under consideration by the House of Representatives, certain Congressmen insisted on the addition of the editorializing prohibition, which did not appear in the Senate version.[6] Those who observed the course of the bill in the House say they had the prohibition not been added, the bill would not have passed. The judgment was apparently made by the proponents of the bill that the ban on editorializing was tolerable because of the importance of other measures such as those creating the Corporation for Public Broadcasting and extending the educational television facilities financing. The amendment met little or no resistance, and, when President Johnson signed the Act into law on November 7, 1967, Section 399 became part of the Communications Act. During all of this legislative activity, the financial independence the Public Broadcasting Act seemingly provided for educational broadcasting apparently obscured the offensiveness of Stction 399.

However actual funds appropriated since the original enactment have been considerably below what was expected. A precious responsibility of public broadcasting—to illuminate public issues by sharing its views with its audience—proved cheaply bought. The unhappy result is that anyone in the United States can stand up and give his opinions—except a noncommercial educational broadcasting station.

BROADCAST EDITORIALIZING

Only recently, with the arrival of some new thoughts about the First Amendment, has broadcast editorializing become a widespread licensee activity. Even today there are commercial stations that do not editorialize, probably because they are not required to and because they are uncomfortable about doing so because of license renewal every three years. As the public has generally become more sophisticated in FCC protest procedures, the risk of generating undue displeasure must inevitably be considered by the licensee in selecting editorial subjects.

Until twenty-two years ago, editorializing by broadcast stations was prohibited by the FCC's decision in *Mayflower Broadcasting Corporation,*[7] which held that "a truly free radio cannot be used to advocate the causes of the licensee."[8] It took nine years for the Commission to release its ban on broadcast editorials; during those nine years, curiously enough, no licensees challenged the prohibition. In 1949, however, there was released the widely read report on *Editorializing by Broadcast Licensees,*[9] which concluded that overt broadcast editorializing was not per se contrary to the public interest. This report was, however, a guarded and hesitant statement, carefully finding an absence of vice, rather than the presence of virtue, in the practice of broadcast editorializing. At one point in the report tht Commission seemed about to encourage the practice, but whatever endorsement it intended was defeated by its syntax:

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[3] 4 Blackstone Commentaries 151, 152.
[4] Public Law 90–129, November 7, 1967.
[5] 47 U.S.C. Section 399.
[6] S. 1160, passed by the Senate on May 17,
[7] 8 F.C.C. 330 (1940).
[8] *Id.* at 340.
[9] 13 F.C.C. 1246 (1949).

> The Commission is not persuaded that a station's willingness to stand up and be counted on these particular issues upon which the licensee has a definite position may not be actually helpful.[10]

Fortified with this grudging permission, some broadcasters began editorializing; others declined the opportunity. In subsequent years, as broadcasters began to evolve their own particular journalism, editorializing increased. At the same time the FCC became more positive in its view of the broadcast editorial, particularly in recognizing the importance of the editorial as part of overall programming service. For example, in one major television renewal hearing, the quality of the incumbent licensee's past performance was found to be diminished by its failure to editorialize.[11]

Some people criticize commercial broadcasters for not choosing more important and controversial issues upon which to give management's views. Some licensees feel that it is best to maintain a low silhouette where management's views are concerned. Still other stations do not editorialize at all. But all commercial stations enjoy the right to editorialize. Why should noncommercial educational stations be treated differently?

LEGISLATIVE HISTORY

Section 399 was said by its supporters to be a "safeguard" against the Corporation for Public Broadcasting becoming a propaganda machine for political parties or presenting only a particular point of view.[12] Despite the fact that in 1954 Congress had already codified the FCC's "fairness doctrine" preventing that very thing,[13] some Congressmen wanted a specific ban. As a result, House Report No. 572, (to accompany HR 6736) declares that Section 399 was added "[o]ut of abundance of caution." [14]

Though the Senate bill imposed no ban on editorials, the bill which emerged from joint conference showed that the House view had won out.[15] The conferees carefully noted that the provision against editorializing was limited to prohibiting editorials representing the opinion of the management of such stations,[16] but a fair reading of the provision does not require such limited interpretation.

Some emphasis was also placed in the House Report on the fact that "considerable testimony" had been heard to the effect that no noncommercial educational station editorializes.[17] Presumably, Congress saw nothing wrong with codifying the status quo and making it permanent.

In any event, the most accurate insights into the legislative background of Section 399 are not found in these various reports. The real motivations behind its adoption are set forth in the pages of the *Congressional Record* for Thursday, September 1, 1967.[18]

Congressman Springer of Illinois was quite explicit about why he wanted Section 399: he didn't like any television stations (commercial or noncommercial) taking positions on candidates and he wanted to close any loopholes that might permit noncommercial broadcasters to immitate their colleagues. He also promised that he was going to watch the documentaries closely to ensure their impartiality.[19] Congressman Jones of Missouri wanted to see "kept out" the kind of editorializing newspapers do, he said, in their news columns—"they slip a needle in before we know what has happened."[20] Congressman Jones thought, however, that educational stations could editorialize about some things; "improvements in the community and things like that."[21]

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[10] *Id.* at 1254.

[11] WHDH, Inc.. 16 F.C.C. 2d 1 (1969).

[12] 1967 C Q Almanac, p. 1042.

[13] 47 U.S.C. Section 315(a) (referred to as the "equal time provision") states: "Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

[14] 1 U.S. Code Congressional & Administrative News 1810 (1st Session, 1967).

[15] H. Rept. 794, October 18, 1967.

[16] 1967 C Q Almanac, p. 1050.

[17] *Ibid*, n. 9.

[18] Volume 113, No. 149.

[19] *Id.* at H 12277. (Presumably a reference to Section 396 which goes the fairness doctrine one better by requiring each program, unless it is part of a series, to be fair and impartial.)

Mr. Keith of Massachusetts didn't want a repeat of what happened in his district when a film was made supporting certain legislation which might have affected some candidacies:

I did not happen to vote for that program. It is conceivable that I could be tied in with the opposition to that program through this film and it could then have adversely affected my candidacy for re-election. This kind of film is the kind of program that we must guard against.[22]

By now the reader should have a notion as to whom the so-called "safeguard" was designed to protect. Mr. Keith was applauded by Congressman Joelson of New Jersey, who added that "a public official is a sitting duck" and "the right of editorializing should be very, very carefully scrutinized."[23] Mr. Watson of South Carolina urged "Let them go ahead and editorialize. Give me the right to control program content and others can editorialize all they want to . . ."[24] Congressman Brown of Ohio inserted a chapter from George Orwell's *1984* in the record, which he said described a kind of "public television."[25] Mr. McClure of Idaho declared "What Orwell had in mind may seem like something of a lark in 1984 if this bill is permitted to pass."[26]

At least for these gentlemen, the purpose of Section 399 was clear: to prevent Congress from creating a monster that might someday turn on its creator. Therefore, to achieve its own self-protective ends Congress simply legislated away a significant part of educational broadcasters' right of free speech.

The lawmaker may argue that the amount of money being dedicated by law to the support of public broadcasting would inevitably create suspicion that in editorials the stations were mouthing "governmental propaganda." Yet, in what matter of controversy or public debate does government ever take a uniform, completely concurring position? Would it be legislative, executive or judicial propaganda? One may ask: what subsidized industry has been denied its right of free speech as a condition of the subsidy? Or what Congressman refrains from speaking his opinion because his entire salary comes from the U.S. Treasury?

The reported legislative history of the editorializing prohibition is rather consistent in claiming that the provision was enacted to protect someone, presumably the public, from the sinister evils of a government-subsidized propaganda machine. However, if Section 399 is to be considered a safeguard or cautionary measure, then the beneficiary must be admitted to be the Congress, not the public whose access to a certain source of information and ideas has been interdicted by that provision. No one explains why it is written in such a way that a noncommercial educational broadcasting station could not editorialize even if it chose not to be subsidized, not to be a beneficiary of CPB. Why is the prohibition not directed against CPB, which receives the money directly from Congress? Why does the prohibition read "engage in editorializing" instead of "broadcast editorials"?

The prohibition was obviously intended to have broad applicability, certainly beyond the scope of those who receive CPB funds, and it may be intended to frustrate the expression of opinions other than those of the station's management. Whatever else it is, the concern or fear implicit in Section 399 is a salute to the spreading influence of radio and television, which has surpassed other mass media in supplying what Woodrow Wilson called the "raw material of opinion."[27]

THE UNCONSTITUTIONALITY OF SECTION 399

The New York Times case mentioned earlier is the latest expression of the law's antipathy to prior restraint of speech or press. A long line of cases preceding that decision and too numerous here consistently found prior restraint to be the antithesis of first amendment freedoms. As Professor Thomas Emerson of the Yale Law School states it:

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[20] *Ibid.*
[21] *Ibid.*
[22] *Id.* at H 12280.
[23] *Id.* at H 12281.
[24] *Ibid.*
[25] *Id.* at H 12282.
[26] *Id.* at H 12289.
[27] Address to the Associated Press, April 20, 1915.

> [T]he essence of a system of freedom of expression lies in the distinction between expression and action. The whole theory rests upon the general proposition that expression must be free and unrestrained, that the state may not seek to achieve other social objectives through control of expression, and that the attainment of such objectives can and must be secured through regulation or action.[28]

Thus, assuming that any legal consequences might follow the broadcast of an editorial, such as a libel or slander action, freedom of expression guarantees the right to broadcast it first, even though an action at law might lie against the broadcaster for doing so if, for example, he acted maliciously.

Even if Congress were to be able to prove that public broadcasting would become a "propaganda machine" if permitted to editorialize, the Constitution does not allow the blanket restriction on expression which Section 399 imposes, but rather requires that Congress or any offended party act with respect to the consequences of that expression.

In the fifty years or so that broadcasting has taken to become a major social force, there never has been a case which clearly decided how the first amendment applies to it. It does indeed apply; this much we have been told by the Court.[29] But exactly how it applies remains in doubt. The best insights to date are found in the decision in *Red Lion Broadcasting Co.* v. *F.C.C.*,[30] and they provide some additional evidence that Section 399 is unconstitutional.

The most important premise of *Red Lion* is the recognition that a licensee is a trustee for the viewers or listeners who rely upon him for access to ideas and information.[31] Thus, the Court speaks of the Government's power to require the licensee "to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." [32] It is conceivable that, in fulfilling this duty to inform his viewers and listeners concerning a major issue, a licensee might feel compelled to editorialize. However, if he were a non-commercial educational licensee, Section 399 would frustrate the fulfillment of his obligation as he saw it. Moreover, in that context, Section 399 would cause the abridgment not only of the licensee's right to speak his opinion, but of his viewers and listeners right to hear it:

> It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.[33]

Some may argue that *Red Lion's* teachings apply only to commercial licensees and that *Red Lion* spoke only to the obligations of that particular group. No foundation for such a distinction is articulated in the *Red Lion* decision, nor do other first amendment theories justify this approach. Educational licensees must operate in the public interest, they must renew their licenses every three years, and they occupy frequencies to the exclusion of others, which is a major premise for the obligations enunciated in *Red Lion*. True, their goals and their system of financing may differ, but they are no more or no less licensees by reason of those differences. And they most certainly do not, by reason of their licenses, forfeit their constitutional rights.

Perhaps the most significant statement by the Court in terms of this discussion of Section 399 occurred in this observation:

> There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or *to publish his own views*; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to Section 326; or of the official government view dom-

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[28] Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 955 (1963).

[29] U.S. v. Paramount Pictures. Inc., 334 U.S. 131 (1948).

[30] Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

[31] While this opinion is the antithesis of the F.C.C.'s *Mayflower* decision mentioned above, the decisions in each case are summed up in almost the identical phrase: "the public interest—not the private—is paramount."

[32] Red Lion, *supra* n. 30 at 389.

[33] *Id.* at 390.

inating public broadcasting. *Such questions would raise more serious First Amendment issues.* (Emphasis supplied).[34]

There is some comfort to be taken from the Court's observation, for it indicates that if the Supreme Court were to face the issue of Section 399's constitutionality, it would undoubtedly find that it abridges freedom of speech and of the press. But if that opinion were handed down today, no amends could be made for the many editorials that never were broadcast in obedience to the statute. The effect of Section 399 has been to delay the complete fulfillment of the mandatory fiduciary relationship between educational broadcasters and their public, as well as to abrogate in part the basic assumption of the first amendment: "that the widest possible dissemination of views and information from diverse and antagonistic sources is essential to the welfare of the public."[35] Unfortunately, the Court has not yet found Section 399 to be constitutionally invalid, and noncommercial educational broadcasters remain disabled.

CONCLUSION

Section 399 prevents noncommercial educational broadcasting licensees from exercising the same right of free expression that they must safeguard in behalf of those who come to use their facilities. It creates a class of persons who have lost, by reason of the kind of broadcasting service they provide, a portion of their constitutional rights.

Congress may assert that in imposing restraints upon public broadcasting, it left open an abundance of other channels of ideas and expression. But, if Congress is free to determine that because one or two or several channels of opinion are open, others may be limited or prevented, then the First Amendment means nothing and its freedoms exist at the pleasure of Congress. The House acted in disregard of these freedoms in forcing the addition of Section 399, and it is unfortunate that public broadcasting did not withstand it on principle, whatever the need for financing.

That Section 399 may never be enforced is true enough. It is equally true that it stands as a dangerous precedent for those who would encroach further upon freedom of expression for self-serving reasons. Senator Sam J. Ervin, Jr., of North Carolina, a noted Constitutional lawyer, is greatly concerned about the increasing insensitivity to these freedoms by those who are sworn to protect them and warns:

> We can never rest upon the laurels won by our ancestors, nor can we delude ourselves into thinking that our liberties, once having been obtained, are forever secure.[36]

The lesson is that no matter how rich are its immediate rewards, any statute which infringes upon Constitutional guarantees costs too much.

Too often, educational licensees are thought of as instructional licensees, whose duties extend only to the classroom and to whom the problems and issues of community and nation are foreign considerations. Obviously, in recent years this view has changed, but in 1967 it may have been partly responsible for the lack of resistance to Section 399. Now, with noncommercial educational broadcasting's general purposes in better perspective, it could be effectively argued that the public broadcaster who holds himself out as a reliable source of ideas and information on any worthy subject has a greater obligation to inform the public, by the expression of his own views when necessary, than do his commercial colleagues.

We read that the Public Broadcasting Service plans to become a major news source and has made a considerable commitment to that end. The National Public Affairs Center for Television has been created, NET News established, and National Public Radio developed. All of the agencies will someday be a significant source if the ideas and information to which access is guaranteed by the Constitution. It may be assumed that their activities will involve more than the mere reporting of news; if not, these agencies will never become major contributors to public opinion, since commercial broadcasting has already evolved a new journalism, transcending the reportorial function. The editorial is the most mature form of journalism. Without the right to editorialize, public broadcasting will be relegated to permanent adolescence.

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[34] *Id.* at 396.

[35] Associated Press v. U.S., 326 U.S. 1, 20 (1945).

[36] Ervin, *The Freedom to Speak,* N. Y. Times, October 3, 1971, at E 13.

AN EMERGING FIRST AMENDMENT RIGHT OF ACCESS TO THE MEDIA? *

(By Jerome A. Barron **)

[The pervasive social and political changes which have characterized this decade have resulted more than anything else from the newly articulated, although long justified, demands of minority groups for social and legal justice. The dissenters, however, often have turned to unorthodox means to voice their protest—often utilizing passive civil disobedience and even violence. Indeed, the tendency no doubt has been stimulated, at least in part, by the failure of traditional notions of first amendment guarantees to provide viable avenues for expression of social protest. The concentration of ownership of the mass media in a relatively few hands, resulting in a form of private censorship, and the changed physical characteristics of our population—changed in its composition, location and habits—have frustrated adequate presentation of the voices of dissent. Modern realities have demonstrated that the goals of the first amendment can be fully achieved only by imposing an affirmative duty on the owners of the media and government to provide access for protest. This article will examine the propriety of such an affirmative duty in the various media, with particular attention to the role which government should assume in promoting access in each area.—Ed.]

THE RIGHT OF ACCESS TO PUBLIC FACILITIES AND THE PRESS

Government and the Right of Access

Since *Access to the Press—A New First Amendment Right*[1] was published, there have been some encouraging signs that a new approach to the first amendment indeed is emerging. Something of the relationship between a stable and vital political order and adequate access for protest to the significant means of communication is at last being understood. In *Adderley v. Florida*[2] Mr. Justice Douglas gave some expression to this idea when, joined by three other Justices, he dissented from Mr. Justice Black's opinion for the Court that using the jailhouse as a forum for protest was not a constitutionally protected practice. Mr. Justice Douglas viewed the issue as essentially a problem in the search for access for protest:

> Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable. . . .[3]

Particularly in the lower federal courts, the importance of access to a forum increasingly is being emphasized. An illustrative recent case is *Kissinger v. New York City Transit Authority*.[4] The Students for a Democratic Society sought to advertise in New York City subway stations through posters opposing United States participation in the Vietnam War. The New York City Transit Authority and the New York Subways Advertising Co., Inc., which had contractual responsibility for advertisements in the subways, refused to accept the advertisement although the students were willing to pay the regular advertising rate. The advertising company gave two reasons for declining the advertisement: space limitations, and the constitutionally significant reason that the posters were too controversial.[5] The Transit Authority claimed that the advertisements did not come within established categories for advertising and also that the posters were provocative and would cause distrubances and vandalism.

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* This article is based on a paper prepared for and discussed at the 1968 (June 20–25) American Civil Liberties Union Biennial Conference at the University of Michigan, Ann Arbor, Michigan on "The Affirmative Obligations of Government in the First Amendment Area."

** Professor of Law, The George Washington University. A.B., Tufts College; LL.B., Yale University; LL.M., The George Washington University.

[1] Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). The article examined whether governmental means are constitutionally available to restrict the opportunities which the privately owned mass media presently have for private, and presumably constitutional, censorship. The importance of re-thinking the constitutional status of the privately-owned opinion-making machinery, closely concentrated in relatively few hands, should not, however, divert attention from the new era of access which appears to a rising with regard to public facilities as a medium for civil rights protest. It is in this area that the affimative role of government in the first amendment area is coming to be most visibly evident.

[2] *Id.* at 50–51.

[3] 385 U.S. 39 (1966).

[4] 274 F. Supp. 438 (S.D.N.Y. 1967).

The court denied the Authority's motion for summary judgment, holding that the Authority and the advertising company could not accept some posters and refuse others. Judge Bonsal pointed out that posters involving ideological matters had previously been accepted, for example "Radio Free Europe—She can't come to you for the truth" and "Read Muhammed Speaks newspaper."[6] Judge Bonsal quoted statements of the Supreme Court that the guise of "conserving desirable conditions" could not be used to "unduly suppress free communication of views."[7] Quoting from *Terminiello v. Chicago*,[8] he emphasized the Supreme Court's insistence there that "a function of free speech * * * is to invite dispute."[9]

There are some significant aspects to *Kissinger*. For one thing, if the New York Advertising Company is a private company, then it is the first time in American law where a court has suggested that a private organization has a constitutional duty to deny freedom of expression to those with whom it deals. To be sure, the advertising company is viewed in the decision as a delegate or agent for the Transit Authority, providing the requisite "state action" under the fourteenth amendment; nevertheless, it is significant that the private advertising company as well as the public Transit Authority was a party defendant.

Another aspect of *Kissinger* has significance for the emergent right of access: In these situations is it not really very easy for the controller of the medium in question to free himself from any obligation to satisfy an affirmative conception of the first amendment? Isn't the solution, practically speaking, for the advertising company never to reject advertising as "too controversial" but rather on the more innocent ground that "space will not permit?" Similarly, aren't the first amendment considerations in these cases really equal protection arguments? For example, in *Kissinger* the Black Muslims were allowed to advertise, so why not the Students for a Democratic Society? But suppose the subway were to ban *all* political advertisements? Presumably in such a case there would be neither a first amendment nor an equal protection argument.

A similar problem arises in the context of broadcasting's "fairness" doctrine. The extent of the licensee's affirmative obligations actually is dictated by the licensee's own past performance. If he indulges in personal attack or in one-sided presentations of controversial issues, then he has created the measure of his own obligation. The argument often has been made that this approach leads to less rather than more discussion, for if the price of airing controversy is that one must provide still more time for controversy, the common-sense solution is to present as little controversy as possible. Particularly is this the case when the station may have broadcast the reply without payment for the time. In broadcasting this problem theoretically is relieved, however, because broadcast licenses must be renewed every three years. Since the test of renewal is performance in the "public interest," and since even-handed presentation of controversial public issues can be a criterion of operation in the public interest, extended evasion of public issue programming is within the reach of sanctions. Similarly, the significance of *Kissinger* is the court's indication that merely abandoning controversy might not satisfy the subway's constitutional obligation; the court raised without deciding the question of whether public entities such as the Transit Authority have an affirmative obligation to facilitate presentation of controversial public issues.[10]

In another federal case in New York, *Wolin v. Port of New York Authority*,[11] two anti-Vietnam War organizations were denied permission to distribute leaflets in the main concourse and passageways of the Port of New York Authority Terminal Building. The district court held that the organizations were entitled to distribute anti-war leaflets in the terminal so long as they did not substantially or unduly impede traffic.[12] Without speaking of the positive role of government in securing the first amendment goals, the court held that if property is dedicated to public use, it is also dedicated to the exercise by the public of constitutional rights such as freedom of expression. This awareness that public facilities have a role to play in stimulating the communication of ideas in addition to the activity to which the facilities are presumably directed is a most creative one. The court also noted that historically the streets have always played a part in the freedom of expression, with the implication that perhaps quasi-public facilities such as the New York City bus terminal, through which hundreds of thousands of people pass every day, occupy the place the streets may once have enjoyed. This approach recognizes that the scope of permissible uses of governmentally controlled facilities for the expression of opinions must be broadened if the first amendment is to be relevant to the mass transportation realities of urban life. The emergence of a first amendment right of access to public facilities is also encouraging because it rejects the alternative means approach in the context of access to the public forum. In this regard, Judge Mansfield in *Wolin* said quite simply: "Nor does the fact a person might impart his ideas effectively in another place provide any reason for denying a person's right to manifest his views in a spot of his own choosing." [13]

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[5] In addition the copy submitted is entirely too controversial to be posted on the stations publicly owned by the New York City Transit System. Our policy has always been to refrain from accepting business, the display of which would be objectionable to large segments of our population. *Id.* at 441.

[6] *Id.* at 442 & n.2.

[7] *Id.* at 443, *quoting* Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

[8] 337 U.S. 1 (1948).

[9] 274 F.Supp. at 443 n.4.

[10] *Id.* at 442.

[11] 268 F.Supp. 855 (S.D.N.Y. 1967), *aff'd*, 392 F.2d 83 (2d Cir. 1968).

On appeal, the Court of Appeals for the Second Circuit held that a bus terminal is an appropriate place for distributing leaflets, carrying placards and in general acquainting passers-by, especially servicemen, with the anti-war views of the protesters.[14] The perplexing question of the necessary degree of intimacy between the forum selected for protest and the object of the protest was squarely before the court. The issue is one which the Supreme Court has yet to amplify clearly, and yet cases like *Wolin* continue to raise it. Judge Kaufman's response to this problem, in his opinion for the court, was that sometimes the forum selected for protest is the object of the protest, and at other times it is selected because that is "where the relevant audience may be found." [15] Apparently the court views an use of the public forum for either purpose as entirely consistent with first amendment objectives.

The Second Circuit's concern that dissent or protest have an audience is an important and novel development in first amendment case law. Certainly it must be recognized that a constitutional breakthrough has occurred when the Second Circuit declares that an anti-war group has "a constitutionally cognizable interest in reaching a broad audience." [16] Creating a constitutionally cognizable right to access certainly is a more sensitive response to first amendment problems that the *laissez-faire* "market place of ideas" concept, which assumed that if the dissenter could speak or write somewhere, society at large somehow would find the message and respond to it. Of course, Judge Kaufman was writing in the context of a public forum rather than a private one, but the concern for access, once it is recognized, surely cannot stop there. Judge Kaufman indicated an awareness of the relationship between a multiplicity of forums and a stable and healthy public order. The momentum of this new awareness must certainly reach all the mass media. The influence of the privately-owned mass media on the information and opinion process is too great for an access-oriented first amendment theory to be halted in its tracks because the monopoly newspaper, for example, is privately rather than publically owned.

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[12] 268 F.Supp. at 862.

[13] *Id.* at 863.

[14] 392 F.2d at 88–91.

[15] *Id.* at 90.

[16] *Id.* at 94. On the Supreme Court level, the importance of access for ideas as a central, if not *the* central, factor in first amendment litigation was given expression by Justice Harlan's concurrence in the draft card burning case. United States v. O'Brien, 391 U.S. 367 (1968). The Court has said that a governmental regulation could withstand first amendment attack if the governmental interest served was not directed at suppression of free expression and if the resulting restriction on freedom of expression was no greater than that necessary to secure the governmental objective. Mr. Justice Harlan wrote a special concurrence, however, to make clear his view that this holding did not preclude first amendment defenses where the restraint upon expression has the "effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate." *Id.* at 388–89. This recognition in Mr. Justice Harlan's concurrence of a constitutional right to an audience for unpopular social and political protest is a most significant observation and is entirely consistent with Judge Kaufman's opinion in *Wolin.*

This emerging right of access to public facilities is, of course, not yet fully developed. In two recent cases the Supreme Court divided over what kinds of public buildings could be used for social and political protest. The Court held that a library[17] could be so used but that a jail[18] exists for security purposes alone. Mr. Justice Douglas and three other Justices disagreed. For him, apparently, public buildings are less restrictedly available for political protest.[19]

A more recent case which suggests a real recognition of the pivotal nature of access in terms of making the first amendment operational is *Food Employees Local 590 v. Logan Valley Plaza, Inc.*,[20] which involved informational picketing in a privately-owned shopping center. A state court enjoined the picketing on the ground that private property could not be used for such a purpose contrary to the wishes of its owners. The United States Supreme Court held that such picketing could not be enjoined; the fact of private ownership was not itself a bar to the exercise of first amendment rights. The Court stressed the quasi-public aspect of the shopping center, relying on *Marsh v. Alabama*,[21] where the Court had held that a company town was sufficiently public in nature that the exercise of first amendment rights could not be abridged. despite the claim of private ownership. The Court conceded that the situation before it was different from Marsh in the sense that total denial of access to the community was not present as it had been in *Marsh*. But because the shopping center serves as the community business block, the Court held that the state should not permit its trespass laws to be used against "those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put."[22] The Court's theory appears to be the "dedication to a public use" approach found in the public facilities cases in the lower federal courts. What is novel about the approach is that it is being used in the context of what is, after all, private rather than public property.

The Court in *Logan Valley* paid the conventional deference to the alternative means test, *i.e.*, whether there are equivalent opportunities for expression available, and resolved the question in the negative. If the state court order were obeyed, the Court reasoned, the picketers would be confined to the paths adjoining the shopping center. But since the picketers were trying to bring home to the customers of a particular store in the shopping center that its employees were non-union, the Court apparently considered ease of access to that audience as crucial. The Court pointed out that if the pickets were kept away from the shopping center their placards would be at such great distances from the store that they would be unreadable.

What is truly significant about *Logan Valley* is that it represents a confrontation between modern land use and the first amendment. The Court states its awareness of the historic role that access to public places such as sidewalks, streets and parks has played in the enjoyment of freedom of expression in the United States. Moreover, we have examined the manner in which the lower federal courts have broadened the kinds of public facilities where such access must be permitted. What *Logan Valley* does is to forge a similar extension at the Supreme Court level as a result of the Court's awareness of changes in residential patterns. Just as in *Wolin* and *Kissinger* the courts were anxious to point out that access to the bus terminal and the subway may be as important as access to the public street, in *Logan Valley* the Court attempts to point out the significance which the shopping center has acquired in American life. The Court reasoned that in the automobile-centered suburb, the shopping center is a focal point for the community, so that access to its parking lot may be indispensable to secure access to that community. The Court qualified the sweep of this observation, however, by remarking that the store being picketed was located in the shopping center at issue and that the message in controversy was related to the operations of that particular store. The Court said it was not necessary to decide whether the shopping center's property rights could, under the first amendment, prevent picketing unrelated to the uses of the shopping center. But the implication seems clear that even unrelated picketing would be viewed sympathetically by the *Logan Valley* majority when conducted in a shopping center which is the only quasi-public facility in a community.

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[17] Brown v. Louisiana, 383 U.S. 113, 142 (1965).
[18] Adderley v. Florida, 385 U.S. 39, 41 (1966).
[19] *Id.* at 49.
[20] 391 U.S. 308 (1968).
[21] 326 U.S. 501 (1946).
[22] 391 U.S. at 319–20.

Particularly intriguing, and signifying a major step in the development of an access-oriented approach to the first amendment, is the Court's comparative indifference to whether the facilities in question are publically or privately owned. Mr. Justice Marshall's somewhat deprecatory remark on this point was that "Naked title is essentially all that is at issue."[23] The rise of a first amendment perspective indifferent to whether the source of restraint on freedom of expression is public or private is of course what rouses Mr. Justice Black to dissent. In retrospect, his dissent is rather ironic, in that the majority in *Logan Valley* relied so heavily on *Marsh*, an opinion written by Mr. Justice Black. For him, however, *Marsh* is really a sport among the cases for it is that rare case where all the attributes of a town are in private hands. It appears that so long as anything less than a total deprivation of first amendment rights is involved, Mr. Justice Black would not make any new inroads on property rights. But whatever the misgivings of Mr. Justice Black and the other dissenters on the point, the majority of the Court now appears ready to expand the opportunities for access to a wider class of forums than ever before. The test of such access, however, apparently is not going to proceed on any simplistic private-public dichotomy but rather on the following inquiry: how crucial to the communication at issue is access to the forum in question?

A vital question is whether or not the protest must be somewhat related to the function of the public facility which is being used. In *Wolin* the fact that the bus terminal was primarily designed for large crowds was, in the court's view, just what made it an appropriate place for communicating political views.[24] Apparently the court held that wherever there are public facilities through which large numbers of people can be easily reached, there is a right of access to those facilities by groups interested in using them for purposes of political expression. This is not true, of course, where the expression might injure the primary purpose for which the facility exists. This approach may well become, if in view of *Logan Valley* it is not already, the constitutional law of access to public facilities for purposes of political and social protest.

The implications of these developments are quite significant. If public use of government facilities imposes on government a duty to permit use of the acilities for the communication of ideas, the significance of this development or privately-run facilities is fairly clear. If such facilities, even though pri-ately sponsored, are also "dedicated to a public use," then presumably the ame affirmative obligations are placed on those facilities. The blurring of hat is "private" and what is "public," which has come to characterize so uch of our life, eventually may create an access-oriented approach to first mendment values which will endow any natural or obvious forum in our ociety with responsibilities for stimulating the communication of ideas. To e sure, the new concern with the public forum is a form of judicial response o the constitutionally sanctioned irresponsibility of the privately controlled ass communication system. To the extent that responsibilities are placed on e latter, and to the extent that they are voluntarily assumed, the pressure n the public facility to serve as an arena for protest in default may be ssened, but it should not be relieved entirely. An access-oriented approach the first amendment implies affirmative obligation on government as well as e private sector and its concerns.

he Pragmatics of a Right of Access to the Press

Government as well as the private sector must begin to assume the burden stimulating the communication of ideas just as it has done with the most vious sources of the communications of ideas—radio, television and the ess. The affirmative obligation of the press and of government facilities to be nsitive to their responsibility to adequately present the contemporary life ideas is, outside the electronic media, best secured for the moment through e courts. The courts need not be powerless to prevent public facilities and the press from taking refuge in an anemic approach to affirmative duty by dodging attacks in order to avoid the duty to provide expression for counterattack. Entry to the press, like entry to circulate leaflets in a bus terminal, can be judicially evaluated in terms of the public use and public need. It is, after all, no more complex a judicial task than is presently involved in analyzing the puzzles of apportionment, school desegregation and obscenity. However, more extended oversight—oversight in forums other than the judiciary at least for the forseeable future—should be given the most cautious study. Licensing of the press has the least honorable history of any enduring constitutional problem in the history of Anglo-American law. The structure of broadcasting, the weaker legal claims to a property right, the mesmerizing capacity of the electronic media themselves, make its regulatory pattern tolerable, even desirable, but not necessarily transplantable to the press.

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[23] *Id.* at 324.
[24] 392 F.2d at 90.

That an merging right of access can, at least to begin with, best be handled in the courts is supported by analogues in other sensitive constitutional areas. For example, in *Jacobellis v. Ohio*[25] the Supreme Court squarely held that the question of what is "obscenity" is a constitutional question to be decided by judges rather than government administrators or juries. Relying on Lockhart and McClure's observation that judges have no special qualities which entitle them to choose which "movies are good or bad for local communities," the Court nevertheless supported the following conclusion about judges:

> But they [the judges] do have a far keener understanding of the importance of free expression than do most government administrators or jurors, and they have had considerable experience in making value judgments of the type required by the constitutional standards for obscenity. If freedom is to be preserved, neither government censorship experts nor juries can be left to make the final effective decisions restraining free expression. Their decisions must be subject to effective, independent review, and we know of no group better qualified for that review than the appellate judges of this country under the guidance of the Supreme Court.[26]

In holding in *Jacobellis* that obscenity is a question of constitutional law of the highest order, the Court really accepted the views on this point which had been argued by Mr. Justice Harlan in *Roth v. United States.*[27]

> Every communication has an individuality and "value" of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an *individual* matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressable within constitutional standards.[28]

If the suppression of a communication on grounds of obscenity is a question of such constitutional significance that it insists on judicial treatment, then certainly the issue of whether a particular group ought to be permitted an opportunity for expression—for participation in the life of ideas—is also a question solvable by judges. It is by the judicial process that we shall establish the contours for answers to questions which a working right of access obviously presents. What is a minority point of view? When and where shall such opinions be heard? Has some significant space already been given to the particular controversy? Must every issue of the publication contain a reference to a particular controversy? Isn't it possible to reach saturation of a given subject? When is the decision not to publish based upon an effort to obstruct the opinion process? Surely resolving these problems is no less baffling than deciding when a book is "without redeeming social importance" or when it is marketed against a "background of commercial exploitation." But which judicial task accommodates itself more easily to the basic theory of the first amendment? A task which winnows out that which is to be suppressed, or a task whose point of inquiry is whether the communications media have been in default and whether a particular point of view has been suppressed?

The procedure recommended here is already asserting itself in the decisions. In *Wolin* and *Kissinger*, the courts engaged in an inquiry into the reason for suppression and the need for access which should be far more widely undertaken. That such a procedure will not render the work of the communications industry unduly miserable is demonstrated by another recent case, *Avins v. Rutgers University.*[29] Plaintiff sued Rutgers University for declaratory and injunctive relief, alleging that the Rutgers University Law Review had refused to publish an article he had written in which he argued for an emphasis upon the primacy of the legislative history of the fourteenth amendment in interpreting that amendment. He complained that the liberal ideology of the law review staff was hostile to such an approach and that they rejected his article for that reason. Plaintiff used essentially the argument that a state university law review is a public instrumentality, in the columns of which all must be allowed to present their ideas. In declining relief the court pointed out that the author himself had said that he had been published in other reviews and would eventually be able to publish the article involved here.[30] What the court's ruling in essence amounts to is that editorial discretion is not threatened by a public instrumentality concept for ideas. Moreover, the court apparently concluded that the case was not a true access problem since the author had himself acknowledged the inevitability of publication.

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[25] 378 U.S. 184, 188 (1964).

[26] Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutiona Standards*, 45 Minn. L. Rev. 5, 119 (1960).

[27] 354 U.S. 476 (1957).

[28] *Id.* at 497.

The inquiry concerning whether there is need to require publication may turn upon whether a restraint on expression actually is present. In *Avins*, as in *Ginzburg v. United States,*[31] an important issue was motivation. In *Ginzburg* the question was whether "pandering" was the motivation for the offending publication. Similarly, in an access situation an important question is whether ideological considerations were the dominant reason for refusal to publish. The court's response to that question in *Avans* is illustrative:

> The plaintiff's contention that the student editors of the Rutgers Law Review have been so indoctrinated in a liberal ideology by the faculty of the law school as to be unable to evaluate his article objectively is so frivolous as to require no discussion.[32]

But even a showing of an ideological reason for refusal to publish is, of course, not sufficient; it must be coupled with a showing of need for access. Since the law review audience is a national one, unlike, for example, that of a monopoly newspaper in a single city, the showing of a need for access in such a context ought to be far more demanding.

It might be concluded from the foregoing that if this is all that is advocated, then it is not, in terms of immediate consequences, such a large step. And that is true. The larger step would be a utilization of an over-all approach to first amendment problems regardless of the immediate beneficial results. Yet, beneficial results from a constitutionally-based doctrine of press responsibility will be created by voluntary utilization of right to access principles as well as by the purely legal advantage of being able on occasion to demand access to the printed media. Managers of publicly sponsored facilities are now able to tell offended superiors what newspaper editors would then be able to tell offended advertisers—that they have no choice and that they must take the offending advertisement. Indeed, the pangs of conscience about the present status of newspaper as a "privileged industry" are already exhibited in the best section of the American press. After *Access to the Press—A New First Amendment Right*[33] was first published, the *St. Louis Post-Dispatch* commented on it in the following editorial:

> The newspaper (which is in no way licensed by the Government as a broadcasting station) has an obligation to the community in which it is published to present fairly unpopular as well as popular sides of a question. *Enforcing such a dictum by law is constitutionally impossible, and should be.* As a practical matter, a newspaper which consistently refuses to give expression to viewpoints with which it differs is not likely to succeed, and doesn't deserve to.[34]

Whether it is true, as the *Post-Dispatch* suggests, that the wicked do not prosper, it has been the effort of this article to not take the chance that they might and to show that a right of access is both constitutionally possible and practicably workable.

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[29] 385 F.2d 151 (3d Cir. 1967).
[30] *Id.* at 153.
[31] 383 U.S. 463 (1966).
[32] 385 F.2d at 154.
[33] Barron, *supra* note 1.
[34] St. Louis Post-Dispatch, Aug. 24, 1967, at 2E, cols. 2–3 (emphasis added).

A Right of Access and Broadcast Regulation

With regard to the printed media, the emphasis was on utilization of the judicial process to resolve the problem of access along the well-traveled paths established by other first amendment problems such as obscenity and libel. Concerning the electronic media, positive direction to first amendment theory can best be achieved by emphasizing the desirability of approaching the existing structure of broadcast regulation with a realistic rather than romantic view of first amendment purposes. The relationship of the "fairness" and "equal time" concepts to the first amendment objective of the widest possible dissemination of controversial ideas has been insufficiently appreciated. The merit of programming standards should not depend upon whether radio is no longer a limited access medium or whether television still is.[35] Diversity of ideas, not multiplicity of forums, is the primary objective of the first amendment. To be sure, it is hoped that a greater number of forums will create a more diverse opinion process. A flick of the radio dial should be sufficient to dispel that illusion, however. Since the sameness of programming has come to be the dominant characteristic of American radio, the mere abundance of radio stations should not be sufficient for first amendment compliance. An abundance of radio stations no more guarantees diversity of opinion than the scarcity of television stations assures onesidedness.

A positive approach to free expression in broadcasting requires less new legal architecture than is the case with the printed media. Some affirmative obligations already exist—for example, the "equal time rule" and the "fairness" doctrine, both found in section 315 of the Federal Communications Act.[36] To be sure, since their inception these efforts to assure debate have been unceasingly attacked by the industry and their allies in the press who realize that their own lack of legally imposed responsibility to the communications process stands in direct contrast to the situation in broadcasting. What is needed is not more legislation, but a wider appreciation of the relationship of the section 315 responsibilities to basic first amendment goals. If meaningful interchange of ideas is to be anything but an oratorical term, the constitutional underpinning—the decisiveness of opportunity of access to the public—must be stressed in order to obtain wider industry understanding and cooperation. [As it is, the communications industry, by creating in the public's mind an identity between itself and the first amendment, has achieved the public relations triumph of the twentieth century over the eighteenth.]

Some background on the development of the "fairness" doctrine is useful in order to understand the controversy which has arisen concerning it and broadcast regulations generally. The language of section 315 defines the basic outline of the doctrine. Broadcast licensees are required "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[37] It is instructive to note that the language of the statute itself goes a long way toward the goal of imposing an affirmative duty of access for controversial issues. Of course, it has not been so broadly interpreted. Rather, it has been viewed by the FCC as merely giving statutory force to the "fairness" doctrine. The FCC administratively promulgated the doctrine in 1949, and it imposed upon station licensees an affirmative obligation to provide an opportunity for counter-attack on controversial public issues—assuming, of course, that one side of the controversy has already been presented by the station licensee.

It would seem, however, that a statutory duty "to afford reasonable opportunity for the discussion of conflicting views" is a command to do more than merely provide an opportunity for response once the station has decided to give time to a particular issue. If the statute were administered to require licensees to provide access for significant public issues, one of the most important means for evasion of the "fairness" principle would be weakened. At the present time, dislike of a particular side of an issue or unwillingness to be required to give free time for reply are frequently sufficient reason for a licensee to decide to avoid a particular issue altogether. An access approach to the language of section 315 would make the road to evasion of the fairness doctrine a little steeper. If section 315 were read as a command requiring access for controversial public issues as well as a restatement of the "fairness" principle, then we would have a structure to stimulate access to ideas in broadcasting similar to that advocated above for the press.

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[35] *See* ACLU Staff Paper, Affirmative Obligation of Government to Implement the Exercise of the First Amendment 10.

[36] 47 U.S.C. § 315 (1964).

[37] *Id.* § 315(a).

In broadcasting, however, access would necessarily have more teeth. The fact that station licenses must be renewed every three years means, at least in theory, that the extent of a licensee's performance in the public interest is evaluated by the FCC when it decided whether to renew the license for another term. If persistent evasion of the principles of access and fairness has been a routine feature of a licensee's programming, then there is no reason why another applicant should not be licensed in its stead. But the remedy need not be that drastic. Informal agency rulings, cease and desist orders, and renewals for one year terms rather than the normal three year term are all milder ways of dealing with the problem of enforcement.

What this illustrates is that the existing structure of broadcast regulation permits an understanding of the problem of access which can be inclusive enough to reach failure to recognize or seek out dominant public issues. These orders, of intense concern to the vitality and stability of the public order, are given minimal attention in broadcasting as a routine matter. The area of race relations is a prime example of an issue where access is not so much denied as underplayed.

The portrayal of the races on the mass media effectively illustrates the defects of an approach to freedom of expression which is entirely concerned with protecting expression only after it has satisfied admission criteria formulated by managers of the mass media with no analysis of how these criteria work. A solution to the problem of access in terms of black-white relationships is more subtle and intratable than merely structuring the law so that if a Negro group seeks a reply to an anti-Negro or anti-civil rights editorial, or wishes space for a political advertisement, the mass media will have an obligation to take it. Moreover, the underrepresentation of the Negro as a normal citizen on television and in the daily press is more than an access problem. The mass media not unsurprisingly reflect the society which they mirror. It is no accident that one of the most distinguished Negro novels is called the *Invisible Man*. That certainly is the image of the Negro in mass communications. Until recently, the Negro simply did not exist in the world of television advertising, and he is only barely present now. Political and constitutional theorists have speculated over definitions of speech—speech which is protected and speech which is unprotected—but every communication, whatever its primary purpose, also doubles as an idea. Professor Charles Black has explained that commercial advertising itself, with its insistence on acquisitiveness, is an idea from which he at least would like to shield his children.[38] Similarly, the white world of television advertising reflects the idea that normally is white—the reality of twenty million Negroes simply is not visible in mass communications as a matter of routine presentation. It is, of course, true that the Negro is presented, but most often he is presented as a social irritant and disturber of the peace.

How can a more representative presentation of the Negro be secured? Presumably as a response to the death of Martin Luther King and also to deal with the problem of understating or ignoring the Negro in broadcasting, a questionnaire recently was circulated by FCC Commissioners Kenneth Cox and Nicholas Johnson. This action is extremely instructive in terms of illustrating what can be done under existing authority. The inquiry was directed to broadcasters in a single state, Oklahoma, and asked how many members of minority groups the broadcasters employed in their stations and how much programming they devoted to problems of the Negro community and to problems of race relations generally.[39] Such inquiries have more potential, at least in the long run, than elaborate procedures for governing television or radio during riots. Certainly the dilemma of the electronic media in a time of violence is how to inform the public without inflaming it.[40] But, as noted in the Kerner Commission chapter on mass media, the failure of the mass media is not in riot reporting but in the day-to-day portrayal or nonportrayal of Negro life:

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[38] Black, Jr.. *He Cannot Choose But Hear: The Plights of the Captive Auditor,* 53 COLUM. L. REV. 960, 969 n.18 (1953), in THE OCCASIONS OF JUSTICE 125 n.18 (1963).

[39] *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study,* 14 F.C.C.2d 1 (1968).

> [T]he communications media, ironically, have failed to communicate. They have not communicated to the majority of their audience—which is white—a sense of the degradation, misery, and hopelessness of living in the ghetto. They have not communicated to whites a feeling for the difficulties and frustrations of being a Negro in the United States. They have not shown understanding or appreciation of—and thus, have not communicated—a sense of Negro culture, thought, or history.
>
> The absence of Negro faces and activities from the media has an effect on white audiences as well as black. If what the white American reads in the newspapers or sees on television conditions his expectation of what is ordinary and normal in the larger society, he will neither understand nor accept the black American. By failing to portray the Negro as a matter of routine and in the context of the total society, the news media have, we believe, contributed to the black-white schism in this country.[41]

Commissioners Cox and Johnson have been attacked within the broadcasting industry merely for inquiring into the number of Negro personnel employed by broadcasters and the amount of race-connected programming performed by them in a single state. The industry's attack is based on allegations of restraint upon freedom of expression.[42] But would a requirement that the conventional means of communication give some coverage to the nation's largest racial minority as a part of their day-to-day programming thwart the industry's effort to secure freedom of expression? Of course, the first amendment shields the communications industry and all others from government censorship. But is this in any way inconsistent with requiring the industry as a matter of its internal practice to make some attempt to represent the major social components in our national life, particularly when dialogues between the races is so urgently needed?

THE "FAIRNESS" DOCTRINE AND THE FIRST AMENDMENT: THE SIGNIFICANCE OF THE CONSTITUTIONAL QUESTION

What I have called the public relations triumph, the exploitation of a romantic theory of the first amendment for completely commercial and nonideological ends, is presently being utilized in a renewed attack on the "fairness" doctrine—particularly the so-called "personal attack" provision.[43] In July 1967 the FCC adopted a provision which requires that when licensees attack the "honesty, character, integrity or like personal qualities" of a person or group, the licensee must furnish a tape or script to whomever is attacked and offer him—free of charge in most cases—air time for reply. The Commission defended its rule on the ground that it embodied the first amendment goal stated in *New York Times* v. *Sullivan* that "debate on public issues should be uninhibited, robust, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." [44]

Recently, in the context of the libel field, the Supreme Court in an 8–1 decision has emphasized the wide ranging scope afforded to newspapers to make "unpleasantly sharp attacks." [45] But the Court has yet to focus on the most important aspect of the constitutional principle enunciated in *New York Times* v. *Sullivan*—that the underlying goal is debate. Affording newspapers relative immunity from libel actions without imposing some obligation that they provide space for reply is not constitutionally encouraged debate but judicially supported monologue or, worse, harangue. The application of the “fairness” principle to the “personal attack” situation in broadcasting is a well considered response to the first amendment goals stated by the Supreme Court and stands in sharp contrast to judicial silence on the affirmative obligation of newspapers to allow their quarry some measure of response.

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[40] Laurent, *Riots Demand Responsible Coverage,* Wash. Post, Apr. 8, 1968, at B–8, col. 1.

[41] REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 383 (Bantam ed. 1968).

[42] *See* Laurent, *Censorship or Responsibility at FCC?,* Wash. Post, Apr. 19, 1968, at C–9, col. 5.

[43] For a discussion of this attack on the "fairness" doctrine, see Green, *The Troubled Air: Which Way Fairness?,* Wall Street Journal, Apr. 23, 1968, at 18, col. 3.

[44] 376 U.S. 254, 270 (1964).

[45] St. Amant v. Thompson, 390 U.S. 727 (1968).

The FCC’s performance in the “fairness” area has always been fairly uneven. One reason is that the broadcasting industry has exhibited a tendency to overreact to the “fairness’ principles. Moreover, until quite recently the constitutional position of the “fairness” doctrine really had not received direct judicial consideration. Recently, however, the Court of Appeals for the District of Columbia, in *Red Lion Broadcasting Co. v. FCC*,[46] squarely upheld the constitutionality of the “fairness” doctrine as entirely consistent with the first amendment.

The Supreme Court accepted review in *Red Lion* but deferred decision until resolution of a similar case in the Seventh Circuit that has just recently been decided.[47] In considering the personal attack and political editorial rules issued by the FCC subsequent to *Red Lion*, which presented issues similar to those in *Red Lion*, the Seventh Circuit disagreed with the District of Columbia Circuit. Although it did not consider the constitutionality of the “fairness” doctrine, the court held that “In view of the vagueness of the Commission’s rules, the burden they impose on licensees, and the possibility they raise of both Commission censorship and licensee self-censorship, we conclude that the personal attack and political editorial rules would contravene the first amendment.”[48]

The facts of *Red Lion* are illustrative both of the operation of the “personal attack” aspect of the “fairness” doctrine and of the manner in which the “fairness” doctrine implements debate instead of retarding the objectives of free expression. In November 1964 a Pennsylvania broadcaster carried a program by the Rev. Billy James Hargis, who attacked a book by Fred Cook which had been critical of Barry Goldwater, the Republican candidate for President. Cook requested an opportunity to reply to Hargis, but the radio station said that the “personal attack” aspect of the “fairness” doctrine required it to supply free time for reply only if no paid sponsorship could be found. The station wished Cook to affirm that he could not obtain such sponsorship. Cook complained to the FCC, which replied essentially that the station had the duty to make reply time available, paid or not. The FCC stated that it was not necessary for Cook to show that he could neither afford nor find sponsored time before the station’s duty to provide reply went into effect. The Commission reasoned that the public interest required that the public be given an opportunity to learn the other side and that this duty stood even if the expense of the reply time had to be sustained by the station. A formal order to that effect was entered and the station appealed to the United States court of appeals.

Judge Tamm for the court of appeals pointed out that federal courts have continuously held that regulatory action by the FCC does not violate the first amendment because broadcasting is a limited access medium.[49] He reasoned that fairness does not restrict “free speech” but implements it:

> After having independently selected the controversial issue and having selected the spokesman for the presentation of the issue in accord with their unrestricted programming, the Doctrine, rather than limiting the petitioners’ right of free speech, recognizes and enforces the free speech right of the victim of any personal attack made during the broadcast.[50]

Judge Tamm approved the FCC’s use of the limited access idea to justify fairness by holding that the purpose of the Federal Communications Act is to permit the Government to license frequencies without interfering with free speech—licensing which is, after all, supposed to be in the public interest. However, the irony of allowing such licensees to “themselves make radio unavailable as a medium of free speech”[51] was at last pointed out by a court. Hopefully, this kind of analysis will be extended as a matter of constitutional doctrine to all components of the communications industry. The economic interdependence of the media and the fact that the one or two newspapers which presently exist in our large cities usually also own one of the important radio and television stations in the community give the media enormous power for private censorship. What is necessary is not to point to the lack of a "fairness" principle with regard to the legal responsibilities of newspapers but rather to point to the "fairness" principle as a standard which should have some analogue in the press as well.

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[46] 381 F.2d 908 (D.C. Cir. 1967).

[47] Radio Television News Directors Ass’n v. United States, 400 F.2d 1002 (7th Cir. 1968).

[48] *Id.* at 1020.

[49] 381 F.2d at 923.

[50] *Id.* at 924.

[51] *Id., quoting In re* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1248 (1949).

Another useful perspective on this problem arises from Judge Tamm's refusal to hold that the "fairness" principle infringes upon the political rights of the people, justifying the Commission's rule that when a licensee has chosen to sponsor a program which presents one side of an issue and has been unable to obtain "paid sponsorship for the appropriate presentations of the contrasting viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee—and *thus leave the public uninformed*—on the ground that he cannot obtain paid sponsorship for that presentation."[52] Again, for government to require some observance to the informing function of the first amendment seems entirely in order. The broadcasters contended that the "fairness" doctrine operated as a prior restraint, *i.e.*, that they were forced to become the "first censors" of all public interest broadcasting because if a licensee might have to broadcast an opposing view, indeed give free time to it, it might not broadcast the particular matter at all.[53] Judge Tamm rejected this argument:

> I do not find in the operation of the Fairness Doctrine any restriction upon the rights of the people to engage in political activities. . . . Broadcasters alone determine the programs they will carry, the format to be followed, and the personnel to be utilized in these broadcasts.[54]

Moreover, he pointed out that no broadcast material is required to be first submitted to the FCC, and that the licensees' latitude "in the selection of program material, program substance, and identity of program personnel is founded only by their own determination of the public interest of their end product."[55] To the spectre the industry is fond of raising that the FCC's disapproval of a licensee's responsiveness to the "fairness" doctrine may result in loss of the license at renewal time, Judge Tamm observed that the Commission had made it clear that no sanction would be invoked "against any broadcaster for an honest mistake in judgment."[56]

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[52] *Id.* at 926, *quoting* Cullman Broadcasting Co., 25 P & F RADIO REG. 895, 897 (FCC 1963).

[53] In *Radio Television News Directors Ass'n* the Seventh Circuit found a similar argument to be convincing.

> [T]he Commission's rules are too vague because they lack standards precise enough to enable a licensee to ascertain whether he is subject to the rules' obligations. When a licensee considers the vagueness of the rules, the mandatory and pervasive requirements of the rules, and the threat of suffering serious sanctions for noncompliance with them, it is likely that he will become far more hesitant to engage in controversial issue programming or political editorializing.

400 F.2d at 1016.

In Banzhaf v. FCC, No. 21,285 (D.C. Cir. Nov. 21, 1968), the Court of Appeals for the District of Columbia distinguished *Radio Television News Directors Ass'n* and at the same time suggested that access to broadcasting could be required as a first amendment matter even apart from the "fairness" doctrine. The *Banzhaf* court affirmed an FCC ruling requiring radio and television stations which carry cigarette advertising to "devote a significant amount of broadcast time to presenting the case against cigarette smoking." Slip opinion at 4. The court attemped to distinguish *Radio Television News Directors Ass'n* by saying that if the "fairness" doctrine is ultimately held to be unconstitutional it would be because its attempt to assue balanced presentation of controversial issues may result in no presentation of such issues at all. In the cigarette advertising situation, on the other hand, the court said the first amendment interest is futhered by the Commission's ruling:

> But where, as here, one party to a debate has a financial clout and a compelling economic interest in the presentation of one side unmatched by its opponent, and where the public stake in the argument is no less than life itself—we think the purpose of rugged debate is served, not hindered, by an attempt to redress the balance.

Slip opinion at 36–37.

Even that most venerable constitutional cliche, the marketplace of ideas concept of the first amendment, received a candid reappraisal from Judge Bazelon in his opinion for the court in *Banzhaf*:

> A primary First Amendment policy has been to foster the widest possible debate and dissemination of information on matters of public importance. That policy has been pursued by a general hostility toward any deterrents to free expression. The difficulty with this negative approach is that not all free speakers have equally loud voices, and success in the marketplace of ideas may go to the advocate who can shout loudest or most often.

Slip opinion at 36 (footnote omitted). This and similar statements in the court's opinion reflect a newly emerging and more realistic awareness of the positive dimension of the first amendment than has characterized the law in this area of the past. Finally, it should be noted that if the access-oriented approach to § 315, urged in this article, is adopted, the criticism of the courts in both *Radio News* and *Banzhaf* that the "fairness" doctrine might muzzle rather than stimulate debate would be met.

[54] 381 F.2d at 926.

Judge Tamm has taken what may be called a "problem-solving" approach to constitutional law and the first amendment; he has given some consideration to making the first amendment work, to analyzing its practice as well as stating its theory. He concluded:

> there is no abrogation of the petitioners' free speech right. On the contrary, I find that the conduct of the petitioners absent the remedial procedures afforded the complainant Cook would, in fact, constitute a serious abridgement of his free speech rights. I find in the Fairness Doctrine a vehicle completely legal in its origin which implements by the use of modern technology the "free and general discussion of public matters [which] seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[57]

The *Red Lion* determination that the duty of the broadcaster to furnish an unpaid reply to a personal attack was not violative of the first amendment is an important step in the evolution of a constitutional theory that will be sensitive to the unanticipated power which the marriage of technology and capital has placed in the relatively few hands which dominate mass communications. *Red Lion* suggests the method by which to build a constitutionally rooted opinion-making structure. If the Supreme Court affirms *Red Lion*, it will augur well for the beginnings of a first amendment theory which will have contemporary revelance. Otherwise the prospects for constructing a public forum model, within the context of privately owned mass media, will be quite dim. And so, ironically, will be the entire future of private broadcasting. Oddly enough, the ultimate role of public television is to a considerable extent contingent upon whether private broadcasting legally can be required to assume some measure of public and social responsibility. Perhaps when *Red Lion* is finally reviewed by the Supreme Court the centrality of the concept of access to the problem of protecting freedom of expression will be considered. The presentation of such an issue could not help but expose the incomplete nature of the present law in the area where the law of libel and the first amendment intersect. Hopefully, the Court will reflect on the new reading of section 315 suggested earlier insofar as it reveals the necessity to promote access for ideas as well as protection of ideas once they have been admitted to the forum.

In conclusion, *Red Lion* is a critical case in many ways. The importance the broadcasting industry attaches to the case is illustrated by the substantial briefs amici curiae filed by the major networks in support of the station and against the "fairness" doctrine. The case may settle the future of program regulation generally, not merely for public issue programming. At the least, it raises the question of whether the first amendment should receive a different interpretation when the new mass media, radio and television, rather than the press, is involved. Another and broader approach would be to review the impact of the new technology on all the media when viewed against a background of economic combinations continuously concentrating the ownership of the media. Such a review by the Supreme Court might result in an urgently needed inquiry into whether traditional first amendment theory should be rethought so that it can meet the challenge posed by the alliance of modern capital and technology.

The previous defense of "fairness" is undertaken without being unmindful of the problems in the enforcement of the "fairness" doctrine. Of course these problems exist, but seen from a constitutional perspective, many of these difficulties are soluble. Recently a group attacked the free use of broadcast time to advertise the Peace Corps. Should this and similar problems be solved by hunting about for some group opposed to the purposes of the Peace Corps and giving that group free time? Or is it wiser to keep government out of the business of propaganda? For broadcasting to identify with and echo governmentally-sponsored positions would be most unfortunate. This is particularly so since the executive branch often holds a single view on a variety of controversial issues and is in a strong position to exert pressure both on the FCC and on the licensed station holders.

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[55] *Id.*
[56] *Id.* at 929.
[57] *Id.* at 929–30, *quoting* Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

The experience of the mass media in totalitarian countries, as well as the experience of French television in a presumably democratic country, illustrates the dangers to free discussion of controversial issues inherent in a close connection between the media and government. An illustration of this danger is provided by a recent case in which a student newspaper editor at a state university refused to follow a college rule that the paper could print praise of the state government but not criticism. The college expelled the editor. A federal court reinstated him,[58] and the case is now on appeal. There is an important and fundamental difference—a difference which must be stressed—between a positive role for the first amendment which is achieved through a governmentally-sponsored *process for* stimulating the interchange of ideas and a positive role for the first amendment in which the government contributes substantively to the information process in any institutionalized way. If the new experiment in public television[59] can be sufficiently separated from direct political pressures so that it is a governmentally-sponsored structure for infusing a new and non-commercial approach to programming, it will be successful. But at all costs broadcasting, whether private or public, must be prevented from becoming a mere conduit for the views espoused by the particular political administration in power.

"EQUAL TIME" AND THE MCCARTHY CASE: A PROBLEM OF ACCESS

Reference to another case illustrates both the limitations of the present approach to the affirmative obligations of broadcasting and at the same time indicates that the constitutional dimension of the problem is at last being dimly perceived. The case, *McCarthy v. FCC*,[60] involves the request of Senator Eugene McCarthy for "equal time" to answer the hour-long interview of President Johnson carried by the three major television networks on December 19, 1967. Senator McCarthy contended that President Johnson was a "legally qualified candidate" within the meaning of section 315 of the Communications Act. The FCC denied the Senator's request on the ground that section 315 only applies to legally qualified persons who, among other things, had previously announced their candidacies, and that Lyndon Johnson had not announced his candidacy. As it turned out, the FCC was a reasonably good phophet, but at the time it did not seem so. Moreover, the FCC refused even to give Senator McCarthy a chance to show that President Johnson was acting as a candidate in fact. But suppose an incumbent President did not announce his candidacy until his party's national convention? Would section 315 be unavailable to provide "equal time" for announced candidates in the President's party to answer the incumbent President's "non-political" speeches? What of the opposition candidates? Is it not difficult to think of a more efficient way to maximize the already significant institutional aura of an incumbent President and to further minimize the chances for unseating him?

The court of appeals did give a little encouragement to those who think that political change can be achieved through conventional means of communications, however. The court indicated that the question of the right to "equal time" is a sensitive problem which requires more than a simple-minded inquiry into whether the previous speaker is an "announced" candidate. The court therefore suggested that the approach to the problem could not be mechanical. Moreover, the court provided some guide to a definition: "program content, and perhaps other criteria, may provide a guide to reality where a public figure allowed television or radio time has not announced for public office."[61]

But the court nevertheless declared, in an understatement which is perhaps a disservice to the gravity of the problem, that "no rule in this sensitive area can be applied mechanically without, in some instances at least, resulting in unfairness and possible constitutional implications."[62] This use of governmentally licensed facilities to aid an incumbent President suggests a kind of media-government alliance or implicit endorsement which seems contrary to the basic purposes of the first amendment. If the central meaning of the first amendment is to allow criticism of government, as some have said, then unimpeded praise of the government would itself seem to present a first amendment violation. But the constitutional dimension of the problem of access to the major communications media is just beginning to be understood.

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[58] Dickey v. Board of Educ., 273 F. Supp. 613 (M.D. Ala. 1967).

[59] *See* Public Broadcasting Act of 1967, 47 U.S.C. §§ 390–99 (Supp. III, 1965–67).

[60] 390 F.2d 471 (D.C. Cir. 1968).

[61] *Id.* at 474.

CONCLUSION

It would be misleading to ask what the affirmative role of government should be in implementation of first amendment goals if that suggests that the halo which private managers of the media have long assumed is now, somewhat threadbare, to be placed intact on government. What must be emphasized is the positive dimension of the first amendment. The first amendment must be read to require opportunity for expression as well as protection for expression once secured. Provision of opportunity for expression is, under an affirmative approach to the first amendment, the responsibility of both governmentally-controlled as well as privately-controlled means of communication. No illusions are entertained about government power as compared with private power. The need is to build counterbalances into each sector to stimulate them to develop a responsiveness to the longing for an information process which is truly participatory. Moreover, any dichotomy which suggests that government is the ally or that private power is the enemy, or vice versa, of contemporary civil liberties is overly simplistic, particularly when the determination of what is public and what is private becomes an increasingly difficult task.

In the area of communications we are on the verge of a more comprehensive and sensitive idea of what freedom of expression should mean in a technological age. The rise of an affirmative approach in broadcasting indicates that the eighteenth century associations which still insulate the press are not present in broadcasting, making possible a more realistic appraisal of the electronic media. But there is a need for such an appraisal of other forums as well—forums such as the press and public facilities, whose capacities for censorship have received little attention until recently. Similarly, attempts to identify procedures created to assure debate with the suppression of ideas must be understood for what they are: the unreflecting use of hallowed symbols for purposes which are antithetical to debate and discussion.

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FREE SPEECH AND THE MASS MEDIA

(By James A. Ruebright)

Any individual or group with muscle or wealth has power to suppress the speech of others. Accordingly, free speech is an artifact: it can exist only where its antagonists are subject to social restraint.

Government, an agency of restraint, has power to protect free speech. Ironically, government has power to censor and supress as well; but government is not unique in this respect. Other institutions, like "private" corporations, enjoy similar power. For example, the private companies that govern the mass media—the newspaper syndicates and the radio and television networks—regulate the form and content of substantial portions of public discourse. Further, substantial evidence indicates that these institutions can, and do on occasion, exercise their power in a censorial fashion.[1]

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[62] *Id.*

[1] Commentators contend that the custodians of the median permit only established views to enter the marketplace of ideas. *See* Barron, *Access to the Press—A New First Amendment Right,* 80 HARV. L. REV. 1641 (1967); Johnson & Westen, *A Twentieth-Century Soapbox: The Right to Purchase Radio and Television Time,* 57 VA. L. REV. 574 (1971); Note: *Resolving the Free Speech—Free Press Dichotomy. Access to the Press Through*

The framers of the first amendment contrived to restrict the censorial power of government.[2] Commentators and critics, sensitive to the effective censorship emanating from other sources, contend that analogous restraints are now required in areas where *private* power restricts free expression.[3] For example, in this issue of the *Virginia Law Review* Commissioner Nicholas Johnson of the Federal Communications Commission argues that radio and television broadcasters should be, and are in fact, constrained by the first amendment and by statute to sell broadcast time to persons wishing to communicate political speech. He maintains, in short, that the broadcaster's power to regulate the form and content of political speech transmitted in his medium is subject to a right of access-for-purchase, inhering in anyone with the means to buy and the will to speak.[4] This Note examines Commissioner Johnson's argument and questions his conclusion: The constitution does not compel a right of access, policy does not support it, and Congress has foreclosed judicial innovation by adopting a regulatory scheme protecting the interests of the media and the public.

The analysis here is structured by three questions. First, are the custodians of the mass media subject to first amendment restraints? Second, if they are, does the first amendment require them, specifically, to sell air time (or advertising space) to those who wish to buy? Third, do statutes impose such a requirement, if the first amendment does not?

FOUR THEORIES OF STATE ACTION

The first amendment protects free speech by restricting the power of government, but in a proper case the conduct of private individuals may be subject to the same restraint. This occurs where governmental power facilitates private conduct in such a way that the private act becomes, in a constitutional sense, action by the state. If the custodians of the mass media are in fact constrained by the first amendment, it is for this reason.[5]

Advertising, 22 U. FLA. L. REV. 293 (1969). One reason for this may be the technology of mass communication:

> We have seen that the very technology and especially of broadcasting can be realized only when they are reaching very large audiences. . . . This technological fact predisposes all the mass media to conform to an already widely accepted taste. It also makes it very difficult for a novel point of view or a just emerging problem to gain access to network broadcasts or other mass components of the mass communications system.

D. LACY, FREEDOM AND COMMUNICATIONS 69 (1961). The economic problems of maintaining subscriptions and ratings dictate an editorial policy calculated to woo the majority. As Mr. Justice Douglas, a staunch defender of the press, has noted:

> Money makers have taken over the press. They want readers and advertisers; and so they cater to the low common denominator of the populace.

Quoted in C. LINDSTRUM, THE FADING AMERICAN NEWSPAPER 163 (1960). Generally, the absence of price competition (a circumstance obtaining, to some extent, in both publishing and broadcasting) eliminates economic pressure as a means of controlling discriminatory conduct engaged in by the media. *See* Q. VILLARD, THE DISAPPEARING DAILY at V (1944); J. R. WIGGINS, FREEDOM OF SECRECY 178 (rev. ed 1964); Robinson, *The FCC and the First Amendment: Observation on 40 Years of Radio and Television Regulation.* 52 MINN. L. REV. 67, 88 (1967).

[2] The press, originally the most significant communications medium, was singled out by the framers of the first amendment as a vehicle of debate to be insulated from governmental restraint. Firstamerica Dev. Corp. v. Daytona Beach News-Journal Corp., 196 So. 2d 97, 99 (Fla. 1966); Barron, *Law and the Free Society Lectures,* 48 TEX. L. REV. 766, 744 (1970). Radio and television have long been recognized as forms of communication protected by the first amendment. *See, e.g.,* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969); United States v. Paramount Pictures, 334 U.S. 131, 166 (1948); *cf.* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 545–46 (1941).

[3] *See, e.g.,* Barron, *supra* note 1, at 1641.

[4] Johnson & Weston, *supra* note 1, at 633.

[5] The term "state action," and the concept embodied in it, emerged and developed in cases involving the fourteenth amendment. *See* The Civil Rights Cases, 109 U.S. 3 (1883). In that context the word "state" referred to political entities like New York, or Louisiana. Here the term "state action" is employed, by analogy, to describe activity by the Federal Government. If the conduct of broadcasters constitutes "state action" in this sense, it is not because their conduct is facilitated by the power of a *state* (and is subject, therefore, to the prohibitions of the first amendment, through the operation of the fourteenth), but because their conduct is facilitated by *federal* power (and is subject directly to the first amendment restraint). Commissioner Johnson relies on this analogy by arguing from cases that construe the "state action" requirement in the fourteenth amendment context. See pp. 642–44 *infra.*

State Action and the Newspapers

In recent cases courts have recognized a constitutional right of access to public forums.[6] The courts have held, essentially, that the managers of public facilities—bus terminals,[7] busses,[8] subways,[9] and high school newspapers[10]—cannot exclude some speakers from their forums, while granting access to others. Once the managers have opened the forums to the public, they cannot close them discriminatively. An operative fact in every case was public ownership of the facility in question, yet in some instances direct control over the contested forum was exercised by a private agency, not the Government itself.[11] Thus the discriminatory conduct was that of a private individual, not an officer of the state. In that event the controlling issue was whether the conduct of the private party (the manager of the forum) betrayed "state action." In each case the fact of public ownership appears to have been critical to the affirmative result.

Elsewhere, individuals have sought to vindicate a right of access to *privately* owned forums, and in some cases they have met with success. In *Marsh v. Alabama*[12] and *Food Employees Local 590 v. Logan Valley Plaza,*[13] for example, the Supreme Court held that the Constitution secures a right of access to a privately owned facility, like the streets of a company town or the sidewalks of a shopping center, where the facility serves a function of the kind ordinarily served by a governmental entity.

Few private facilities, however, take the place of a governmental entity In *Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune,*[14] for example, a union submitted a full page editorial advertisement to each of the four general circulation newspapers in Chicago. The ad showed a picket line in front of Marshall Field & Co.'s store and set forth the union's reasons for picketing the company. Each of the newspapers refused to publish the advertisement. The union then sought injunctive relief in the federal district court to compel the newspapers to publish its advertisement. The District Court granted the newspapers' motion for summary judgement on the ground that the newspapers' conduct did not violate the first amendment.[15] On appeal, the Seventh Circuit affirmed. The state involvement in the publication of the newspapers did not constitute "state action." The first amendment did not constrain the publishers to sell advertising space.[16]

Relying on *Marsh v. Alabama* and *Food Employees v. Logan Valley Plaza,* the union had argued that a special relationship exists between the state and the newspapers in light of state laws which exempt newspaper employees from jury service; require newspapers to publish legal notices, notices of elections, and municipal ordinances; and grant newspapers certain tax exemptions. The union also cited a Chicago regulation which restricted newsstand sales on public streets to daily newspapers printed and published in Chicago, and the common custom of providing a designated space in public buildings for the use of the press and other news media.[17]

Rejecting this argument, the circuit court concluded that, whatever the relationship between government and the press, newspapers do not serve a "public function" of the kind comtemplated by the Court in *Marsh* and *Logan Valley.* The contention that they did was inconsistent with traditional notions about the role of the press in American society. Rather than "exercising delegated powers of a governmental nature, the press has long and consistently been recognized as an independent check on governmental power."[18] Interpreting the public function theory narrowly, the court viewed ***Marsh*** and ***Logan Valley*** as holding that private property remains unburdened by constitutional obligations unless it becomes a functional equivalent of municipal streets or sidewalks.[19] The court then distinguished the present case on the grounds that (1) the sidewalks and streets of a company town or shopping center are not analogous in function to the advertising pages of a newspaper. and (2) the newspapers do not grant the general public unrestricted access to their advertising pages Rather, the newspapers select their advertisers by contract.[20]

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[6] For a discussion of recent developments relating to the rights of access to public forums see Barron, *An Emerging First Amendment Right of Access to the Media?,* 37 Geo. Wash. L. Rev. 487 (1969).

[7] Wolin v. Port Authority, 392 F.2d 83 (2d Cir. 1968).

[8] Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967).

[9] Kissinger v. New York City Transit Authority, 274 F. Supp. 438 (S.D.N.Y. 1967).

[10] Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969).

[11] *See* Barron, *supra* note 6, at 489.

[12] 326 U.S. 501 (1946) (company town's refusal to permit distribution of religious literature on streets held to violate first amendment).

[13] 391 U.S. 308 (1968) (shopping center's refusal to permit picketing on shopping center property held to violate first amendment).

[14] 307 F. Supp. 422 (N.D. Ill. 1969).

[15] *Id.* at 425–29.

[16] Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune, 435 F.2d 470 (7th Cir. 1970).

[17] *Id.* at 473.

The union had also relied on ***Burton v. Wilmington Parking Authority.***[21] In that case the Supreme Court found state action in the discriminatory conduct of a private restauranteur, who leased space in a publicly owned building and operated his enterprise in furtherance of "public purposes." The circuit court distinguished ***Burton*** on the grounds that a publicly owned building sustained the restaurant and that the private business constituted a "physically and financially integral, and indeed, indispensible part of the State's plan to operate the project as a self-sustaining unit."[22]

The court's conclusion that the ***Burton*** concept of state action is inapplicable to newspapers seems correct. In ***Burton*** the Supreme Court noted that the Parking Authority could have prohibited the discrimination by inserting appropriate conditions in the lease.[23] Since the state's failure to do so contributed to the discrimination by making it possible in the first instance, the discrimination arguably became state supported. Moreover, the state could have withdrawn its support without invading other legitimate interests, i.e., the state could have insisted on appropriate conditions without unduly burdening the lessee. By contrast, in ***Chicago Joint Board*** it is arguable whether the state could have required the newspapers to publish the union's advertisement without invading the newspapers' first amendment rights.

A weakness of the circuit court's opinion was its failure to recognize the broad implications of the public function theory.[24] Thus in ***Marsh*** the Supreme Court adopted the following language to describe the theory of the public function approach:

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.[25]

This statement embodies an expansive conception of the constitutional obligations of property owners. Now unquestionably, recognition of a first amendment right of access was peculiarly appropriate in ***Marsh***, given the facts of the case. But the principle stated there is abroad one. Liberally construed, the principle would subject the management of private property to first amendment restraint whenever the property is opened to public use for the owner's advantage. Thus, in ***Logan Valley*** the public function rationale extended to the sidewalks of a privately owned shopping center The Court found that the factual differences between the cases did not require a different outcome. It reasoned that a shopping center served the community in the same way as a business block, and, therefore, the owners of the shopping center could not exclude from their sidewalks "those members of the public wishing to exercise their First Amendment rights . . . in a mannner and for a purpose generally consonant with the use to which the property is actually put."[26]

In spite of its breadth, however, the public function theory should not subject newspapers to constitutional demands. Under the better view of ***Marsh*** and

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[18] *Id.* at 474 (quoting the District Court opinion below, 307 F. Supp. at 427).

[19] *Id.* at 474–75.

[20] *Id.* at 475.

[21] 365 U.S 715 (1961).

[22] 435 F.2d at 476.

[23] 365 U.S. at 725.

[24] Professor Barron suggests that these cases represent an awareness by the Court of the growing importance of private facilities in guaranteeing first amendment rights and a willingness to look beyond the issue of private ownership in finding state action. Barron, *supra* note 6, at 493–94.

[25] 326 U.S. at 506.

[26] 391 U.S. at 319–20.

Logan Valley, private property serves a "public function" only when it is used *as public property is used*. Thus, while a newspaper "serves" the public in a general sense, it serves no "public function," because no public property is normally used in an equivalent way. In short, the public function theory comprehends only those public services that have counterparts in the service of facilities that are owned by the public. A newspaper is not one of these.[27]

This "public equivalence" analysis is supported by *Evans v. Newton*.[28] In that case the Supreme Court found state action in the operation of a public park under the direction of private trustees. The Court stated that its finding was

> buttressed by the nature of the service rendered to the community by a park. The service rendered even by a private park . . . is municipal in nature. . . . Like the streets of the company town in *Marsh v. Alabama* . . . the predominant character and purpose of this park [is] *municipal* [and should] be treated as a public institution . . . regardless of who now has title under state law.[29]

Even though a newspaper is a public institution to the extent that it provides a service to the public, by no stretch of the imagination can its function be considered *municipal*. The newspaper has no equivalent in the service of ordinary governmental functions.

The public equivalence theory was properly used by the *Chicago Joint Board* court as a basis for rejecting the union's argument that state action inheres in the conduct of newspaper publishers, because a newspaper "'enjoys monopoly power in an area of vital public concern.'"[30] The union based its argument on a recent case in which a regional educational association responsible for the accreditation of colleges and secondary schools was found to be subject to constitutional restraints in the performance of its accreditation function.[31] The court quite correctly distinguished this case, noting that the regional educational association, unlike the newspapers, acted "in a quasi-governmental capacity by virtue of its role in the distribution of Federal funds under the 'aid to education statutes.'"[32]

Thus *Chicago Joint Board* was decided on state action grounds. But the union's complaint presented a more fundamental issue. If the court *had* found that state involvement in the publishing process was sufficiently intimate to bring the first amendment into play, it would have faced the question whether the first amendment compelled the newspapers to sell advertising space. Did that amendment, conceived to protect the press from the coercion of law, burden the press with legal obligations in and of itself? The union insisted that it did. The issue awaits analysis.[33]

State Action in Broadcasting

If there is a distinction of constitutional significance between the newspaper industry and radio and television broadcasting, it is that state involvement in the latter is more pronounced. Broadcasting, unlike publishing, is a regulated industry,[34] a circumstance which in other contexts has supported a finding of state action.[35] Broadcasters, unlike publishers, are licensees of the state. They broadcast over allocated frequencies under a three year license granted by the Federal Communications Commission.[36] Furthermore, the scope of the Commission's control over the licensees is very broad indeed. It comprehends technical matters, like the allocation of broadcast frequencies and the maintenance of technical and financial competence; but it comprehends policy matters as well. In insuring that licensees operate in the public interest, the FCC exercises a limited power of review over the content of broadcast materials.[37]

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[27] While the critique of the public function analysis is developed here by reference to newspaper publishing, it applies with equal force where broadcasting is concerned. Commissioner Johnson argues that broadcasters serve a "public function" under the *Marsh* rationale. Johnson & Westen, *supra* note 1, at 591. But broadcasting is not a public function in the narrow sense urged here. Broadcasting has no functional equivalent in services rendered by publicly owned facilities, see pp. 650–53 *infra*.

[28] 382 U.S. 296 (1966). In *Evans* a state court permitted a municipality to transfer its control over a public park to private trustees who denied Negroes access to the facility. The Supreme Court barred the discrimination. The park had been placed in trust for use by "the white race only," under the terms of Senator Bacon's will.

[29] 382 U.S. at 301–02.

[30] Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune, 435 F.2d at 477.

[31] Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, 302 F. Supp. 459 (D.D.C. 1969), *rev'd on other grounds*, 432 F.2d 650 (D.C. Cir. 1970).

[32] Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune, 435 F.2d at 476.

[33] See discussion of constitutional right of access at p. 650 *infra*.

[34] Communications Act of 1934, 47 U.S.C. §§ 301–609, *as amended*, (Supp. V, 1970). For a background on the problems raised by governmental regulation of the mass media, see Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947); Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON. 15 (1967); Marks, *Broadcasting and Censorship: First Amendment Theory after Red Lion*, 38 GEO. WASH. L. REV. 974 (1970); Robinson, *The F.C.C. and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967).

Any attempt to find state action in broadcasting, however, would be paradoxical. Each element in the regulatory scheme is carefully designed to assure that governmental intervention will not invade the first amendment rights of the broadcasters or destroy the essentially private nature of the media.[38] To treat this limited and necessary state involvement as a predicate for a far broader, constitutionally imposed scheme of limitations on first amendment rights would be bootstrapping at its worst. More importantly, this approach would ignore the basic and desirable antagonism between the Government and the broadcaster. In short, the fact that the broadcaster exercises governmental power in a fiduciary capacity must not obscure his role, within the framework of the first amendment, as a speaker whose basic interests are directly, fundamentally opposed to those of the government, in its role as the potentially most dangerous censor.[39]

In his article Commissioner Johnson relies on *Public Utilities Comm'n v. Pollak*[40] to support the contention that the conduct of broadcasters constitutes state action. In *Pollak* the Court found state action in the conduct of a privately owned bus company, a public utility under "the regulatory supervision of the Public Utilities Commission of the District of Columbia."[41] Since the broadcast industry is also under the supervision of a regulatory agency, Commissioner Johnson argues that its actions constitute state action as well. This argument is contradicted by judicial decision. In *McIntire v. Wm. Penn Broadcasting Co.* Reverend Carl McIntire sued a radio station for violating his first amendment right by refusing to broadcast his religious programs.[42] The court held that, although a radio station is a public trustee under the Communications Act of 1934, it "is not a public utility in the sense that it must permit broadcasting by whoever comes to its microphones."[43] Moreover, the court held that broadcasters cannot be regarded as instrumentalities of government for he purpose of establishing state action. This result is consistent with the holding in *Chicago Joint Board* and with the "public function" analysis advanced above. Broadcasting serves the public, but it does not (indeed, it must not) serve a function analogous to that served by governmental entities or, for that matter, by public utilities. The fact of its service alone must not be regarded as a predicate for the imposition of constitutional restraints.

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[35] In Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952), the Court held that a privately owned bus company was to be treated for constitutional purposes as a governmental entity, relying on the fact that the bus company "operate[d] . . . under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress." *Id.* at 462. *Cf.* American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

[36] 47 U.S.C. §§ 307, 309 (1964).

[37] The statutory source of regulation of program content is the "public interest" standard of 47 U.S.C. § 309(a) (1964). The Commission requires each broadcaster to cover controversial issues of public importance in a fair manner, presenting opposing viewpoints on each issue under the fairness doctrine announced in 1949. Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). Congress implicitly approved the doctrine in amending the equal time for political candidates requirement of § 315 by stating that its action constituted no exception "from the obligation imposed upon [the broadcasters] under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." Act of September 14, 1959, § 1, 73 Stat. 557, *amending* 47 U.S.C. § 315(a) (1964). The Supreme Court upheld the constitutionality of the fairness doctrine as well as the personal attack and political editorial doctrines, 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1970), in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[38] Radio and television broadcasts have long been recognized as forms of communication protected by the first amendment. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969); United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948). In addition, section 326 of the Communications Act of 1934, 47 U.S.C § 326 (1964) prohibits censorship by the FCC. In enforcing the fairness doctrine the FCC has assumed that it lacks authority to require licensees to broadcast specific programs. *Cf.* Note, *Regulation of Program Content by the FCC,* 77 Harv. L. Rev. 701, 709 (1964). In fact, "no licensee has ever been disciplined for failure to perform his duties under the fairness doctrine." Marks, *Broadcasting and Censorship: First Amendment Theory After Red Lion,* 38 Geo. Wash. L. Rev. 974, 976 (1970). *See also* Renewal of Licenses, 9 P.R.F. Radio Reg. 2d 687 (1967); Renewal of Licenses, 10 P.F.R. Radio Reg. 2d 944 (1967); Commercial Practices of Broadcast Licensees, 2 P.S.F. Radio Reg. 2d 885 (1964) (dissent of Chairman Henry, joined by Commissioner Cox); Singer, *The FCC and Equal Time: Never-Neverland Revisited,* 27 Md. L. Rev. 221, 248 (1967).

[39] Marks, *supra* note 38, at 993 n.89. The opposite view is expressed by Commissioner Johnson in Johnson & Westen, *supra* note 1, at 604. *See* Barron, *In Defense of "Fairness": A First Amendment Rationale for Broadcasting's "Fairness" Doctrine,* 37 U. Colo. L. Rev. 31 (1964).

[40] 343 U.S. at 451 (1952). *See* Johnson & Westen, *supra* note 1, at 592.

[41] 343 U.S. at 462.

State Action and the Courts

Commissioner Johnson urges that state action may be found in the judicial or administrative resolution of controversies that arise between broadcasters and individuals who have been denied access to the media.[44] As authority for this proposition he cites *Shelley v. Kraemer.*[45] In that case the Supreme Court held that judicial enforcement of private restrictive covenants against Negroes was state action in itself and, as such, was violative of the equal protection clause. But courts and commentators disagree over the implications of *Shelley,* and the nature and extent of the judicial involvement necessary to constitute state action is unclear.[46] Construing the *Shelley* rationale narrowly, some commentators accept Justice Black's view that the doctrine applies only in cases like *Shelley,* where the court refuses to disrupt a transaction between a willing purchaser and a willing seller by enforcing a prior agreement between the seller and a third party.[47] On the other hand, some commentators argue that state action exists wherever the state determines the legal relations of its citizens, and that in such a case the role of the court is to balance the conflicting constitutional rights involved.[48]

According to FCC Commissioner Johnson,[49] the resolution of a right-of-access controversy under the balancing theory must involve a weighing of the plaintiff's right to free speech against the rights of the defendant, who has denied him a forum.[50] Commissioner Johnson notes the analysis adopted in *Marsh.* There the Court balance[d] the Constitutional rights of owners of private property against those of the people to enjoy freedom of press and religion, . . . [recognizing] that the latter occupy a preferred positions.[51]

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[42] 151 F.2d 597 (3d Cir. 1945).

[43] *Id.* at 601.

[44] *See* Johnson & Westen, *supra* note 1, at 595.

[45] 334 U.S. 1 (1948).

[46] *Shelley* has been called "constitutional law's *Finnegan's Wake.*" Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 Harv. L. Rev. 143, 148 (1964). *See, e.g.,* Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion,* 110 U. Pa. L. Rev. 473 (1962); Lewis, *The Meaning of State Action,* 60 Colum. L. Rev. 1083, 1108–20 (1960); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler,* 108 U. Pa. L. Rev. 1 (1959). *Shelley* has also been subject to severe criticism. Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 Harv. L. Rev. 1, 29 (1959).

[47] Bell v. Maryland, 378 U.S. 226, 331 (1964) (Black, J., dissenting). Apparently this is also the view of Mr. Pollak. "The line sought to be drawn is that beyond which the state assists a private person in seeing to it that others behave in a fashion which the state could not itself have ordained." Pollak, *supra* note 46, at 13.

[48] The inquiry is "whether the particular state action in the particular circumstances, determining legal relations between private persons, is constitutional when tested against the various federal constitutional restrictions on state action." Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment,* 30 So. Cal. L. Rev. 208, 209 (1957). Mr. Henkin takes the view that the state is responsible whenever its courts enforce private discrimination. Limitations on the applicability of the doctrine come from a more restrictive definition of equal protection. He suggests that there exists countervailing rights of liberty and privacy, including a protected right to discriminate preferred by the constitution over the victim's claim to equality. This right the state may constitutionally be permitted to support. Henkin, *supra* note 46, at 487–88.

[49] Johnson & Westen *supra* note 1, at 596, 597.

[50] The victim's right to equality must be balanced against the discriminator's countervailing rights to liberty and privacy. In a first amendment context the individual's right of free speech is balanced against the countervailing rights of free speech and the rights of private property.

[51] 326 U.S. at 509.

Commissioner Johnson views *Marsh* as standing for the proposition that whenever the state determines the legal relations of its citizens, "if it would be unreasonable to prefer [a particular person's] . . . interest[s] [over another's], it would also be unconstitutional."[52] It would seem, however, that the *Marsh* approach is inappropriate in this context. There are two reasons for this. First, in that case state action inhered, not in the court's resolution of a private controversy, but in the conduct of a private owner, whose facility served a "public function." Second, in *Marsh* the asserted rights in conflict were, on the one hand, the preferred right of the Jehovah's Witnesses to distribute religious literature[53] and, on the other, the non-preferred right of the owner to regulate access to sidewalks open to public use. Thus the adoption of a "balancing" analysis produced, in *Marsh*, a happy and a comprehensible result: weighed against the non-preferred right, the preferred right prevailed. In the context of broadcasting, however, two preferred rights collide: the first amendment right of those who seek access to the media, and the first amendment right of the broadcasters themselves. It may be doubted whether a balancing analysis is helpful where the "weights" involved are so nearly equal.

Commisioner Johnson also relies on *New York Times Co. v. Sullivan*[54] to establish the proposition that judicial denial of a right of access constitutes state action. In *Sullivan* the Court held that the state courts of Alabama could not apply the common law of libel in a suit between private parties, when application would infringe first amendment rights. While *Sullivan* did not hold that state action inheres in every adjudication of legal rights, the case did significantly expand the circumstances in which judicial resolution of a private dispute will constitute state action. The case suggests, as *Shelley* certainly does, that the Court will likely adopt an expansive view of state action when a restrictive approach would jeopardize an interest otherwise subject to constitutional protection.

But *Sullivan* does not suggest that the concept of state action is flexible enough to comprehend the variety of official conduct contemplated by Commissioner Johnson. When a court or agency refuses to recognize a right of access to a broadcast facility, it acquiesces in the conduct of the broadcaster. If that conduct is discriminatory, the court acquiesces in private discrimination. Mere acquiescence, however, may not qualify as state action. An affirmative exercise of state power enforcing or compelling private discrimination seems to be required. As the Court said in *Sullivan:* "[t]he test is not the form in which state power has been applied but, whatever the form, whether such power ***has in fact been exercised.***"[55] This interpretation of the state action requirement receives substantial support from the decision in *Adickes v. S. H. Kress & Co.*, where the Court held that state power must compel private discrimination before discriminatory state action appears.[56] In many ways this is a sound result. If state action were found in any adjudication where a court "acquiesced" in private discrimination, state action would inhere in virtually every judicial determination of private rights; and few private discriminations would be immune from constitutional prohibition. In that event, those constitutional safeguards that now protect the liberty of the individual from the encroachments of government would operate against the individual himself, with a consequent loss of the liberty the safeguards were designed to protect.

Should the Court accept the argument that state action inheres in a judicial denial of access to the media, it would then confront the difficult task of balancing an asserted right of access against the freedom of the press. The result would depend on the Court's view of the service now rendered by the mass media, assessed in light of the policy underlying the first amendment—the maintenance of free and open debate. If the Court accepts the argument that the concentration of private power over the media now operates to restrict the spectrum of views presented to the public, then the Court might conclude that the right of the press to operate free from restraint is subject to a private right of access. But the persistence of what Professor Barron has called the "romantic view" of the press cannot be underestimated.[57] It would be difficult for the Court to accept the notion that the free press is no longer a fundamental element of American democracy, but is, rather, a threat to its existence. And it is possible that the sheer difficulty of balancing the rights involved would precipitate at the threshold an adverse decision on the state action issue.

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[52] Johnson & Westen *supra* note 1, at 596 (quoting Edwards v. Habib, 397 F.2d 687, 695 (D.C. Cir. 1968).

[53] 326 U.S. at 509.

[54] 376 U.S. 254 (1964).

[55] 376 U.S. at 265 (emphasis added).

[56] 398 U.S. 144, 170 (1970).

The Public Domain Theory of State Action

In a recent FCC decision Commissioner Johnson suggests that because broadcast frequencies are "public property," any action taken by the broadcast licensee is state action.[58] To establish the premise that broadcast frequencies are public property, Commissioner Johnson relies on language in *United Church of Christ v. FCC*,[59] where Judge, now Chief Justice, Burger said: "[a] broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." [60] Now if, as the Commissioner contends, the electromagnetic spectrum is part of the public domain, the question here is little different from the question involved in *Burton*, where the Court found state action in the conduct of a lessee of public property. The licensee's use of the broadcast frequencies is analogous to the lessee's use of the building owned by the Wilmington Parking Authority, and the character of the state involvement in the two cases must be the same. State action inheres in both. But to quote Professor Moore: "There are two things wrong with this argument, its premise and its conclusion." [61]

First of all, it is misleading to characterize the broadcast frequencies as "public property." Modern commentators define ownership in terms of the owner's power to elicit the aid of the state in excluding others from the use or enjoyment of the property in question.[62] But this right to exclude is rarely absolute. The seventeenth century notion of absolute dominion has given way, and today we freely recognize the diverse public obligations attendent upon ownership. Thus the owner of real estate is subject to zoning regulations,[63] the automobile owner is subject to licensing and safety regulations,[64] and the farmer is subject to certain health and output regulations,[65] But it does not follow from the fact of regulation that real estate, automobiles, and farms are "public property." Likewise, it does not follow, as Judge Burger and Commissioner Johnson appear to argue, that the public "owns" the broadcast frequencies simply because Congress has chosen to regulate their use.[66]

But has Congress appropriated the broadcast frequencies for public use, as, in other contexts, it has appropriated real property for the same purpose? Commissioner Johnson argues that Congress has done just that by specifying in section 301 of the Communications Act that licensees do not have an ownership interest in the broadcast frequencies.[67] He contends that if the licensees do not "own" the frequencies, the public must. But the effort to describe the impact of the Act in terms of public ownership obscures the original legislative purpose. Congress passed the Communications Act to regulate the broadcast frequencies, because, potentially, there are more broadcasters than frequencies.[68] Thus the regulatory scheme limits the number of licenses granted and, quite properly, attaches conditions—in the form of public obligations—to licensure.[69] But the traditional justification for this derives from the scarcity of broadcast frequencies, not from the fact of public ownership, and the power to regulate derives from Congress' well-established power to regulate commerce among the several states.[70] Further, the nature and extent of these obligations are severely limited by constitutional and statutory provisions.[71] Finally, to the extent that the "ownership" issue is controlled by congressional intent, evidence indicates that Congress intended to subordinate the public interest in the broadcast frequencies to that of the private user. Thus, while Congress has exempted government-owned stations from the licensing procedure of the FCC, it has subordinated them to privately owned stations by requiring that they "conform to such rules and regulations designed to prevent interference with other radio stations and the rights of others as the Commission may prescribe." [72] If Congress had appropriated the frequencies for the public use, it is not at all clear why it would then have given priority to private users.

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[57] Barron, *supra* note 1, at 1642.

[58] *In re* Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242, 254–55 (1970).

[59] 359 F.2d 994 (D.C. Cir. 1966).

[60] *Id.* at 1003.

[61] Speech by J. N. Moore, Virginia Law School, Dec. 8, 1970.

[62] *See, e.g.*, Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

[63] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[64] Kane v. New Jersey, 242 U.S. 160 (1916).

[65] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942).

[66] 47 U.S.C. §§ 151–609 (1964).

[67] Johnson & Westen *supra* note 1, at 589.

[68] National Broadcasting Co. v. United States, 319 U.S. 190, 213 (1943); F.R.C. v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 279 (1933). For general background on the problems posed by the technology of the mass media see Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947).

[69] National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

Even if the broadcast frequencies are public property in some sense, Commissioner Johnson's reliance on *Burton* appears to be misplaced. *Burton* does not stand for the broad proposition that the conduct of all lessees of public property constitutes state action. Rather, in *Burton* the operative fact was that the state had neglected to insert a nondiscriminatory clause into its lease, in contravention of a well-established policy requiring governmental encouragement of nondiscriminatory treatment of Blacks. In the words of Justice Clark: "By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." [73] Thus in a sense, the state action issue was the only real issue in the case. If indeed the contested conduct was state action, there was no doubt about its unconstitutional character. By contrast, there is no well-established governmental policy of providing for individual access to the privately owned broadcast facilities. The very heart of the present controversy is whether such a right exists.[74] And until a court, the FCC, or Congress decides that there is a right of access, it simply cannot be said that the state has a duty to act in the sense required by *Burton*.

Finally, the public domain theory, as described by Commissioner Johnson, proves too much. If one assumes that the broadcast frequencies are public property and that private use of broadcast frequencies is state action, it is difficult to discern factors that would limit the theory's general application. Would any private use of any public property be state action as well? Arguably, if the Commissioner's principles were the law, the private user of public streets or the private speaker employing the air itself (a part of the public domain) to communicate his speech to others, would be subject to the constitutional restraints that now restrict the exercise of state power.

TWO POSSIBILITIES FOR A RIGHT OF ACCESS

A Constitutional Right of Access

If the conduct of broadcasters or publishers does in fact satisfy the state action requirement, the remaining question is whether a substantive right of access actually exists. To answer the question the first task is to determine whether the cases discussed above which have posited a right of access to "public facilities" are applicable.[75] Are radio and television stations "public facilities?" Sound considerations suggest that they are not. The forum provided by the privately owned media is qualitatively different from the forum provided by public facilities in this sense. The essence of a free press is independence. The private media must have unrestricted freedom to challenge the government's policies and propaganda in the marketplace of ideas. Commissioner

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[70] 47 U.S.C. § 151 (1964).

[71] *Id.* at § 326. *See* Lafayette Radio Electronics Corp. v. United States, 345 F.2d 278 (2d Cir. 1965) (§ 326 should be read with § 303 in determining the extent of the Commission's power).

[72] 47 U.S.C. § 305 (1964). *Cf.* L. B. Wilson, Inc. v. FCC, 170 F.2d 793 (D.C. Cir. 1948) where the court said:

> That private as well as public interests are recognized by the Act is not to be doubted. While a station license does not under the Act confer an unlimited or indefeasible property right . . . nevertheless the right under a license for a definite term to conduct a broadcasting business requiring—as it does—substantial investment is more than a mere privilege or gratuity.

Id. at 798. *See also* FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) (Communications Act protects the private as well as the public interest).

[73] 365 U.S. 715, 725 (1961).

[74] See text p. 653 *infra*

[75] See text at notes 6–11 *supra.*

Johnson compares the broadcaster to the gate keeper of a public park, contending that their functions and obligations are the same.[76] But the analogy does not work. The broadcaster is not merely a custodian, he is an advocate. It is true that the broadcaster must present representative community views as well as his own,[77] but in this respect he is more like a public defender than a custodian of a public forum. The government has effective advocates of its own,[78] and the broadcaster must act as an adversary by presenting contrary points of view. Thus the broadcaster plays a dual role: just as the public defender opposes the government in a court of law, the broadcaster opposes the government in the marketplace of ideas; just as the public defender has duties as an officer of the court, the broadcaster has a fiduciary duty to the public to present representative community views. The question, then, is whether this dual role requires the broadcaster to sell broadcast time.

Professor Barron has addressed this problem and has recognized that the first amendment protects competing interests: the public interest in the free flow of ideas and the public interest in the right of the media to be free from government control.[79] He argues for a constitutional right of access by constructing the following syllogism: access to the media is necessary to accomplish the first amendment policy of encouraging "the widest possible dissemination of information from diverse and antagonistic sources";[80] the media's freedom to restrict access can be curtailed without impinging on the constitutionally protected freedom of media content;[81] hence, the courts should recognize a constitutional right of access.

Although judicial recognition of a right of access would be consistent with the underlying policies of the first amendment, it does not follow that recognition is constitutionally compelled. A distinction must be drawn between the obligations Congress has power to impose, and the obligations imposed by the Constitution itself. In *Red Lion Broadcasting Co. v. FCC*, for example, the Court held that the first amendment does not preclude congressional regulation designed to assure some individuals a right of access in some cases.[82] The Court did not hold, however, that the Constitution itself guarantees a right of access; nor has any other court so held.[83]

From a policy standpoint this approach is apropriate. The difficult task of striking the proper balance between the broadcaster's liberty and the individual's right to use broadcast facilities requires a judicious division of labor between the courts and the legislative branch. Recognition of a right of access would necessarily work substantial changes throughout the broadcast system, changes the courts have little capacity to evaluate. This means that the courts should defer to the superior expertise, fact-finding, and policy-making ability of Congress and the administrative agencies.

One of the changes wrought by legislative or judicial recognition of a right of access would be increased governmental regulation of the content of speech communicated over the media. Effective recognition of a right of access cannot be accomplished by granting unlimited access to all who desire it. Indeed, this would be technically impossible: "what is essential is not that everyone shall speak, but that everything worth saying shall be said. . . ."[84] But what is "worth saying"? Given the diversity of the speech not being heard at a given moment, how is government to determine what speech merits publicity? Professor Barron himself admits that there are many problems here:

> What is a minority point of view? When and where shall such opinions be heard? Has some significant space already been given to the particular controversy? Must every issue of the publication contain a reference to a particular controversy? Isn't it possible to reach saturation of a given subject? When is the decision not to publish on a particular issue a "news" decision and when is

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[76] Johnson & Westen *supra* note 1, at 583.

[77] See text at note 97 *infra*.

[78] In addition to the coverage given to public officials as a matter of course, the Government often has its own mechanisms for disseminating information. An interesting and controversial case study of this phenomenon, *The Selling of the Pentagon*, was a television documentary presented by C.B.S. on February 23, 1971.

[79] Barron, *supra* note 1, at 1641, 1656.

[80] Associated Press v. United States, 326 U.S. 1, 20 (1945).

[81] Barron *supra* note 1 at 1651.

[82] 395 U.S. 367 (1969).

[83] Barron *supra* note 1, at 1667–69.

[84] A. MEIKELJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1960).

it a decision based upon an effort to obstruct the opinion process? Surely resolving these problems is no less baffling than deciding when a book is "without redeeming social importance" or when it is marketed against a 'background of commercial exploitation."[85]

Thus it is apparent that recognition of a right of access would engender content-oriented regulation of speech, under standards difficult to administer. At what point would such regulation become unconstitutional? Would it be possible for Congress to expand the existing statutory right of access, recognized in *Red Lion*, without infringing first amendment rights?

As the court in *Chicago Joint Board* pointed out, the American concept of the free press is grounded on the assumption that governmental control over the media should be limited, lest the antagonistic roles of the government and the press be upset.[86] Until now, courts have ignored the right of access problem and have tipped the scales in favor of the media's right to be free from government control. If the pendulum should swing the other way, it should do so only after a regulatory scheme has been devised which carefully preserves the traditional role of the media as an "'independent check on governmental power.'"[87] Congress has conceded power to regulate the broadcast media. Arguably, it has power to expand the limited right of access now secured by the personal attack and fairness doctrines. But, if Congress exercises this power, the courts should, as they have in the past, adopt a strict standard in reviewing the legislation. Any other approach would, in effect, allow Congress to sit in judgment over its own case. In the continuing and desirable controversy between the broadcasters and the Government, the courts, not Congress, should mediate.

Do the facts of the present case demand that the courts assume a more active role than the one suggested above? An enduring justification for judicial activism is legislative inaction.[88] If, under ordinary circumstances, a proper regard for legislative power compels the courts to await legislative initiatives, the courts may take the initiative when the legislature does not.[89] But in the area of broadcasting there is no history of legislative inaction. In fact, Congress and the FCC have been active in dealing with the specific problem of access to the media. In 1949, the FCC used its broad powers under the public interest standard of the Communications Act of 1934 to create the fairness and equal time doctrines,[90] and Congress codified these doctrines in its 1959 amendments to the Act.[91] Moreover, in *Red Lion* the Court indicated its approval of the broadcaster's performance under the regulatory scheme designed by Congress and the FCC: "The communications industry, and in particular the networks, have taken pains to present controversial issues in the past, and even now they do not assert that they intend to abandon their efforts in this regard."[92]

A Statutory Right of Access

If there is no constitutional right of access, the remaining question is whether Congress has created one. With respect to the electronic media the relevant legislation is the Communications Act of 1934. In two recent decisions, *In re Democratic National Committee (DNC)*[93] and *In re Business Executives Move for Vietnam Peace (BEM)*,[94] the FCC ruled that there is no general right of access granted by the Act. The Commission held that any right of access under the Act is limited to the equal time and fairness doctrines, and absent the special circumstances which bring those doctrines into play, the broadcasters have complete discretion to deny access. Commissioner Johnson dissented to both decisions,[95] arguing that a right of access was created by the Act.[96]

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[85] Barron, *supra* note 6, at 496.

[86] See text at note 18 *supra*.

[87] Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune Co., 435 F.2d 470, 474 (7th Cir. 1970).

[88] *See* Cox, *Foreward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

[89] *See* Muskopf v. Corning Hospital Dist., 55 Cal.2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (Sup. Cr. 1961).

[90] Report of the Commission on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

[91] 47 U.S.C. § 315(a) 1964).

[92] 395 U.S. at 393.

[93] 25 F.C.C.2d 216 (1970).

[94] 25 F.C.C.2d 242 (1970).

[95] 25 F.C.C.2d at 230; 25 F.C.C.2d at 249.

[96] He also made several constitutional arguments which have been partially dealt with in the previous sections of this Note and which appear elsewhere in this issue. Johnson & Westen, *supra* note 1.

In *DNC* the Committee sought a declaratory ruling on the question whether the CBS television network had violated the public interest standard of the Act by refusing to sell prime time to the Committee for an issue oriented program.[97] The Commission found that CBS was substantially fulfilling its obligations under the public interest standard by presenting "representative community views and voices on controversial issues which are of importance to . . . [its] . . . listeners,"[98] and that the public interest standard does not entail a right of access "over and beyond the fairness doctrine right of the public to be informed."[99] The majority argued that the language of section 3(h) of the Act—providing expressly that a broadcast license is not to be regarded as a common carrier—[100] implies that a broadcaster does not have to grant access to all who request it. Rather, the broadcaster satisfies his statutory obligations by presenting representative community views. In this respect, recognition of a right of access would be contrary to the express provisions of the Act. The majority pointed out the danger that a new right of access, together with the established fairness doctrine, would defeat the policy of the first amendment by allowing wealthy and powerful groups to monopolize the issue coverage. Finally, the majority asserted that promotion of FM radio, UHF television, and cable television would be a much better way to increase the total coverage of issues.

In *BEM* an organization of business executives filed a complaint against a Washington, D.C. television station for refusing to sell time for one-minute announcements urging immediate withdrawal of American troops from Vietnam. The majority, rejecting *BEM*'s argument that this denial of access violated the fairness doctrine, found that the broadcaster had fulfilled its duties under the fairness doctrine by presenting representative community views on controversial topics. At the core of the majority opinion was the principle that

> [n]o particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure, rather than the right of any individual or group to present personal views.[101]

In sum, the majority held that a right of access is not required by the fairness doctrine or by the underlying public interest standard and that a right of access is probably prohibited by section 3(h) of the Act.

Commissioner Johnson differs with the majority on two fundamental points. First, he disagrees with the finding that the media's treatment of public issues is thorough enough to conform to the public interest standard. He argues that it is not in the public interest for broadcasters to deny political ideas access to the marketplace, while granting instant access to the purveyors of "toothpaste or 'feminine deodorant spray.'"[102] Second, he asserts that the majority's interpretation of the Act as prohibiting a right of access is erroneous. Section 3(h) of the Act, according to Commissioner Johnson, does not give the broadcaster complete discretion to deny access; rather, its only purpose is to exempt the broadcast industry from the common carrier provisions in Title II of the Act.[103] Furthermore, he argues, recognition of a limited right of access would be consistent with prior FCC rulings which were not held to violate section 3(h) of the Act.[104] Finally, Commissioner Johnson proposes an access-for-purchase plan which would require licensees to sell up to five percent of their prime evening time for political programming on a first-come first-served basis.[105]

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[97] A similar request to buy time was granted by NBC. It was not clear whether NBC had been approached. ABC issued a statement, however, that it would make an exception to its general rule of not selling time for controversial issue programs when major political parties made such requests. DNC also requested time to solicit funds for the party. NBC and ABC said they would sell time for advertisements soliciting funds: CBS initially rejected the request but subsequently revised its policy to permit spot announcements for solicitation. The Commission stated its approval of the ABC policy allowing spot announcements for solicitation "on a reasonable basis."

[98] 25 F.C.C.2d at 222.

[99] *Id.* at 223.

[100] 47 U.S.C. § 153(h) (1964) provides:

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

[101] 25 F.C.C.2d at 244.

[102] *Id.* at 233.

[103] 47 U.S.C. §§ 201–22 (1964).

While the views of both sides are based on reasonable interpretations of the Act, both the majority and minority overstate their cases. In all probability, the Communications Act neither prohibits nor requires a right of access. The broad public interest standard appears to give the Commission the power to further the policies of the Act by whatever means it deems appropriate. The fact is that the Commission has not chosen to adopt the means advocated by Commissioner Johnson. The Commission has interpreted the public interest standard as requiring that broadcasters present representative community views on controversial issues, and the Commission has found that broadcasters are adequately performing that function. While this may or may not be the best or wisest approach, its propriety is clear; and, in accordance with the principle first established in *National Broadcasting Co. v. United States*,[106] courts should defer to the Commission's interpretation of its statutory mandate, inquiring only whether its decision in a given case is supported by substantial evidence.[107] In sum, the FCC has acted within its power in denying a right of access; and until Congress or the FCC decides differently, Commissioner Johnson's access-for-purchase proposal remains without authoritative support.

J. A. R.

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THE FCC AND THE FIRST AMENDMENT: OBSERVATIONS ON 40 YEARS OF RADIO AND TELEVISION REGULATION

By Glen O. Robinson*

INTRODUCTION

Congress created the first system of regulation of radio and television with its enactment of the *Radio Act of 1927*.[1] Although considered a drastic measure at that time,[2] today, some forty years after its creation, comprehensive regulation of radio and television communications has for the most part become an accepted phenomenon. Although regulatory policy has yet to mature completely, the essential features of the policy have been outlined. With this coming of age, it seems appropriate to reflect on an aspect of radio regulation which has been of critical importance from the earliest time: the first amendment implications of the various facets of radio and television regulation.

Virtually everyone accepts the proposition that the first amendment does apply to radio and television. Whatever doubts might once have existed about the applicability of the first amendment to mass communications media were dispelled in *United States v. Paramount Pictures*[3] where *the Supreme Court stated that it had "no doubt" that radio, newspapers, and moving pictures were covered by the first amendment.* Even the Federal Communications Commission, which has never shown itself to be keenly aware of the finer points of constitutional limitations, has recognized the applicability of the first amendment as at least some kind of general curb on its regulatory actions which are intended to limit or to aid free speech.[4]

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[104] Commissioner Johnson relies heavily on the following language from United Broadcasting Co. (WHKC), 10 F.C.C. 515 (1945), to support this point.

> Under section 3(h) of the act, broadcast stations are expressly declared not to be common carriers. These facts, however, in no way impinge upon the duty of each station licensee to be sensitive to the problems of public concern in the community and to make sufficient time available, on a nondiscriminatory basis, for full discussion thereof, without any type of censorship which would undertake to impose the views of the licensee upon the material to be broadcast.

Id. 517–18. This case seems to destroy the majority's argument that a right of access would violate § 3(h), but WHKC cannot be used as authority for the proposition that there is a right of access granted by the Act, because it involved policies which had been *voluntarily* adopted by the station.

[105] 25 F.C.C.2d at 235.

[106] 319 U.S. 190 (1943).

[107] *Id.* at 224.

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[1] 47 U.S.C. §§ 81–83 (1964).

[2] *See* J. HERRING & G. GROSS, TELECOMMUNICATIONS, ECONOMICS AND REGULATION 226 (1936).

[3] 334 U.S. 131, 166 (1948). *See also* American Broadcasting Co. v. United States, 110 F. Supp. 374, 389 (S.D.N.Y. 1953), *aff'd*, 347 U.S. 284 (1954).

Despite this agreement on its general applicability, *there continues to be very considerable doubt on the part of many, including the FCC, whether the first amendment really has the same scope in the field of radio and television as it does in the case of other communications media.* This doubt is founded on the persistent and widely held, but almost never critically analyzed, *assumption that broadcasting is somehow different or unique.*

For example, one of the assumed unique characteristics of radio and television is the fact that for technical and economic reasons *access to these communications media is limited.* Since only a few thousand persons can use the airwaves, it follows that some form of regulation is essential. Many assume that this regulation must include some form of regulation of programming in order to compensate for the supposed monopoly power given to the fortunate few who obtain licenses to use the airwaves. When viewed in this light, there are relatively few outside the industry who are very much concerned about FCC regulation of program operations, even where it represents an intrusion which would be bitterly attacked outside the field of radio and television. *So long as the broadcast licensee is regarded as a monopolist who, were it not for regulation, would be able to run free, it is he who is portrayed as the censor and not the Commission. Indeed, the Commission can pass itself off as the champion of free speech, dedicated to ensuring that the licensee gives the fullest expression to all possible viewpoints and addresses itself to all possible tastes.* There is no doubt that the Commission is aided in playing this role by dissatisfaction with the average quality of programming, particularly among intellectuals who would be most likely to express concern about infringements on free speech. The Commission's repeated exhortations to broadcasters to upgrade the quality of programming and its efforts to encourage, cajole, or even coerce broadcasters to present better programming "in the public interest," add to the pattern. When the Commission is joined by the newspapers and the irrepressible complaints of the public, it is not surprising that the broadcaster attracts little sympathy.

There is more than a little discrimination and a very noticeable absence of critical judgment in this treatment of broadcasting. Most of those who rail against the poor quality of television programming fare have never given a second thought to the equally poor quality of the newspapers, magazines, and books which flood the newsstands and bookstalls. Those who are disturbed that there are only three television stations in their city, or only three television networks, are not generally as disturbed over the fact that there are only one, or perhaps two, daily newspapers in the same city, and at most a handful of weekly news magazines. These same people are probably not at all disturbed that there are only two major political parties.

But despite first appearances this Article is not intended as an apology for the cause of broadcasters. It is, rather, an attempt to discuss comprehensively the constitutional limits on governmental regulation of radio and television under the first amendment. It is important to emphasize at the outset that the primary concern of this Article is not with the entire scope of the first amendment with regard to mass communications media of all kinds. The principal aims here are to focus on those restraints on radio and television which are clearly extraordinary, to point out those restraints which, though they may appear to be of great moment, clearly are not extraordinary or are not, in any event, unique to radio and television, and to evaluate the first amendment implications of such restraints.

I. REGULATION OF ENTRY AND CONTROL OF ECONOMIC CONCENTRATION

A. *The allocations and licensing scheme*

It is impossible to present a full history and description of the complex system of allocations and licensing as it has been developed for radio and television. However, a brief outline of the scheme will suffice to set the framework for analyzing the first amendment problems of Commission regulation.

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[4] *E.g.*, *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 20 P & F RADIO REG. 1902, 1907 (1960).

The Radio Act of 1927 and its successor, the Communications Act of 1934, both of which gave the Commission broad licensing and regulatory powers over radio communications, were the outgrowth of a breakdown of the law during the early 1920's[5] which had permitted the emerging commercial radio industry to develop in chaos. Because of the lack of effective regulation prior to 1927, radio stations were free to begin operation when and where they chose. The new stations used any frequency they desired, changed frequencies, and increased power without regard to interference caused to others. The result was a great waste of radio frequencies because "with everybody on the air, nobody could be heard."[6] *The primary purposes of the 1927 Act were to ensure adequate technical service to the public by establishing regulations designed to eliminate objectionable interference and to promote optimum utilization of the radio spectrum through fair, efficient, and equitable distribution of facilities.*[7]

To accomplish these objectives, the Commission has allocated different portions of the radio spectrum to different kinds of uses, such as radio and television broadcast, citizens radio, and safety and special services. Secondly, it has allocated the available broadcasting channels on a geographic basis in an attempt to achieve optimum utilization with minimal electrical interference and a fair and equitable distribution of the frequencies.[8]

The most flexible system of allocation is the allocation and distribution of AM frequencies and stations. Standard broadcast (AM) stations are broken down into four major classes.[9] Each class of station is given its own normally protected contour within which its signal is intended to be free of objectionable interference from co-channel and adjacent channel stations.[10] Although some effort has been made to develop a reasonably equitable distribution of the AM facilities to all parts of the country, no fixed assignment scheme, such as has been adopted for FM or television, has ever been established for AM radio.

The FM allocation system was originally the same as that for AM stations. Recently, however, the Commission abandoned the flexible AM approach and, in lieu of the normally protected contour approach, established a system of allocation based on minimum mileage separation between facilities and on specific assignments of FM frequencies to specific communities.[11] The current FM allocation systems is patterned on the allocation scheme for television. At the time when the Commission came to consider allocation of frequencies for television use, it had the benefit of some twenty years experience with its AM broadcast allocations scheme, a system which, due to excessive flexibility, had permitted the spectrum to become overcrowded and, as a result, had failed in its *primary purpose of preventing objectionable interference.* To guard against overcrowding and the resultant erosion of service because of objectionable interference, the Commission in its *Sixth Report and Order* in 1952[12] set forth a comprehensive scheme for allocating all television channels on a fixed basis across the country.[13] The heart of the allocations scheme is a table of assignments which assigns all television channels to specific communities. The table is based on a system of minimum mileage separations between stations, designed to eliminate in advance the possibility of objectionable interference in the service areas of existing and potential television stations.

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[5] The Radio Act of 1912, 37 Stat. 302, granted to the Secretary of Commerce authority to deal with regulatory problems presented by the private use of radio channels for broadcasting including authority to license radio broadcast stations. However, the Secretary's authority to regulate under the Act was virtually destroyed by subsequent judicial interpretation. In Hoover v. Intercity Radio Co. 286 F. 1003 (D.C. Cir. 1923), *appeal dismissed per stipulation*, 266 U.S. 636 (1924), the court held that the Secretary lacked discretion to refuse to renew a license on the grounds of interference. Subsequently in United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926), a district court held that licensees were not bound by nonstatutory regulations and could operate on any frequency despite the Secretary's regulations to the contrary. Following *Zenith* the Secretary abandoned all efforts to regulate and urged, in vain, self-regulation.

[6] NBC v. United States, 319 U.S. 190, 212 (1943). For a more extensive history of this early period, the failure of regulation under the Radio Act of 1912, and enactment of the Acts of 1927 and 1934, see L. White, The American Radio 126–54 (1947); Office of Network Study, FCC, Second Interim Report on Television Network Procurement pt. II, 59–69 (1965).

[7] *See* NBC v. United States, 319 U.S. 190 (1943); W. Jones, Report to the Administrative Conference, Licensing of Major Broadcast Facilities by the Federal Communications Commission 3–6 (1962).

[8] For a useful summary of these two types of allocation of the radio spectrum and of the principal components of the economic structure of the broadcasting industry, see W. Jones, Cases and Materials on Regulated Industries 1032–63 (1967).

[9] 47 C.F.R. § 73.21 (1967).

[10] The normally protected contour concept is far too technical and complex for discussion here. It is sufficient to note that the concept of normally protected contour involves a relationship between (a) a signal by the protected station of specified strength (for most AM stations, the 0.5 millivolt/meter ground wave signal is protected during the day) and (b) the interfering signal of another station which exceeds a specified strength (which varies depending on whether the signal is co-channel or adjacent channel) such that the desired station's service in those areas which it is designed to serve is free of objectionable interference from the undesired station.

[11] 47 C.F.R. §§ 73.202–03 (1967). *See Revision of FM Broadcast Rules*, 23 P & F Radio Reg. 1859 (1963).

Although the table of assignments is fixed, it is not rigid. Changes in allocations have been made on a selective basis. Although the Commission has generally adhered to the minimum mileage separation requirements and refused to authorize short-spaced assignments,[14] since 1952 it has granted numerous petitions to amend the table and has reassigned channels to different locations.[15]

Within this general allocations framework, the Commission controls entry into broadcasting by a system of licenses renewable every three years.[16] Leaving aside those cases involving comparative choice between two or more mutually exclusive applications, licenses for available frequencies are granted subject to a showing by the applicant that it has complied with the Commission's technical regulations and standards, that it possesses the necessary character,[17] financial,[18] and legal[19] qualifications, and that its program operations will serve the public interest.[20]

B. General outline of economic regulation

Unlike most other federal regulatory schemes, the Communications Act does not comtemplate a system of economic regulation and, accordingly, does not authorize the Commission either to fix the rates charged by the licensed stations or to engage in other general economic regulation.[21] Notwithstanding this supposed limitation on its authority, the Commission has, in fact, exercised its regulatory powers to control certain economic aspects of radio and television to a considerable degree.

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[12] *Sixth Report on Television Allocations,* 1 P & F Radio Reg. pt. 3, at 91:601 (1952).

[13] 47 C.F.R. §§ 73.606–07 (1967).

[14] The Commission in *Interim Policy on VHF-TV Channel Assignments,* 21 P & F Radio Reg. 1695 (1961), undertook consideration of short-spaced VHF assignments in certain specified markets in which only two VHF stations then operated, but refused to adopt a policy under which it would authorize further short-spaced VHF assignments in markets having "serious shortages" of channels. Subsequently, in *VHF Drop-ins,* 25 P & F Radio Reg. 1687 (1963), the Commission rejected most of the limited drop-in proposals which had been held for consideration under its prior *Report and Order* in 21 P & F Radio Reg. 1695 (1961).

[15] *E.g., VHF Channel Assignments in Nevada,* 7 P & F Radio Reg. Bd 1589 (1966); *Channel Assignment in Rhinelander, Wisc.,* c P & F Radio Reg. 2d 1683 (1964). The FM table of assignments possesses the same flexibility and reassignments can be made on petition of interested party or on the Commission's motion. *E.g., FM Channel Assignments,* 1 P & F Radio Reg. 2d 1545 (1963).

[16] 48 Stat. 1081 (1934), 47 U.S.C. § 301 (1964). Although in the field of radio and television the Commission's authority to regulate entry was originally considered to be limited to radio and television *broadcast* stations, the Commission has now extended its authority to limit and control entry into the nonbroadcast radio and television area of community antenna television, discussed below. However, the Commission's "regulation" of entry into the field of community antenna television is limited and is incidental to its licensing of radio and television broadcast stations.

[17] This is a negative qualification and the applicant need not affirmatively allege good character. Typically a finding of "bad" character relates to willful refusal to disclose or misrepresentations to the Commission. *See, e.g.,* WMOZ, Inc., 1 P & F Radio Reg. 2d 801 (1964). But it may involve virtually any activity which bears on character, *e.g.,* violation of the Communications Act, FCC regulations, or other laws. *See, e.g.,* General Electric Co., 2 P & F Radio Reg. 2d 1038 (1964) (violation of antitrust laws considered). *See generally* Brown, *Character and Candor Requirements for FCC Licensees,* 22 Law & Contemp. Prob. 644 (1957).

[18] Traditionally, applicants were required to show financial resources sufficient to build the station and operate it for three months without advertising revenue. Recently, however, the Commission has established a requirement that all stations demonstrate financial ability to construct and meet fixed and operating costs for one year without revenue or to establish convincingly that such revenue will be forthcoming in an amount sufficient to continue operation. Ultravision Broadcasting Co., 5 P & F Radio Reg. 2d 343 (1965).

[19] Legal qualifications relate chiefly to § 310(a) of the Act, forbidding licenses to aliens, *e.g.,* United Artists Broadcasting, Inc., 7 P & F Radio Reg. 2d 7 (1966), and to compliance with the Commission's multiple ownership rules. See the discussion of multiple ownership rules in text accompanying notes 26–27 *infra.*

[20] For a discussion of program regulation, see Part II *infra.*

1. Monopoly, Diversification, and Chain Broadcasting—

Although the Commission does not have power to enforce the antitrust laws as such,[22] it has long undertaken economic regulation along essentially antitrust lines, relying on its general authority to protect the public interest. The Commission's multiple ownership rules, its regulation of certain network practices, and its policy of favoring diversification of control in the mass communications media all reflect economic policy substantially similar to the policies of the federal antitrust laws.

The genesis of the Commission's regulation of economic concentration is its *Report on Chain Broadcasting,*[23] released in 1941 after some three years of intensive study of problems posed principally by the networks. The present scope of the rules and policies which grew out of this original study[24] can be summarized very generally. The rules prohibit or limit various types of exclusive dealing practices between networks and affiliated stations and network ownership of stations under circumstances where it would restrain competition.[25] In addition, multiple ownership rules limit the total number of stations which can be held under common ownership or under common control[26] and prohibit "duopoly," the common ownership or control of two or more stations of the same class in the same area.[27]

The Commission's original chain broadcasting regulations were upheld in *National Broadcasting Company v. United States,*[28] against a challenge that they were beyond the Commission's statutory powers. The Commission's multiple ownership rules were subsequently upheld against a rather feeble attack in *United States v. Storer Broadcasting Company.*[29]

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[21] *E.g.,* FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940). For a brief discussion of the similarities and differences as to the economic characteristics of broadcasting and public utility fields where there is extensive economic regulation, see Levin, *Federal Control of Entry in the Broadcast Industry,* 5 J. LAW & ECON. 49, 52–56 (1962).

[22] United States v. RCA, 358 U.S. 334, 343 (1959).

[23] FCC, REPORT ON CHAIN BROADCASTING (1941).

[24] The fullest treatment of the problem of economic concentration in radio and television, although now considerably out of date, is the so-called *Barrow Report,* HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE REPORT ON NETWORK BROADCASTING, H.R. REP. NO. 1297, 85th Cong., 1st Sess. (1958) [hereinafter cited NETWORK BROADCASTING]. *See also* Hale & Hale, *Competition or Control II: Radio and Television Broadcasting,* 107 U. PA. L. REV. 585 (1959).

[25] These rules, generally referred to as the "chain broadcasting rules," are substantially identical for radio and television. *See* 47 C.F.R. §§ 73.131–.138 (AM), .231–238 (FM), .658 (TV) (1967).

For a comprehensive history of the rules up to 1958, see NETWORK BROADCASTING. The principal changes in the rules since 1958 have been the prohibition of television option time, *see Television Option Time,* 25 P & F RADIO REG. 1651 (1963), and the prohibition of network's representation of affiliated stations in selling national spot sales, *see Network Spot Sales Representation,* 19 P & F RADIO REG. 1501 (1960), *aff'd sub nom.* Metropolitan Television Co. v. FCC, 289 F.2d 874 (D.C. Cir. 1961).

[26] Again the rules are substantially identical for radio and television. *See* 47 C.F.R. §§ 73.35 (AM), .240 (FM), .636 (TV) (1967). With respect to AM and FM stations, the rules place an upper limit on common ownership, interest in, or control of seven stations. With respect to television stations, the upper limit is again seven stations, no more than five of which may be VHF stations. For a brief outline of the history of these rules, see NETWORK BROADCASTING 84.

In 1965 the Commission proposed a further amendment to the multiple ownership rule to limit common ownership of television stations in the "top 50" markets to a total of one UHF and two VHF stations. *Television Multiple Ownership Rules,* 5 P & F RADIO REG. 2d 1609 (1965). Pending such amendment, it adopted an "interim policy" under which it would, in the absence of a compelling showing, designate for hearing any application to acquire a VHF station in the top 50 television markets by a party already having one or more such stations or by a new party to acquire more than one such station. Although this interim policy was undoubtedly intended to have some restraining effect in itself, this effect was almost certainly weakened by the Commission's subsequent refusal to order a hearing on an application by a Chicago station licensee to take over and operate a station in Denver, one of the top 50 markets. Channel 2 Corp., 6 P & F RADIO REG. 2d 885 (1966).

[27] The "duopoly" rules formerly prohibited common ownership, interest in or control of another station in the same class where both would serve "substantially the same area." Under this approach a number of different factors were considered in determining whether two stations would serve substantially the same area. *See, e.g.,* Sheffield Broadcasting Co., 21 P & F RADIO REG. 514j (1962). The current rules, however, have established fixed boundaries to this "area" by proscribing common ownership, interest in, or control of two or more stations where there would result any overlap of specified contours of the respective stations. In AM and FM, any overlap of the respective 1 mv/m contours is proscribed; in television, overlap of Grade B contours is proscribed. 47 C.F.R. §§ 73.35 (AM), .240 (FM), .636 (TV) (1967).

[28] 319 U.S. 190 (1943). The *NBC* case also considered and rejected a first amendment challenge to the regulations, discussed at note 73 *infra.*

Apart from the chain broadcasting and multiple ownership rules, *the Commission has long purported to follow a general licensing policy of promoting diversification of ownership of all mass communications media*[30] *in evaluating the respective merits of competing applicants in a comparative hearing.*[31] This policy has never been crystallized into written regulations, and, like most of the factors assessed in comparative hearings, it has not been vigorously or consistently applied.[32]

2. *Economic Injury Through Competition—*

Ignoring dicta in several early circuit court opinions,[33] the Commission persistently refused, until recent years, to consider competitive economic injury to existing licensees as a basis for refusing to license new stations. This policy was approved in *FCC v. Sanders Brothers Radio Station,*[34] where the Supreme Court held that the Commission was not bound to consider economic injury as such in determining whether or not to grant an application for a new station. However, the Court did indicate that under some circumstances economic injury could be taken into account where it might have an important bearing on the ability of the new station or the existing station to render adequate service.[35] Following *Sanders,* the Commission continued to disclaim any power to refuse licenses on the grounds of competitive injury, or that if it had such power, it would be in the public interest to exercise it.[36]

In 1958, the policy of refusing to consider competitive injury even where the competitive injury might lead to disruption of service was sharply reversed in *Carroll Broadcasting Company v. FCC.*[37] The court held that the Commission had misread the *Sanders* case and that, while the Commission could not consider competitive, economic injury merely for the purpose of protecting the revenue of an existing station, it could and must take it into account where it threatens the ability of the existing station to provide adequate service to the public. Although the primary concern of the court in *Carroll* seems to have been with competitive injury which would so drastically curtail an existing station's revenues as to cause it to leave the air, it seems clear that the decision was not intended to be limited to such extreme situations. Thus, for example, economic injury which might lead to curtailment of high-cost, local live programming would justify refusal to license a new station.

The Commission's refusal to consider competitive injury in the licensing of new stations prior to the *Carroll* case was motivated principally by a fear of being deluged by similar protests against every new applicant. The Commission was unwilling to undertake the difficult task of sorting out the valid protests. The Commission explained its refusal to consider economic injury by disclaiming the power to make any such economic determinations, but this seems to have been more of a rationalization than a reason, since the Commission has long rendered economic judgements in converse situations involving economic concentration. The most notable example of the Commission's willingness to consider economic injury on a broad, general plane in which *it* could choose the time and place to apply economic judgement and policy is its deintermixture proceedings during the 1950's, in which it decided to reallocate VHF and UHF channels to different television markets because of the inability of UHF stations to compete effectively with VHF stations in the same market.[38] Although the Commission has now declared a moritorium on its deintermixture policy because of the enactment of the all-channel receiver legislation,[39] this does not represent an abandonment of the type of economic regulation represented by its deintermixture efforts, but simply the choice of a different remedy; legislation requiring television receivers to be compatible with both UHF and VHF reception.

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[29] 351 U.S. 192 (1956).

[30] The other media interests generally involved besides radio and television are newspaper interests. However, while ownership, interest in, or control of a newspaper is a comparative "demerit" against an applicant in theory, the fact remains that common ownership of newspapers and broadcast stations is so prevalent as to indicate that newspaper ownership is not a serious liability. *See, e.g.,* the comprehensive list of broadcast stations identified with newspaper and magazine ownership in 1966 BROADCASTING YEARBOOK, at A–92–99.

[31] In noncomparative cases the Commission has only rarely considered an applicant's ownership or control of other communications media where the applicant meets the multiple ownership rules. *See* NETWORK BROADCASTING 112–13. A rare exception is Laurence W. Harry, 13 F.C.C. 23 (1948), *aff'd sub nom.* Mansfield Journal Co. v. FCC, 180 F.2d 28 (D.C. Cir. 1960).

[32] As to newspapers, see note 30 *supra,* and Heckman, *Diversification of Control of the Media of Mass Communication—Policy or Fallacy?,* 42 GEO. L.J. 378 (1954) (which argues, however, that the diversification policy should not be pursued except to prevent monopoly). For a general criticism of the policy as applied both with respect to newspaper and other radio ownership,. see NETWORK BROADCASTING 121–24; Note, *Diversification and the Public Interest: Administrative Responsibility of the FCC,* 66 YALE L.J. 365 (1957).

The Commission's new *Policy Statement on Comparative Broadcast Hearings,* 5 P & F RADIO REG. 2d 1901 (1965) suggests a somewhat greater stress on the factor of diversification than has been stressed in the past cases. To what extent this stress in a general policy statement will carry over to actual decision, however, is anyone's guess.

[33] *E.g.,* WOKO, Inc. v. FCC, 109 F.2d 665, 666–68 (D.C. Cir. 1939); Tri-State Broadcasting Co. v. FCC, 107 F.2d 956, 957–58 (D.C. Cir. 1939).

[34] 309 U.S. 470 (1940).

[35] *Id.* at 476.

[36] *See* Voice of Cullman, 14 F.C.C. 770 (1950); Southeastern Enterprises, 13 P & F RADIO REG. 139 (1957). For a vigorous criticism of the latter case and the Commission's policy of refusing to consider competitive injury, see Note, *Economic Injury in FCC Licensing: The Public Interest Ignored,* 67 YALE L.J. 135 (1957).

[37] 258 F.2d 440 (D.C. Cir. 1958).

3. Regulation of Community Antenna Television—

Without question the most extensive economic regulation yet undertaken by the Commission is its controversial regulation of community antenna television

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[38] VHF and UHF channels were intermixed in the same markets in *Sixth Report on Television Allocation,* 1 P & F Radio Reg. pt. 3, at 91:601 (1952). It was not long after the lifting of the television "freeze" that it became apparent that UHF stations suffered a very substantial competitive disadvantage in comparison to VHF, due mainly to (a) inferior propagation characteristics of UHF and a very restricted service area in the case of UHF stations as compared with VHF stations and (b) the manufacture of VHF-only receivers by television set manufacturers.

To correct the situation, the Commission instituted five rulemaking cases looking towards the deintermixture of five specific communities. On further study of the problem, the Commission determined that the problem was too widespread to be materially affected by deintermixture in only five markets and terminated the earlier proposals, *First Report on Deintermixture,* 13 P & F Radio Reg. 1511 (1955). Subsequently, the Commission instituted rulemaking looking toward solution of the problem on a broad, nationwide basis, as a result of which it concluded that the most promising solution to the problem would be to transfer all television stations to UHF frequencies, *Second Report on Deintermixture,* 13 P & F Radio Reg. 1571, 1577 (1956). As an "interim" measure, it instituted proceedings looking toward deintermixture in certain specified communities. *Id.* at 1581, 1583–84. Following the release of its *Second Report,* the Commission deintermixed a number of communities, *e.g.,* Elmira Deintermixture Case, 15 P & F Radio Reg. 1515 (1957); Fresno Deintermixture Case, 15 P & F Radio Reg. 15861 (1957), *modified,* 18 P & F Radio Reg. 1733 (1959), *modified further,* 19 P & F Radio Reg. 1598a (1960).

The Commission's proposal to transfer all television stations to UHF announced in 1956 failed to jell. In April, 1959, the Commission reported to Congress, in substance, that it was still "studying" the problem. It reported its conclusion that deintermixture either on a selective community or area basis was ineffective but that, as an "interim policy," it had decided to add VHF channels to some large population centers. The VHF additions were short-spaced drop-ins which were supposed to alleviate the shortage of service in those areas by adding a third VHF station—obviously on the assumption that UHF in those areas could not be made to work. *See Hearings on Television Allocations Before the Senate Comm. on Interstate and Foreign Commerce,* 86th Cong., 2d Sess. 4585–611 (1960) (Statement of FCC Chairman Doerfer).

The 1959 report to Congress notwithstanding, the Commission subsequently proposed deintermixture on a selective basis in eight specified communities, *Expanded Use of UHF Channels,* 21 P & F Radio Reg. 1711, 1714 (1961). However, the deintermixture proposals were met by fierce opposition from the strongest elements in the industry. At the same time that it released its interim policy in 1961, the Commission proposed to Congress that it enact all-channel receiver legislation which would require all receivers shipped in interstate commerce to be capable of receiving both VHF and UHF channels. At that time it seems evident that the Commission viewed all-channel receiver legislation as a means for paving the way to an eventual shift of all VHF stations to the UHF spectrum. *See id.* at 1714–15. The all-channel receiver legislation proved to be a promising way out of the deintermixture controversy for both the Commission and the industry. The industry opponents of deintermixture agreed to support the all-channel receiver legislation but insisted that Congress exact from the Commission a commitment that its interim policy on deintermixture and its intention to pursue an all-UHF system would be abandoned for at least a sufficient period of time to permit the all-channel receiver legislation to cure the competitive imbalance between UHF and VHF, which it was thought that the all-channel receiver legislation could do. On the representation by the Commission that it would terminate its deintermixture efforts, the all-channel receiver legislation was enacted in 1962 as § 303(s) of the Communications Act. *See* H.R. Rep. No. 1559, 87th Cong., 2d Sess. 18–26 (1962); S. Rep. No. 1526, 86th Cong., 2d Sess. 13–19 (1962). As a result, the Commission declared a moratorium on its deintermixture proposals. Deintermixture Cases, 23 P & F Radio Reg. 1645 (1962).

[39] See note 38 *supra.*

(CATV).[40] Because of its relative newness and far-reaching importance, and because it serves as an ideal vehicle for considering what limitations, if any, the first amendment places on economic regulation by the Commission the Commission's regulatory efforts to control CATV warrant somewhat greater attention than other areas of FCC economic regulation.

Begun as relatively crude facilities designed to bring television broadcast signals into topographic pockets and other geographical areas where an adequate number of satisfactory signals could not be received, CATV has now become a major rival of the broadcast industry.[41] In the six year period between 1959, when the Commission first considered CATV regulation,[42] and 1965, when it first adopted comprehensive regulations governing CATV operations,[43] the number of CATV systems more than trebled.[44] Instead of the old "Mom and Pop" type of community facility, bringing in perhaps three to five nearby signals, CATV systems now boast of twenty or more channels and, with the aid of microwave, can take the signals virtually any distance and into any size or type of community.[45] With this extraordinary development and growth it was inevitable that there would be a confrontation between CATV owners and broadcasters, for although CATV does not generally compete with broadcast stations for advertising revenues,[46] it does compete for the audience on which their advertising revenue depends.[47]

The history of CATV regulation began with the Commission's termination of an inquiry into the economic impact of CATV systems and other auxiliary facilities such as translators on broadcast stations.[48] The Commission in 1959 found insufficient economic impact by CATV systems at that stage of their development to justify taking jurisdiction over these all-wire facilities.[49] However, it was not long before it became apparent that CATV was a rapidly growing phenomen which, unless regulated before it grew too large, might escape regulation until after it had had a severe economic impact on broadcast stations. In 1962 the Commission, in *Carter Mountain Transmission Corporation*,[50] denied a microwave carrier's application for a license to improve service to CATV customers because of probable economic injury to a local station in competition with CATV. However, the carrier was given leave to reapply on a showing that the CATV system would carry the local station on its cable and that it would not carry programs of stations which duplicated the local station's programs. This type of protection is generally referred to as "non-duplication" or, more euphemistically, "exclusivity." Later in 1962 the Commission instituted rulemaking proceedings to consider adopting the *Carter Mountain* type of conditions of carriage and nonduplication as permanent rules for all common carrier licensees. The proposal was extended a year later to noncommon carrier licensees as well.[51] These proposals culminated in the Commission's *First Report on CATV Regulation*[52] in 1965, adopting rules requiring mandatory carriage and nonduplication for all microwave-served CATV systems.[53]

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[40] Reduced to its basic elements, a CATV system consists of two basic components: (a) a "head-end" system consisting of receiving antennae and related equipment (e.g., amplifiers), usually of high gain capability and generally situated in a location best suited for receiving usable signals from broadcast stations; and (b) a distribution system consisting of coaxial cable, which transmits the signal from the head-end system to the subscriber, and amplifiers to compensate for signal attenuation through the cable. Although the CATV system itself *transmits* entirely by wire, most larger systems today make use of micro-wave relay facilities which permit a signal to be picked up by a receiving antenna near its point of origin, converted to microwave frequencies and transmitted virtually any distance to another receiving antenna from which it is converted back to video-audio frequencies and transmitted by cable to the subscriber. For a brief description, see *Hearings on Regulation of Community Antenna Television Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce,* 89th Cong., 1st Sess., ser. 89–16, 4–5 (1965) [hereinafter cited as *1965 Hearings on CATV Regulation*].

For general surveys of the CATV regulation problem, see Note, *The Wire Mire: The FCC and CATV,* 79 HARV. L. REV. 366 (1965); Note, *Community Antenna Television: Survey of a Regulatory Problem,* 52 GEO. L.J. 136 (1963). An economic analysis of the CATV industry, commissioned by the FCC, is M. SEIDEN, AN ECONOMIC ANALYSIS OF COMMUNITY ANTENNA TELEVISION SYSTEMS AND THE TELEVISION BROADCAST INDUSTRY (1965) [hereinafter cited as SEIDEN REPORT]. Although the SEIDEN REPORT contains a number of dubious conclusions, resulting partly from now out-of-date statistics, it provides a useful general description of the industry and its structure as of that time.

[41] On the growth of CATV, see authorities cited note 40 *supra*.

[42] *CATV Systems and Auxiliary Television Services,* 18 P & F RADIO REG. 1573 (1959).

[43] *First Report on CATV Regulation,* 4 P & F RADIO REG. 2d 1725 (1965) [hereinafter cited as *First Report*].

[44] *Second Report on CATV Regulation,* 6 P & F RADIO REG. 2d 1717, 1772–79 (1966) [hereinafter cited as *Second Report*].

[45] *Id.*

[46] Some CATV systems have carried local advertising but not to the degree that it has become a serious competitor for advertising revenues. The Commission's new rules prohibit deletion of advertising of the station whose signal is carried. *Id.* at 1757. However, they apparently do not prohibit carriage of advertising by CATV in addition to the station's advertising.

[47] The existence or probable existence *vel non* of economic injury is really at the heart of the entire controversy between CATV, broadcasters, and the Commission. CATV interests have persistently denied that there has been (or that there is sufficient evidence that there will be) any serious impairment to broadcast revenues resulting from CATV competition. *See, e.g., 1965 Hearings on CATV Regulation* 132–33, 213–15 (statements of President of NCTA and President of Jerrold Corp.). The broadcast opponents of CATV on the other hand have contended essentially that the past impact has been understated but, in any event, the *past* experience with CATV, based on its operations as a small service, is an inadequate guide to the future and that current trends show demonstrable tendencies towards economic impact. *See, e.g., id.* at 357–59, 389–94; *Appendix to Reply Comments of NAB,* in FCC Dkt. Nos. 14895 and 15233, Oct. 26, 1964 (the "Fisher Report"). The Commission, wavering somewhat at first, has now sided with the latter view that CATV would, absent regulation, have strong economic impact on all broadcast stations. *Second Report* 1772–80.

[48] *CATV Systems and Auxiliary Television Services,* 18 P & F RADIO REG. 1573 (1959). Translators are low power, auxiliary *broadcast* stations designed, as CATV systems were originally designed, to fill in topographic "pockets" and sparsely settled areas where adequate off-the-air service cannot be received from regular broadcast stations. For a brief description of their history and use, see SEIDEN REPORT 18–22 Historically,

The carriage and nonduplication rules implemented by the Commission's *First Report* followed the regulatory mode of *Carter Mountain*. No jurisdiction was asserted directly over the CATV systems themselves, but only over those served by microwave facilities. While this disposed of virtually all of the larger systems and those capable of having the greatest economic impact on broadcast stations, the mode of regulation could hardly be considered completely effective from the point of view of the Commission, or very evenhanded from the point of view of those regulated. Moreover, the carriage and nonduplication rules, originally the ultimate goal of CATV regulation, had become merely a stopgap measure in the view of the broadcast opponents of CATV and the Commission. At best they helped correct an unfair competitive

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translator operations have been severely restricted by Commission regulation, primarily to avoid a very troublesome problem of interference which it has been thought would result from too free licensing of such facilities. However, the Commission has in recent years taken some steps to liberalize translator licensing and has under consideration other proposals. *See Second Report* 1757–61. Without question, considerable impetus for this liberalization policy stems from the desire to provide an auxiliary *broadcast* facility as a competitive substitute for CATV.

[49] *CATV Systems and Auxiliary Television Services*, 18 P & F Radio Reg. 1573, 1595–97, 1602 (1959). Although the Commission did not pass directly on its statutory power to control CATV in the event it were shown that CATV had a marked economic impact on broadcasting, it did reject other bases of jurisdiction It held that it had no power to assert jurisdiction over CATV systems as common carriers under part II of the Act, following its prior decision in Frontier Broadcasting v. Collier, 16 P & F Radio Reg. 1005 (1958). 18 P & F Radio Reg. at 1599. It further held that it had no statutory power to *license* CATV systems under § 301 of the Act because CATV did not comewithin the definition of "radio station" or "broadcasting" to which § 301 applies. *Id.* at 1600–01. The Commission stated that it had no plenary authority to regulate CATV simply because it was related to or affected broadcasting, which was within its jurisdiction. *Id.* at 1600. Finally, it held that it had no power to regulate CATV indirectly through its admitted jurisdiction over microwave facilities which serve CATV. *Id.* at 1603–05. On this latter position, the Commission subsequently changed its mind and was upheld on appeal in Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

Although the Commission reserved judgment on its authority to regulate CATV where it could be shown to impair its regulatory scheme for broadcasting, it seems evident that the Commission did not believe there was any basis for asserting jurisdiction even if economic injury were substantiated.

[50] 22 P & F Radio Reg. 193 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*. 375 U.S. 951 (1963)

[51] *See* 1965 FCC Ann Rep. 82–83.

[52] Note 43 *supra*.

[53] The most controversial aspect of the nonduplication rules was, and has continued to be, the question of the duration of the nonduplication protection. Over the bitter opposition of CATV interests, who wanted no more than simultaneous or at least no more than "same-day" nonduplication protection, the Commission adopted a period of [illegible] days protection, 15 days before broadcast and 15 days after. *See e.g., 1965 Hearings on CATV Regulation* 133–53 (testimony of President of NCTA). The extra period was thought essential to protect delayed network broadcasts and, to a degree, syndicated film broadcasts by local stations. *First Report* 1768–71. However, the Commission subsequently reduced the protection period down to "same-day" protection. *Second Report* 1747–51.

advantage which CATV was considered to have[54] and alleviated some of its economic impact. These rules did not, however, correct the basic economic problem which was posed by CATV, *i.e.*, simple dilution of audience as a result of an increased number of available signals.

Believing that this problem could not be met without more comprehensive control exercised directly over CATV systems, and not merely over microwave carriers, the Commission simultaneously issued in its *First Report*, a notice of further inquiry[55] which proposed, in addition to carriage and nonduplication requirements, broad scale restrictions on CATV operations. In 1966 the Commission released its *Second Report on CATV Regulation*[56] in which it asserted jurisdiction and regulatory authority over CATV systems directly, irrespective of whether they used microwave facilities, extended carriage and nonduplication rules to all CATV systems, and issued comprehensive regulations controlling CATV entry which were aimed principally at distant carriage of signals by CATV into markets far removed from those served by the stations whose signals were carried.[57] The Commission asserted its jurisdiction over all CATV systems on the grounds that its authority under the Act is not confined to regulation of common carriers and licensing of radio stations, but extends beyond these areas to activities in interstate commerce[58] which are an integral part of the radio and television system and which have an immediate and substantial disruptive effect on the scheme of regulation adopted by the Commission and approved by Congress and the courts.[59]

The ultimate effect of the Commission's regulation of CATV is still uncertain despite the adoption of its *Second Report*. As may be expected of any undertaking of this magnitude, it will be many years before the scope of the rules is fully developed, and not until this occurs can their true effects be known. Although plainly more far-reaching insofar as a greater number of persons are involved, the CATV rules are not unique in their ultimate purpose or effect. The basic theory behind them is essentially that underlying the *Carroll* case:[60] Unrestrained competition can severely curtain the economic support of radio and television stations causing injured stations to cut back more expensive programming (which by a somewhat dubious hypotheses is deemed "better" programming) to leave the air permanently, resulting in a loss of broadcast service to the public.

4 *Proposed Authorization and Regulation of Subscription TV—*

Whether to authorize subscription television (STV) on a permanent basis has been one of the enduring problems of the Commission since the earliest days of television. In 1955 the Commission instituted proposed rulemaking to inquire into its power under the Communications Act to authorize subscription television and to determine whether such authorization would be in the public interest.[61] After prolonged delay, experimental operations were licensed in

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[54] One of the chief grounds relied on by the Commission in its *First Report* was that the CATV system has an unfair competitive edge because: (a) in those homes in which it is hooked up, it can effectively preclude reception of competitive off-the-air signals, a problem which was overcome by requiring carriage on the cable; and (b) unlike the broadcast station, CATV does not pay for the programs which it takes from broadcast stations and sells in competition with such stations. This latter problem was alleviated in part by the nonduplication rules and the carriage rules. *See First Report* 1747–52.

[55] *Notice of Inquiry and Notice of Proposed Rule-Making,* 4 P & F RADIO REG. 2d 1680 (1965).

[56] Note 44 *supra.*

[57] The principal purpose served by this type of "distant carriage" restriction, as opposed to other forms of restriction, is that it enables the Commission to conform CATV operations to its basic geographical scheme of allocations for television broadcast stations; and it effectively limits the attractiveness and, hence, growth potential of CATV systems since, except as permitted within the strict geographical limits, the CATV system cannot bring in much more than subscribers already have.

[58] Although the question whether CATV systems which operate in the confines of one state operate in interstate commerce was the subject of considerable dispute by CATV interests, this seems the least troublsome aspect of the problem. *See* Idaho Microwave, Inc. v. FCC, 352 F.2d 729 (D.C. Cir. 1965); Ward v. Northern Ohio Tel. Co., 300 F.2d 816 (6th Cir.) *cert. denied*, 371 U.S. 820 (1962).

[59] *See Second Report* 1725–32; *Notice of Inquiry and Notice of Proposed Rule-Making, Regulation of CATV*, 4 P & F RADIO REG. 2d 1680, 1707–12 (1965). On congressional and judicial approval, *see* H.R. REP. No. 1559, 87th Cong., 2d Sess. 3 (1962) (approving the system of service through diverse local stations); Logansport Broadcasting Corp. v. United States, 210 F.2d 24 (D.C. Cir. 1954) (upholding the Commission's *Sixth Report and Order*).

[60] 258 F.2d 440 (D.C. Cir. 1958).

[61] 20 Fed. Reg. 988 (1955).

Hartford, Connecticut.[62] At the termination of the trial period in Hartford, further proceedings were commenced to study the question anew in light of the results of this test.[63]

To make an initial investigation and prepare a report on the question, three commissioners were appointed as a Subscription Television Committee. After some two years of further rulemaking proceedings, the STV Committee has recently submitted its report in which it proposes for adoption by the full Commission permanent authorization of STV, but with numerous restrictions and limitations.[64] The full Commission, apparently still undecided, has declined to act without still further comment and argument from the industry and other interested parties.[65] Accordingly, the matter is still pending and, after twelve years in limbo, the fate of STV is still undecided.

The central issue on which regulatory policy has been and is being debated is analogous to the issue raised by the sudden rapid growth of CATV: the problem of economic impact on free television broadcasting. The matter of economic impact is, however, distinct. Although there would be direct diversion of audience from free television to pay television, the principal impact of STV, according to its opponents, is the possible diversion or siphoning of programs and talent from free television. This siphoning argument is based on the conclusion that STV could outbid conventional television's advertising sponsors for program talent. Of principal concern is the supposed ability of STV to outbid free television for movies and major sports events. With this type of programming lost to STV, free television would be unable to generate sufficient advertising revenues to compete for an audience and would eventually lose out to STV. At that point, according to the STV opponents, all television would become pay television.[66]

The primary concerns of the STV Committee with regard to the economic impact of STV are two: the possible preemption of broadcast time by STV operations, particularly in prime-time viewing hours,[67] and the siphoning of programs and program talent from free television to STV.[68] As protection against these dangers to free television, the Committee has proposed that a number of restrictions be placed on STV market entry and STV operations. In order to ensure that at least three network services and one independent service could be received in such markets and to minimize the number of hours of free television which would be preempted, the Committee would first restrict STV operations to markets receiving Grade A commercial service from five stations, of which the STV station may be one.[69] Further, it would permit only one STV operation in any market.[70] To protect against program and talent siphoning, the STV Committee has proposed regulations which have greater constitutional implications insofar as they are aimed directly at the kind of programming STV may present. The Committee has proposed prohibiting STV from presenting feature films older than two years from the time of first release to theatres on the rationale that movies newer than two years are not generally available to free television. In addition, it has proposed prohibiting STV from carrying current sports events which were regularly carried live on free television in the community in which the STV operates, and prohibiting STV from presenting continuing series programs which are a mainstay of free television. Finally, it proposes limiting the total percentage of time which STV may devote to feature films and sports to no more than ninety per cent of a station's STV programming annually and no more than ninety-five per cent monthly.[71]

As in the case of the restrictions on CATV market entry and operations, the central policy of the above regulations is to restrict competition to the extent deemed necessary to preserve the continuation of free television broadcast service. Essentially, it is a reflection of the principles of the *Carroll* case. It is in these terms that the constitutional implications of the Commission's regulation of CATV and pay television and its economic regulation in general must be considered.

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[62] Hartford Phonevision Co., 20 P & F RADIO REG. 754 (1961), *aff'd*, Connecticut Comm. Against Pay TV v. FCC, 301 F.2d 835 (D.C. Cir.), *cert. denied*, 371 U.S. 816 (1962).

[63] *Further Notice of Proposed Rule Making and Notice of Inquiry*, 7 P & F RADIO REG. 2d 1501 (1966).

[64] *Report of the Subscription Television Committee to the FCC*, 10 P & F RADIO REG. 2d 1617 (1967) [hereinafter cited as *STV Report*].

[65] 10 P & F RADIO REG. 2d 1617 (1967). FCC 67–819 (July 14, 1967).

[66] *See STV Report* 1654–57.

[67] *Id.* at 1660–61, 1668–79.

[68] *Id.* at 1661.

[69] *Id.* at 1668–73; proposed rules, § 73.642, *id.* at 1738.

[70] *Id.* at 1678–79; proposed rules, § 73.642, *id.* at 1738.

[71] *Id.* at 1702–14; proposed rules, § 73.643, *id.* at 1740, app. D.

C. First amendment implications of economic regulation

The foregoing discussion of the general regulatory framework within which the Commission operates is not intended to suggest that the entire regulatory scheme under the Communications Act has serious first amendment implications. All aspects of Commission regulation, whether they be technical, social, or economic, have some measure of impact on free speech. However, no one would seriously contend today that the Commission is without constitutional power to license the use of radio frequencies, and, as part of such a licensing scheme, to impose such technical restraints and limitations as are necessary to ensure a fair, equitable, and efficient distribution and use of such frequencies. *Minimum restraints through licensing are necessary in order that there be any effective radio communication, a fact made clear by the experience of the 1920's. To this extent the cliche that Commission regulation makes possible the exercise of free speech in radio communications is fair and accurate.*

Moreover, beyond the very narrow engineering aspects of allocation of frequencies, it must be accepted that the Commission may set a very broad limit on the type of use to which frequencies may be put. Thus, it seems clearly appropriate to require licensees in the Aviation Radio Service to restrict their communications to those having some relationship to aviation. Nor does it do violence to the first amendment to restrict their use still further and to prohibit private chit-chat.[72]

However, to concede all this sheds little light on the problem, for what is at issue here is not whether the Commission should have and does have the constitutional power to act as a traffic cop of the airways. *The question here is to what extent the Commission may constitutionally restrain free speech on radio and television by regulating economic conditions in the industry.*

The *NBC* case[73] is generally regarded as the touchstone for measuring the constitutionality of Commission regulation. Indeed, in the field of economic and program regulation of radio and television, the *NBC* opinion affirming the Commission's power to regulate chain broadcasting has become the *vade mecum* of the Commission in exercising regulatory powers in nontechnical areas. One can scarcely pick up a single case in which the Commission's regulatory authority is in question where some portion of Justice Frankfurter's opinion is not quoted as a talisman to dispel all doubts about the Commission's statutory and constitutional power.[74]

The importance of the *NBC* case lies not in the nature of the specific regulation upheld but in Justice Frankfurter's sweeping pronouncements on the comprehensive powers[75] with which Congress endowed the Commission and his almost equally broad pronouncements on the constitutionality of Commission exercise of such powers. Of primary importance, of course, is the scope of the latter. Rejecting a challenge to the regulations based on the first amendment, Justice Frankfurter concluded for the majority: "The regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. *Unlike other modes of expression, radio inherently is not available to all.*

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[72] *See* Lafayette Radio Electronics Corp. v. United States, 345 F.2d 278, 281 (2d Cir. 1965) (Friendly, J.), upholding against first amendment challenge Commission regulations prohibiting the use of radio facilities in the Citizens Radio Service as a "hobby" or a "diversion."

[73] National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

[74] The Commission is not alone in so regarding *NBC*. *See, e.g.*, Barron, *The Federal Communications Commission's Fairness Doctrine: An Evaluation*, 30 GEO. WASH. L. REV. 1, 2 n.6 (1961): "The [*NBC*] opinion . . . is generally regarded as having sounded the death knell for the argument that government regulation of broadcasting violated the licensee's right of free expression guaranteed by the First Amendment." Although this statement of the effect of *NBC* in silencing first amendment objections to broadcast regulation is plain hyperbole, it is nevertheless indicative of a widespread, if wholly uncritical, acceptance of *NBC* an dispositive of constitutional issues in broadcast regulation.

[75] 319 U.S. at 217.

That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different . . . The right of free speech does not include, however, the right to use the facilities of radio without a license. *The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the 'public interest, convenience, or necessity.'* Denial of a station license on the ground, if valid under the Act, is not a denial of free speech."[76]

Accepting this opinion at face value, it is difficult to find any significant first amendment limitations on the authority of the Commission to regulate radio and television broadcasting, at least in the area of economic regulation,[77] so long as it can be found that the standard of public interest, convenience, or necessity is satisfied. At the same time, however, Justice Frankfurter's opinion seems fundamentally wrong insofar as it suggests an unacceptably broad license for Commission regulation, particularly in the field of programming. At the heart of Frankfurter's reasoning is the classic cliche: "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation."[78]

This argument, which has been assiduously trotted out on every appropriate occasion, has several major defects.[78a] First, contrary to common assumption, the radio broadcast spectrum is not now, and may never be, saturated. While the technical limitations on entry into broadcasting are real enough, the economic limitations are probably more restrictive. The economic barriers to entry into radio broadcasting are, however, far less restrictive than in the case of media such as newspapers, which lie essentially beyond public control. Second, there are more competitive outlets for expression in radio and television than there are in the newspaper media—or probably in all major publications media combined. This disparity between the number of different radio and television outlets and the number of newsprint media is increasing. Third, the mere fact that there are barriers to entry into the communications media, be it newspapers or radio and television, does not in itself resolve the problem of the kinds of control that are permissible and how narrow the focus on restraint of free speech may be.

The defect of Justice Frankfurter's approach to the constitutional issue is illustrated by the Commission's regulation of community antenna television. The CATV regulations prohibiting duplication of the programs of local broadcast stations by programs carried on CATV systems have been twice upheld against constitutional challenge. In the *Carter Mountain* case[79] the court rejected the argument that the Commission's nonduplication protection for local television stations contravened the first amendment. Essentially the court reasoned that since some restraint on complete freedom is inherent in all licensing regulation of radio communications, "it may be assumed that any denial of a license to transmit radio or television programs keeps off the air, and hence deprives the public of, the material which the applicant desires to communicate. But that does not mean that the Commission must grant every license which is requested. Nor does it mean that the whole statutory system of regulation is invalid. Quite the contrary is true: a denial of a station license, validly made because the standard of 'public interest, convenience, or necessity' has not been met, is not a denial of free speech.[80]"

On the same reasoning, the court again upheld the nonduplication rules against first amendment challenge in *Idaho Microwave, Inc. v. FCC.*[81]

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[76] *Id.* at 226–27.

[77] However, *NBC* is read as broadly permissive in the case of program regulation as well as economic regulation. This is discussed in Parts II & III *infra.*

[78] 319 U.S. at 226.

[78a] *See generally* Part III *infra.*

[79] Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), *cert. denied,* 375 U.S. 951 (1963).

[80] *Id.* at 364.

[81] 352 F.2d 729 (D.C. Cir. 1965).

Neither decision deals with the constitutional issue in a satisfactory way. To be sure, licensing of radio communications involves a degree of restraint. The mere fact that some restraint may be inherent in legitimate licensing does not in itself, however, justify this particular form of regulation nor, indeed, does it bestow a constitutional carte blanche on all forms and all degrees of regulation.[82] Not even the FCC would contend, for example, that the licensing power includes the power to direct every aspect of the licensee's operations, including the particular programs presented. Moreover the reasoning is inapposite in the case of direct regulation of CATV where there is no prevailing scheme of licensing to which regulation can be said to be an incidental restraint.

While the constitutional issue was inadequately analyzed in *Carter Mountain* and *Idaho Microwave*, it was almost ignored in *Buckeye Cablevision, Inc. v. FCC*.[83] In *Buckeye* the court upheld the CATV regulations restricting carriage by the system of distant signals. Unlike *Carter Mountain* and *Idaho Microwave* the rules here were directed against CATV systems themselves and were not confined to regulating microwave carriers within the licensing jurisdiction of the Commission. The two principal challenges to the rules were that the Commission was without statutory jurisdiction to regulate CATV and, more fundamentally, that the rules violated the first amendment insofar as they precluded the system from carrying signals originating beyond a specified distance from the CATV station. Affirming the Commission's jurisdiction to regulate CATV systems directly, the court gave little more than the back of its hand to the first amendment challenge, stating that "the restraint imposed by the rules is no more than is reasonably required to effectuate the public interest requirements of the Act."[84] The court then cited *NBC* and *Carter Mountain* for support.

Taken at face value, this rather offhand statement suggests the preposterous conclusion that the Constitution is circumscribed by an act of Congress and that, so long as the Commission's actions are within the scope of its legislative mandate, there are no first amendment restrictions. Undoubtedly the court did not intend such a sweeping abdication to Congress of the judicial power to determine the scope of the first amendment. However, its refusal to go beyond the question of the legislatively created public interest standard to resolve the constitutional issue suggests just such an abdication.

The court's failure to deal with the first amendment issue is not corrected by its reliance on the *Carter Mountain* and *NBC* cases. As previously noted, the reasoning of *Carter Mountain* is entirely inadequate since the validity of some types and degrees of restraint does not justify all types and all degrees of restraint. Nor is the issue resolved by citing *NBC*. Even if the technical barriers to entry and the fact that radio is inherently not available to all justify Commission regulation of radio and television broadcasting, this clearly does not support regulation of CATV. Unlike broadcasting, CATV transmits its signals entirely by wire, and except to a negligible degree[85] transmission by wire does not interfere with other stations. From a technical viewpoint, CATV is available to all. If, therefore, Justice Frankfurter's scarcity argument is relied on as the constitutional basis for regulating radio and television, it follows that CATV is no more constitutionally subject to regulation of entry than newspapers, magazines, or other communications media. The *NBC* case, far from providing support for Commission regulation, as concluded by the Commission,[86] really supports the opposite result.

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[82] *Cf.* Sherbert v. Verner, 374 U.S. 398 (1963).

[83] 10 P & F Radio Reg. 2d 2029 (D.C. Cir. 1967).

[84] *Id.* at 2034. *Buckeye* conflicts with an earlier decision in the Ninth Circuit, Southwestern Cable Co. v. United States, 378 F.2d 118 (9th Cir. 1967), *petition for cert. filed*, 36 U.S.L.W. 3068 (U.S. July 13, 1967), holding that the commission had no statutory jurisdiction over non-microwave CATV.

[85] Even radio transmissions by wire emit some degree of spurious radiation which may interfere with radio broadcast signals. These spurious emissions are not of major significance, however, and can be practically eliminated by use of heavy cable. The Commission's regulations have long provided for control of such spurious emissions long before CATV itself was regulated. *See* 47 C.F.R. § 15.1 (1967).

[86] *See Notice of Inquiry and Notice of Proposed Rule-Making, Regulation of CATV,* 1 P & F Radio Reg. 2d 1679, 1709–10 (1965); *see also CATV Regulation (Petition for Reconsideration of Second Report),* 8 P & F Radio Reg. 2d 1677, 1681–82 (1967) (rejecting argument that regulation unconstitutionally restrains free speech, relying in part on *NBC*).

Following Justice Frankfurter's scarcity argument to its logical conclusion, it must be seen that abandonment of CATV regulation and the supplanting of broadcasting with CATV and other forms of wire communication would do away with the entire problem of spectrum scarcity and with it the entire ostensible basis for the regulatory scheme established by the Communications Act of 1934.

Notwithstanding what seem to be obvious fallacies in the reasoning underlying the *NBC*, *Carter Mountain*, and *Buckeye* cases, it does not necessarily follow that the economic regulation sustained in those decisions is unconstitutional. The problem is not that these decisions have reached the wrong result but that they have traveled the wrong path. On grounds other than those advanced in the decisions, the Commission's economic regulation and its proposed subscription television regulations seem defensible even under the strictest application of the first amendment.

Radio, television, newspaper publication, and theatre are, within limits, subject to general economic restraints and regulations. For example, no one doubts any longer that communications media, whether or not their facilities are inherently available to all, are subject to the antitrust laws. In *Associated Press v. United States*[87] the Court, per Justice Black, held that the antitrust laws prohibited the Associated Press from restricting member newspapers from furnishing news to nonmember newspapers. The Court rejected the contention that this application of the antitrust laws to a news media was in violation of the first amendment. "*It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom.* The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. *That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.* Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. *Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.* The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.[88]"

It may be argued that the *AP* antitrust case disposes of the constitutional challenge to regulations against monopoly but not of the converse, *i.e.*, regulaions which have the effect of *furthering* economic concentration, and economic regulation of the kind reflected in *Carroll*, CATV regulation, and the proposed regulation of STV operations is directly contrary to regulation of the type upheld in the *AP* case since the effect really is a measure of protection of economic concentration.

One critic of the policy of imposing barriers to entry on economic grounds has contended that this latter type of economic regulation, in contrast to antimonopoly regulation, is unconstitutional.[89] He concludes that the chain broadcasting rules upheld in *NBC* flow logically from the Court's recognition of the scarcity of available frequencies,[90] but economic regulation of entry does not. But this distinction between regulatory limits on entry and regulatory limits on monopoly simply reflects a bias in favor of strong competition at all costs. However sound this view may be as a matter of economic or social policy, it seems rather far-fetched to give it constitutional stature.

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[87] 326 U.S. 1 (1945).

[88] *Id.* at 20 (footnote omitted). The Court also relied in part on its decision in Associated Press v. NLRB, 301 U.S. 103 (1937), in which it upheld against first amendment challenge the application of the National Labor Relations Act to AP. *See* note 272 *infra* and accompanying text. It also relied on its prior decision in Indiana Farmer's Guide Co. v. Prairie Farmer Co., 293 U.S. 268 (1934), involving the application of the antitrust laws to a newspaper. However, in *Prairie Farmer* the first amendment issue was not raised or discussed.

[89] Givens, *Refusal of Radio and Television Licenses on Economic Grounds*, 46 VA. L. REV. 1391, 1400–03 (1960). *Cf.* Weaver v. Jordan, 64 Cal. 2d 235, 49 Cal. Rptr. 537, 411 P.2d 289 (1966), which invalidated a state statute banning subscription television (by wire) and distinguished *NBC* on grounds that the rules there were designed to eliminate monopoly whereas the statute here fostered monopoly.

[90] Givens, *supra* note 89, at 1401–02.

While it is true that economic regulation of the type considered in the *Carroll* case, the Commission's CATV regulation or its proposed regulation of STV may in a very real sense be economic protectionism,[91] it is nevertheless a protectionism undertaken to effect the purpose the antitrust laws were supposed by the Court in the *AP* case to serve—diversity of opinion. The rationale expressed by the Commission for its regulation of CATV is that CATV, left to itself, may seriously curtail if not destroy many of the local broadcast outlets whose continued existence is necessary to maintain diversified sources of free speech and opinion.

More fundamentally, the constitutionality of general economic regulation does not necessarily turn on whether the regulation has the purpose or effect of benefiting free speech itself. This is clearly the necessary conclusion to be drawn from *Associated Press v. NLRB*[92] which upheld the constitutionality of the National Labor Relations Act as applied to the press. Here the NLRB had entered a cease and desist order against AP under section 7 of the Act ordering it, among other things, to reinstate a member of its editorial staff whom it had discharged. AP argued that the Act, as applied to it in this manner, violated the first amendment. AP contended that in hiring and firing "it must have absolute and unrestricted freedom to employ and to discharge those who, like Watson, [the discharged employee] edit the news . . . and that the Associated Press cannot be free to furnish unbiased and impartial news reports unless it is equally free to determine for itself the partiality or bias of editorial employees . . . [A]ny regulation protective of union activities, or the right collectively to bargain on the part of such employees, is necessarily an invalid invasion of the freedom of the press.[93]"

The Court rejected the contention as irrelevant since no bias on the part of the employee had been shown. The contention was also rejected as an unsound generalization, the Court noting "[t]he business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws.[94]"

Unlike the *AP* antitrust case discussed above, the *AP* labor case does not in any respect turn on a presumed, ultimate benefit to the goal of free speech. It cannot be said, for example, that application of the labor laws, unlike the antitrust laws, has the effect of fostering diversity. The rationale of the *AP* labor case is, very simply, that communications media as commercial enterprises are no less subject to general social regulation merely because they are in the business of dissemination of news and opinion.

The same rationale, which seems quite obviously sound as a principle of constitutional law, applies to radio and television as well as to newspapers. It applies regardless of whether radio and television is distributed through a spectrum which is inherently not available to all or by means of wire which is.[95]

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[91] *See* Cole, *Community Antenna Television, The Broadcaster Establishment, and the Federal Regulator*, 14 AM. U.L. REV. 124–25, 142–45 (1965).

[92] 301 U.S. 103 (1937).

[93] *Id.* at 131.

[94] *Id.* at 132. For an extended treatment of "general legislation" to which the "press," including radio, is subject, see 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 500–678 (Comm'n on Freedom of the Press ed. 1953). Chafee identifies five types of "general burdens" in this regard: (1) taxation, (2) laws against unfair competition, (3) rationing of paper (not, of course, applicable to radio), (4) labor laws, and (5) antitrust laws. *Id.* at 501. Of all of these general burdens, Chafee regards the application of the antitrust laws to communications industries as the most troublesome in its potential for interference with freedom of the press. *Id.* at 666–74. Chafee's concern in this respect seems unjustified. As he himself recognizes, the antitrust laws have not been applied to communications industries in such a manner as to raise any imminent threat to freedom of speech and the press. Nor is there anything which suggests such an application is likely in the future.

[95] *But see* Weaver v. Jordan, 64 Cal. 2d 235, 49 Cal. Rptr. 537, 411 P.2d 289 (1966), holding unconstitutional under the state constitution and the first amendment a statute banning subscription television. The result seems dubious. Even though the statute seemed ill-advised, it does not seem unconstitutional to proscribe certain methods of communications on general economic or other grounds not going to the content of the speech. *See* cases discussed in text above; *cf.* Kovacs v. Cooper, 336 U.S. 77 (1949). The court conceded the validity of general regulatory restraints of the type upheld in *Kovacs* or in the *AP* cases, but struck down the statute here because it went beyond regulation and banned subscription television entirely. But the distinction seems thin.

It is important to stress that acceptance of this rationale in support of the constitutionality of the Commission's regulations is not necessarily an acceptance of the Commission's statutory power. It is particularly necessary to distinguish statutory from constitutional authority in the CATV area.[96] Moreover, in order to accept this rationale, one need not accept the necessity or the wisdom of the Commission's regulatory policy in all respects. In the case of CATV regulation one might take the view that the Commission's regulation goes too far. One can even take the extreme view that the Commission's regulatory policies in this area are the handiwork of the economically and politically influential members of the industry.[97] Similarly one might conclude that the proposed restrictions on STV operations, such as limiting STV to markets having five or more commercial services, are unnecessary and overly protectionistic. But an unwise or unnecessary policy does not become transformed into an unconstitutional policy merely because free expression is in some way involved. If this were the case, there are many antitrust, labor, social, and economic measures in effect today which might well be unconstitutional as applied to any form of communications media.

While it might be granted that the Commission could limit or proscribe altogether a CATV system's competition with broadcast stations in certain markets where this is deemed necessary to the public interest, it is arguable that the Commission cannot achieve this same result by proscribing certain types of CATV programming and that it therefore cannot impose restrictions simply because the CATV programs duplicate local programming or because they originate in a "distant market." In the abstract, the argument has a certain persuasiveness. Certainly the power to achieve a given economic result such as protection from "disruptive" competition does not include the power to achieve it by any and all means. Assuming the power of the Commission to preclude CATV entry into certain markets entirely,[98] it clearly cannot impose unconstitutional restrictions or conditions on entry.[99] Plainly the Commission could not tell a CATV system that it could operate in a given locale, but only on the condition that it carry such particular programs as the Commission approved as suitable for the residents of that locale.

However, the mere fact that a particular program classification is used to implement the regulatory objective does not necessarily indicate that the Commission is engaged in censorship. The Commission's CATV program nonduplication rules which, in general, preclude a CATV system from carrying television programs which duplicate the programs carried on the same day by local broadcast stations, illustrate the problem. Although the effect might be to proscribe a particular classification of programming, the classification is a neutral one, based not on program content or quality but simply on the timing and manner of presentation. The effect is not to keep such programming from being presented but to restrict the number of entirely duplicative presentations at substantially the same time. Thus, what is really involved here is not a true classification of programs but a classification of signals. If it is accepted that economic regulation in general is constitutional, then given a justifiable economic objective such as the elimination of duplicate programming, such restraints as the CATV nonduplication rule seem constitutional.[100]

An analogous albeit somewhat more troublesome problem is presented by the new subscription television regulations proposed by the Commission's STV

The Act did not ban all television communications but only the business of charging directly for television. Query whether the extent of the restraint on such an incident of communications and not directed to the content of the communications goes any further than the restraint upheld in *Kovacs* or restraints imposed in applying general economic regulation of the type sustained in the *AP* cases.

[96] That is, statutory authority in the *jurisdictional* sense. Of course, since § 326 of the Act, 47 U.S.C. § 326 (1964), is in substance an incorporation of the first amendment's prohibition of "censorship," anything which unconstitutionally interferes with free speech also violates § 326.

[97] *See* Cole, *supra* note 91.

[98] *But see* Weaver v. Jordan, 64 Cal. 2d 235, 49 Cal. Rptr. 537, 411 P.2d 289 (1966).

[99] *E.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Hannegan v. Esquire, Inc., 327 U.S. 146, 156 (1946); Terral v. Burke Constr. Co., 257 U.S. 529 (1922).

[100] The same reasoning would hold true of the CATV rules restricting carriage of "distant" signals, *i.e.*, signals originating beyond a certain distance from the community served by the CATV system. Here regulation is again drawn on a classification of program signals, a differentiation between local and distant signals. Like nonduplication, the classification is not based on a judgment of program quality or desirability but on the purely neutral factor of distance (which again is used as a means of achieving a measure of economic protection).

Committee. The proposal to prohibit broadcast of feature films which are more than two years old, current sports events regularly carried live on local conventional stations, series-type programs, and combined feature film and sports totaling more than ninety per cent of a station's annual STV programming would appear to go beyond the kind of CATV nonduplication protection previously discussed. Here certain types of programs, not merely the manner of their presentation, are singled out and forbidden to be carried on STV. Such predetermination of allowable program types would seem clearly unconstitutional if imposed as a flat restraint against presentation on television altogether.

However, such a conclusion is not dispositive here. By prohibiting STV from carrying movies which are more than two years old, the Commission would not be attempting to make a program judgment about the relative quality or acceptability *vel non* of older movies. It would instead be acting on the economic prediction that presentation of older films by STV would siphon such programming away from free television thereby impairing the vitality of the latter.[101] The same economic judgment underlies the proposed regulation which would prohibit STV from carrying current sports events, regularly carried live on free television,[102] and from carrying series-type programs,[103] which, along with movies, have been a mainstay of free television. As in the case of CATV nonduplication regulation, the aim of these rules is not to render judgment on particular types of programs but rather to achieve certain economic goals based on classifications which relate to programming types. As the STV Committee Report points out, such a structuring of the channels of distribution seems entirely consistent with the first amendment, even though it necessarily places some limitation on the dissemination of speech.[104]

The foregoing does not mean, of course, that the Commission has a constitutionally free rein to do as it pleases in the field of economic regulation. More particularly, it does not mean that, under the guise of economic or social regulation fostering diversity of speech, it can control the speech itself to ensure that the dissemination of ideas is sufficiently diverse according to its judgment. In this respect, the STV Committee's proposal to restrict a station's annual STV programming to not more than ninety per cent feature film and sports programs clearly seems to go beyond any general economic regulation. The sole basis for such a rule is to force STV to present cultural programming.[105] Such a rule is based squarely on a judgment as to the type of programming deemed to be desirable, a judgment which goes beyond general economic regulation and enters, subtly but surely, into the area of program regulation, where the Commission's regulatory policies and actions seem to be of far more doubtful constitutional validity.

II. REGULATION AND CONTROL OF PROGRAMMING

While the first amendment implications of the Commission's activity in the field of economic regulation have received relatively little attention, the Commission's regulatory efforts in the field of programming have provoked considerable comment. This is understandable in view of the far more doubtful constitutionality of many of its activities and policies in program regulation. The analysis of the constitutional implications of the Commission's regulation of programming has, however, tended to be undiscriminating. Little attention has been given to the different regulatory measures which control or influence programming and to the distinct effects of and the different constitutional problems raised by such measures.

A. *Direct restraints against illegal, harmful, or offensive programming*

1. *Commission Actions From Dr. Brinkley to Pacifica*—

To date the Commission has instituted direct action against a station for broadcast of particular programs in only a few cases. These include defamatory programs,[106] programs involving improper and harmful medical advice[107] or medical advertising,[108] broadcasts relating to illegal lotteries,[109] broadcasts of certain horseracing information,[110] broadcasts of fradulent contests,[111] *and "offensive" programming.*[112] In several such cases, however, although the Commission instituted action by issuing a show cause order or by instituting a hearing on license revocation or renewal, it has taken no final action either because it was persuaded that the programming was in fact satisfactory[113] or because it was satisfied that the licensee's "bad" performance would not be repeated.[114]

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[101] *See STV Report* 1705–07.

[102] *See id.* at 1707–13.

[103] *See id.* at 1714.

[104] *Id.* at 1705. Accepting this argument, however, I do not, for reasons previously set forth at length, subscribe to the Committee's reliance on the sweeping pronouncements laid down in the *NBC* case as support for its proposed regulation. *See id.* at 1704–05.

[105] *See id.* at 1712–13.

The earliest case involving direct restraint in the regulation of programming is the *Dr. Brinkley* case.[115] While much as been made of this famous case, more attention has been given to the atrocious opinion by the court of appeals in affirming the Radio Commission's action than to the facts which led the Commission to refuse to renew Dr. Brinkley's license for a radio station. Dr. Brinkley controlled a radio station, a pharmaceutical association, and a hospital which he operated in a common interest. The hospital was advertised over the station and paid a substantial amount to the station each month for this advertising. The pharmaceutical association was composed of druggists who dispensed medical preparations prepared according to Brinkley's formulas. Each member of the association paid a nominal fee to the station for use of the formulas. For three and one-half hours *daily*, Brinkley personally broadcast a program over the station devoted to diagnosing and prescribing treatment for cases from symptoms given in letters addressed to Brinkley or the station. Predictably, the good doctor's treatment was in almost all cases to prescribe one of his prepared tonics.

It was against this background that the Radio Commission denied Brinkley's aplication for renewal. On appeal the decision was affirmed by the court of apeals on the grounds that: (a) the operations of KFKB were being used for the purely private purpose of furthering Dr. Brinkley's other business and professional interests with no regard for the public interest; and (b) that use of the station for diagnosing the problems of and prescribing treatment for patients whom Brinkley had never even seen was inimical to the public health and safety and, therefore, was not in the public interest.

In 1936 the Commission set down for hearing a renewal application by a licensee which had carried advertisements of two medical preparations. One of these was prepared and sponsored by a person convicted of practicing medicine without a license, while the other was prepared and sponsored by a person convicted of violating the Food and Drug Act and of fraudulent use of the mails in promoting the advertised preparations. However, because the licensee had previously cancelled the advertisements, apparently after learning of these facts regarding the sponsors, and had an otherwise good record, the license was renewed.[116]

Shortly after the Radio Commission had refused to permit Dr. Brinkley to continue to use radio frequencies to further his "organized charlatanism," is was confronted with the Reverend Doctor Shuler, another "doctor," of similarly doubtful character.[117] The Radio Commission refused to renew Shuler's broadcast license based on findings that he was using his licensed frequency for defamatory broadcasts and for obstructing the orderly administration of public justice. As in the *Brinkley* case, the Commission's action seems clearly justified on the facts. Shuler's defamatory broadcasts evidently consisted of more than an occasional lapse of caution and judgment in criticizing individuals. In reviewing the evidence on which the Commission made its finding, the court of appeals noted that Shuler "not satisfied with attacking the judges of the courts in cases then pending before them, attacked the bar association for its activities in recommending judges, charging it with ulterior and sinsister purposes. With no more justification, he charged particular judges with sundry immoral acts. He made defamatory statements against the board of health. He charged that the labor temple in Los Angeles was a bootlegging and gambling joint. . . . On one occasion he announced over the radio that he had certain damaging information against a prominent unnamed man which, unless a contribution (presumably to the church) of a hundred dollars was forthcoming, he would disclose . . . . He alluded slightingly to the Jews as a race, and made frequent and bitter attacks on the Roman Catholic religion and its relations to government." [118]

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[106] Trinity Methodist Church, South v. Federal Radio Comm'n, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied,* 288 U.S. 599 (1932).

[107] KFKB Broadcasting Ass'n v. Federal Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931).

[108] *See* WSBC, Inc., 2 F.C.C. 293 (1936).

[109] WRBL Radio Station, Inc., 2 F.C.C. 687 (1936).

[110] Community Broadcasting Serv., Inc., 13 P & F RADIO REG. 179 (1955).

[111] KWK Radio, Inc., 25 P & F. RADIO REG. 577 (1963); *cf.* Melody Music, Inc., 6 P & F. RADIO REG. 2d 973 (1966) (involvement in fixed quiz show not involving station considered as bearing on "character" of renewal applicant); Eleven Ten Broadcasting, 22 P & F RADIO REG. 699 (1962) (also involving other matters, however, such as program log falsification).

[112] Mile High Stations, Inc., 20 P & F RADIO REG. 345 (1960); Pacifica Foundation, 1 P & F RADIO REG. 2d 747 (1964) (licensee exonerated); *cf.* Palmetto Broadcasting Co., 23 P & F RADIO REG. 483 (1961), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir.), *cert. denied,* 379 U.S. 843 (1964) (also involved, however, misrepresentations to Commission).

[113] *See* Pacifica Foundation, 1 P & F RADIO REG. 2d 747 (1964).

[114] *See* Mile High Stations, 20 P & F RADIO REG. 345 (1960).

[115] KFKB Broadcasting Ass'n v. Federal Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931).

[116] WSBC, Inc., 2 F.C.C. 293 (1936).

[117] Trinity Methodist Church, South v. Federal Radio Comm'n, 62 F.2d 850 (D.C. Cir.), *cert. denied,* 288 U.S. 599 (1932).

On these findings the court of appeals, not surprisingly, held that the Commission's refusal to renew Shuler's license was not a violation of the first amendment.

Pursuant to section 1304 of the United States Criminal Code,[119] the Commission has long scrutinized broadcasts of information about prize-giving schemes and taken action against those found to be lotteries. The Commission's power, indeed, its duty to enforce the mandate of section 1304 and to implement it by means of general rule or individual decisions was expressly affirmed in *FCC v. American Broadcasting Company.*[120]

The Commission has also proscribed the broadcast of horseracing information in a manner and under such circumstances that it is evident that the information is being used by bookmakers and others for illegal gambling purposes.[121]

An extension of its action in the *Brinkley* case and its action in lottery and horseracing cases is the action taken by the Commission against programs involving some form of fraudulent contest. In *Eleven Ten Broadcasting Corp.*[122] the Commission denied the renewal of a station's license on finding that the licensee had, among other things, conducted "fraudulent" contests over its station. Although the Commission evidently considered the fraudulent contest alone sufficient to support denial of the license, it relied on other grounds, including deliberate falsification of the station's program logs and other misrepresentations to support its action. Subsequently, in *KWK Radio, Inc.*,[123] the Commission was confronted with a similar fraudulent contest, except that the "fraudulent" program itself was the only matter before it. The Commission revoked the station's license on the basis of findings that it had conducted fraudulent contests which, the Commission found, resulted in deception to the public, inconvenience, "public disorder," and in some instances actual property damage.[124]

Related to the *KWK* case is the Commission's more recent action in making a short-term renewal grant in *Melody Music, Inc.*,[125] which grew out of the famous quiz show scandal of 1959 in which some contestants on a popular quiz program were given the answers to the questions beforehand. There, however, the matter was considered in a context somewhat different from that in *KWK*. In *Melody Music* the station itself had not been held responsible for the deceptive quiz program. One of the two principals of the station had, however, been involved in the rigged contest. As a result the Commission set the renewal application down for a hearing on the character qualifications of the two principals. In its first opinion[126] the Commission denied the renewal application of the station on these grounds. On appeal, the court of appeals for the District of Columbia reversed,[127] stating that the Commission had treated the licensee differently here than it had in *NBC*,[128] where the Commission had renewed NBC's license notwithstanding the fact that its parent corporation (RCA) had violated the antitrust laws. The evident discrimination was made even more patent by the fact that in *Melody*, unlike *NBC* where a violation of law was involved, the rigging of quiz shows shows was not *at that time* a violation of law.[129] On remand the Commission was able to avoid the impossible task of distinguishing the case from other cases in which it renewed the licenses of applicants convicted of violating the antitrust laws. The principals had applied to assign the license to other, presumably untainted. persons. Seizing this opportunity to rescue itself from a bad position. the Commission granted a short-term renewal on condition that the present licensee divest itself of its broadcast interest.

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[118] 62 F.2d at 852.

[119] 18 U.S.C. § 1304 (1964), *formerly* § 316 of the Communications Act of 1934: "Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both. Each day's broadcasting shall constitute a separate offense."

[120] 347 U.S. 284, 289 (1954). The Court held, however, that the rules there adopted by the Commission were too broad.

[121] *See* Community Broadcasting Serv., Inc., 13 P & F Radio Reg. 179 (1955) (also discussing other cases). A brief statement of Commission policy guidelines as to the types of horseracing broadcasts which are considered questionable by the Commission was subsequently issued in *Broadcast of Horse Racing Information*, 22 P & F Radio Reg. 417 (1961), *reaff'd, Broadcast of Horse Racing Information*, 2 P & F Radio Reg. 2d 1609 (1964).

[122] 22 P & F Radio Reg. 699 (1962).

[123] 25 P & F Radio Reg. 577 (1963).

[124] *Id.* at 581–82.

[125] 6 P & F Radio Reg. 2d 973 (1966).

The foregoing cases all dealt with programs which were fraudulent, illegal, or at least patently harmful. Several recent cases focus on a more difficult problem: control of programming deemed to be improper, indecent, or offensive. At the present time, there remains some uncertainty whether the Commission will attempt any direct restraint on programming which it deems merely offensive and, if it does, what circumstances might prompt it to take direct action against such programming.

In *Mile High Stations, Inc.*,[130] the Commission issued an order to show cause why an AM license should not be revoked where the station's announcer had made a number of offcolor remarks over a period of several months. Although the Commission regarded the remarks as sufficiently offensive to warrant license revocation, it declined to take such action and instead simply issued a cease and desist order against further broadcast announcements of this kind.

The problem of what action could be taken against such programming was posed again in *Palmetto Broadcasting Company*.[131] The Commission, in response to complaints received concerning programs which were allegedly vulgar and suggestive, requested from the licensee a statement concerning the complaints. In response to the request, the licensee stated that he was unaware at the time that such offensive statements were made. Subsequently, the Commission designated the licensee's application for renewal of its license and for construction of an antenna system for a hearing on the issues, among others, of whether the licensee had misrepresented facts to the Commission or was otherwise lacking in candor, whether the programming was "coarse, vulgar, suggestive and susceptible of indecent, double meaning," whether the licensee had permitted such program material, and whether, in light of those facts determined on these issues, the applications should be permitted. The hearing examiner found against the licensee on all of these issues and concluded that it had not, therefore, served the interests of the community. He proposed that the applications be denied. The Commission affirmed the examiner's findings but modified his conclusions of law, holding that the licensee's misrepresentations and false statements, *in and of themselves*, constituted grounds for denial of the applications. On appeal, the court of appeals affirmed on the narrow grounds that because of the licensee's concealment of material facts, the Commission was justified in its conclusion that the licensee did not possess the requisite character qualifications and was, therefore, justified in refusing to renew the license.

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[126] 2 P & F Radio Reg. 2d 571 (1964).

[127] 345 F.2d 730 (D.C. Cir. 1965).

[128] 345 F.2d at 732; *see also* General Electric Co., 2 P & F Radio Reg. 2d 1038 (1964); Westinghouse Broadcasting Co., 22 P & F Radio Reg. 1023 (1962).

[129] Rigged quiz shows are now proscribed by 47 U.S.C. § 509 (1964).

[130] 20 P & F Radio Reg. 345 (1960).

[131] 23 P & F Radio Reg. 483 (1962), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir.), *cert. denied,* 379 U.S. 843 (1964).

Subsequently, in *Pacifica Foundation,*[132] the Commission was again confronted at renewal time with complaints directed at several programs which were said to be of questionable taste. This time the Commision refused to take any action, holding that even if the programs were of questionable taste, they were isolated instances spread out over a four year period anad did not demonstrate any persistent lapse of taste, and that the programs were not so egregiously offensive as to warrant Commission action.

2. First Amendment Implications—

In the relatively few cases in which the Commission has singled out for review or taken direct action against particular programs, the constitutional implications of the Commission's actions are largely self-evident. Because the restraint exercised in these cases is directed at particular program content, some form of censorship is necessarily involved. The issue then becomes simply whether or not, on the particular facts, such censorship is constitutional.

While it is not difficult to envision circumstances in which action of the type reflected in the previously discussed cases might well be unconstitutional, it is difficult to find any unconstitutionality in the few cases decided to date, although several recent Commission cases give rise to some concern. Consider first, for example, the Commission's refusal to renew Dr. Brinkley's broadcast license. On the facts of that case, this action can scarcely be considered extraordinary or patently unreasonable. The Commission imposed no greater restraint than could constitutionally have been imposed by other, even more direct means wholly without regard to Brinkley's use of a radio station. Surely a law which outlawed unethical medical practice and which was enforced by means of revocation of a license to practice could not be considered an unconstitutional abridgment of free speech.[133] The refusal to renew Brinkley's broadcast license seems no more unconstitutional than the action taken by the state of Kansas in suspending his medical license for unethical conduct.[134] Surely the Commission's refusal of a license to Brinkley because of his fraudulent practices is no more unconstitutional than the actions of the Food and Drug Administration or the Federal Trade Commission in enforcing provisions of the Food, Drug and Cosmetic Act, the Federal Trade Commission Act, and other acts which regulate labeling and other representations of drugs and medical preparations which are of doubtful safety or efficacy. So far as is known, no one has ever seriously suggested that these acts constitute an unconstitutional abridgement of free speech.

Unfortunately, in discussions about the *Brinkley* case today, attention is focused less on the extraordinary facts which underlie the Commission's actions than on some sweeping and foolish language in the opinion of the court of apeals in affirming. Despite defensible grounds for affirming the Radio Commission's actions, the court of appeals reasoned that there was no censorship and no first amendment violation because there had been no attempt at a prior restraint. "In considering the question whether the public interest, convenience or necessity will be served by renewal of . . . [this] license, the commission has merely exercised its undoubted right to take note of . . . past conduct, which is not censorship." [135]

It scarcely needs pointing out that this reasoning would give the Commission a constitutional carte blanche to take virtually any action it chose against station practices, particular types of programming, or particular programs which it deemed not in the public interest. Fortunately, it is unnecessary to pursue the parade of evils which might ensue from the court of appeals' opinion in the *Brinkley* case since its reasoning was clearly rejected by the Supreme Court's opinion in *Near v. Minnesota,*[136] handed down only a few months after the *Brinkley* case, which made it clear that the reach of the first amendment was not confined to restraints imposed prior to the exercise of speech. Thus, the court of appeals' opinion is of doubtful significance today. Nevertheless, on its special facts, the *Brinkley* case should be and is good law today. The mere fact that the court affirmed on unacceptable grounds should not obscure the fact that this was an extraordinary case which warranted the drastic action taken.

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[132] 1 P & F Radio Reg 2d 747 (1964).

[133] This is not to say, of course, that there may not be constitutional requirements for adherence to certain procedures, *e.g.*, an adjudicatory hearing to be followed in revoking a license.

[134] At the time of the proceedings before the Radio Commission, Brinkley was also before the Kansas State Medical Examination Board in a proceeding to revoke his medical license for "having acted according to the ethical standards of an imposter" and for "organized charlatanism." Brinkley v. Hassig, 130 Kan. 874, 289 P. 64 (affirming denial of an injunction against medical board proceedings), *appeal dismissed,* 282 U.S. 800 (1930).

[135] 47 F.2d at 672 (D.C. Cir. 1931).

[136] 288 U.S. 697 (1931).

Essentially the same considerations which justified the Commission's actions against Brinkley hold true of the *Shuler* case, although perhaps to a less compelling degree. The restraint imposed by the Commission in this later case seems not materially different in kind or effect from restraints imposed by courts in actions for defamation or for contempt of court. With few exceptions, these latter restraints have been generally accepted as constitutionally permissible. For example, a civil action for an injunction or damages against Shuler for his defamatory utterances would probably have been constitutional at the time when the Commission refused renewal of his license, although some of his remarks against public officials would probably now be protected under the *Sullivan* case doctrine.[137]

One critic of the decision has concluded that the essential facts of the *Shuler* case are indistinguishable from those of *Near v. Minnesota* and that the decision is irreconcilable with *Near*.[138] However, it seems extreme to say that the cases are irreconcilable. *Near* does not proscribe all attempts to curb defamatory utterances. It did not say that it could never be constitutional to refuse to permit a person to operate a communications medium which had repeatedly engaged in defaming persons and obstructing justice. The primary evil of the statute struck down in *Near* was its broad and vague scope. It applied not merely to defamatory utterances but to publication of scandalous matter. Moreover, the statute in effect placed the burden of proof on the newspaper, since it was not necessary to prove the falsity of the defamatory utterances before a court could enjoin them. While the facts as reported in the *Shuler* case do not permit a detailed comparison of all of the facts and circumstances, these evils do not appear to have been present in that case. This is not to say, of course, that Commission actions in this area are not subject to the same constitutional scrutiny as applied in *Near*.

The constitutional implications of the Commission's actions in restraining the use of broadcast facilities for broadcasting lottery and other illegal gambling information are in substance no different from those raised by the Commission's actions in the *Brinkley* case. Once again the action of the Commission is not essentially different from that of other agencies such as the Post Office or Justice departments. So far as is known, no one has seriously challenged those provisions of the United States Criminal Code which proscribe the dissemination of lottery information or other information which aids and abets gambling[139] as being unconstitutional. The Supreme Court in the *American Broadcasting* case gave no indication that antilottery laws, reasonably construed, pose any serious first amendment problems. The same basic considerations apply to restraints against the broadcast of fraudulent contests such as that involved in the *KWK* case.[140] the Commission is doing very little more than is done, for example, by the FTC[141] or the Post Office Department[142] or, in a more restricted area, the SEC[143] or the FDA,[144] and the constitutionality of these "antifraud" measures can scarcely be seriously questioned.[145] This is not, however, to suggest that there are *no* first amendment problems here. There are surely some outer constitutional limits on what the Commission can restrain in the name of "fraud." These limits are suggested by the rigged quiz show scandal where relatively harmless deception, done for the chief purpose of enhancing entertainment value, was equated with fraud by both the Commission[146] and Congress.[147] This particular problem in defining fraud is unique to Commission regulation since, outside the field of Commission regulation, civil, criminal, and regulatory actions against fraud and misrepresentation are confined to cases which have long been accepted as actionable at common law or at least those in which it is likely to cause ascertainable public harm. The Commission, however, does not need to look to the traditional definitions of or limitations on actions for fraud. It can, in its view, always proceed under the all-encompassing cloak of "public interest." [148] It is here that the real problem lies.

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[137] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[138] Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 GEO. WASH. L. REV. 719, 758 (1964).

[139] In 1961 Congress made it a crime to use wire communications facilities for the transmission of wagering information by persons engoged in the business of betting or wagering. *See* 18 U.S.C. § 1084 (1964).

[140] 25 P & F RADIO REG. 577 (1963); *see also* Eleven Ten Broadcasting Corp., 22 P & F RADIO REG. 699 (1962).

[141] 15 U.S.C. §§ 52, 53a, 54a (1964); *see, e.g.*, Koch v. FTC, 206 F.2d 311 (6th Cir. 1953).

[142] 39 U.S.C. § 4005 (1964); *see, e.g.*, Donaldson v. Read Magazine, Inc., 333 U.S. 178 (1948).

[143] *See* § 17 of the Securities Act of 1933, 48 Stat. 84 (1933), *as amended*, 15 U.S.C. § 77q (1964); § 15 of the Securities Exchange Act of 1934, 48 Stat. 895 (1934), *as amended*, 15 U.S.C. § 780 (1964); SEC Rule 10b–5, 7 C.F.R. § 240.10b–5; 3 L. LOSS, SECURITIES REGULATION 1423–30 (2d ed. 1961).

[144] 21 U.S.C. §§ 321(k), (m) (1964); *see, e.g.*, Kordel v. United States, 335 U.S. 345 (1948).

More troublesome than the potentially broad exercise of power to proscribe "fraud" which is not really fraud is the exercise of power by the Commission to proscribe "offensive" programming. The Commission's action in *Mile High Stations*,[149] although the result was favorable to the licensee, indicates the need for concern over the exercise of sweeping powers to proscribe programming which the Commission finds offensive or improper. *Mile High Stations* did not attract particularly wide attention, probably because the licensee did not contest the constitutional issue but simply pleaded ignorance of the station announcer's offensive remarks. Since the Commission forgave the licensee this one trespass and terminated the show cause proceeding with a warning, apparently few were concerned with the action of the Commission which raises a serious question of whether restraint of the speech in that case was constitutional.

The Commission's subsequent action in the *Palmetto*[150] case has attracted wider attention. In one sense, however, the action in *Palmetto* is less troublesome than the action in *Mile High Stations*. The Commission's actions in *Palmetto* have been criticized as being, in substance, direct censorship of program content notwithstanding the Commission's unwillingness to rest its decision on the grounds that the program content was vulgar, indecent, and offensive.[151] While this may be, it is important to note that on its facts *Palmetto* is somewhat of an exceptional case in that there were misrepresentations of material fact which could be said to bear on the character of the licensee. Clearly the Commission has some latitude in passing on the character of licensees even though the Commission's findings as to character qualifications may in some instances be connected with or related to program issues.

This is not to say that the Commission would be constitutionally justified in using character qualifications as a dodge to evade the constitutional issues which are confronted when particular programming is called into question.[152] For example, it would clearly be improper and unconstitutional for the Commission to examine a particular program or type of program, decide for itself that the program is bad, and then take action against the licensee, not on the basis of the particular program, but on the basis of the licensee's lack of character qualifications as indicated by the bad programming. *Palmetto* itself, however, does not necessarily indicate that the Commission is disposed to proceed in such a manner, since in *Palmetto* there were misrepresentations to the Commission as to circumstances surrounding the programming.

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[145] *See* Donaldson v. Read Magazine, Inc., 333 U.S. 178, 189–92 (1948), where the Court affirmed the power of Congress to control fraudulent practices (here under the postal fraud statutes): "[T]he constitutional guarantees of freedom of speech and freedom of the press [do not] include complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes." *Id.* at 191.

[146] *See* Melody Music, Inc., 6 P & F RADIO REG. 2d 973 (1966).

[147] *See* 47 U.S.C. § 509 (1964).

[148] It may be that in the narrow area of quiz programs the Commission would be limited by the statutory requirements of § 509 of the Act. However, § 509 would presumably not be interpreted as a limitation on the Commission's power under the Act to take action in the "public interest" against other types of "fraud."

[149] 20 P & F RADIO REG. 345 (1960).

[150] 23 P & F RADIO REG. 483 (1961), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir.), *cert. denied,* 379 U.S. 843 (1964).

[151] Note, *Regulation of Program Content by the FCC,* 77 HARV. L. REV. 701, 712–14 (1964).

[152] *See* BROWN, *Character and Candor Requirements for FCC Licensees,* 22 LAW & CONTEMP. PROB. 644, 654–55 (1957).

The fears raised by the Commission's action in *Palmetto* have been at least partly allayed by its subsequent decision in the *Pacifica* case.[153] Perhaps most significant is the reason given by the Commission for refusing to take action against the licensee for broadcasts which had occasioned many public com-

against the licensee for broadcasts which had occasioned many public complaints.

> "We recognize that, as shown by the complaints here, such provocative programming as here involved may offend some listeners. But this does not mean that those offended have the right, through the Commision's licensing power, to rule such programming off the airway. Were this the case, only the wholly inoffensive, the bland, could gain access to the radio microphone or TV camera. No such drastic curtailment can be countenanced under the Constitution, the Communications Act, or the Commission's policy. . . ."[154]

Even if *Pacifica* does not entirely set to rest all fears raised by *Palmetto* and *Mile High Stations* it does suggest that the Commission intends to proceed cautiously in this area.

While the Commissioon's authority to impose direct restraints on obscene, defamatory, or other socially harmful programming poses significant first amendment problems, the actions of the Commission to date probably do not warrant grave concern since they have been fairly circumscribed within the ambit of restraints constitutionally justifiable and permitted for nonregulated communications media.

3. Control of Advertising: A Note in Passing—

Until its recent "fairness doctrine" ruling that stations advertising cigarettes must devote time to expression of the view that smoking is a health hazard,[154a] the Commission's attempts to "regulate" the advertising practices, as such, of broadcast stations had been minimal, limited, and largely ineffectual. Leaving direct supervision and control of deceptive advertising practices to the Federal Trade Commission,[155] the FCC has traditionally confined its concern almost exclusively to excessive advertising, with an occasional foray into advertising of certain products[156] or overly loud commercials.[157] With respect to excessive advertising, although the Commission did at one time propose to adopt fixed rules imposing time limitations similar to those of the NAB Codes, the proposal was abandoned principally as a result of a strong congressional opposition.[158] As a result, the Commission's efforts in this area have been made largely through "scrutiny" at renewal time[159] and the usual panoply of techniques incident to renewal, including admonitory letters to offending licensees[160] and short-term renewals.[161]

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[153] 1 P & F RADIO REG. 2d 747 (1964).

[154] *Id.* at 750.

[154a] Letter to WCBS-TV, 9 P & F RADIO REG. 2d 1423, *petition for reconsideration denied,* 11 P & F RADIO REG. 2d 1901 (1967). See text accompanying notes 259–63 *infra*.

[155] The Commission has established a "liaison" with the FTC whereby the latter advises the FCC of "questionable advertising" broadcast over radio and television stations. Any determination of deceptive advertising—or perhaps even "questionable" advertising—is taken into account by the FCC in weighing whether the licensee is operating "in the public interest." *Liaison Between FCC and FTC Relating to False and Misleading Radio and TV Advertising,* P & F RADIO REG., Current Service vol. 1, at 11:201 (1957); *see generally Developments in the Law—Deceptive Advertising,* 80 HARV. L. REV. 1005, 1019–27, 1063–1101 (1967).

[156] Knickerbocker Broadcasting Co., 2 F.C.C. 76 (1935) (advertising of birth control product). In the case of liquor, the Commission has confined its activities to approval of the self-regulation standards of the NAB codes which prohibit advertising hard liquor, NAB, THE TELEVISION CODE 14 (§ IX, ¶ 5) (11th ed. 1966), and impose other restrictions on advertising methods, *see Developments in the Law, supra* note 155, at 1155.

[157] *See Objectionable Loudness of Commercials,* 5 P & F RADIO REG. 2d 1621–22 (1965), making certain revisions in regulations to control loudness and adopting a "Statement of Policy" concerning loud commercials proscribing certain practices in commercial announcements

[158] *Commercial Advertising Standards,* 1 P & F RADIO REG. 2d 1606 (1964); *see also Commercial Practices of Broadcast Licensees,* 2 P & F RADIO REG. 2d 885 (1964) (dissent of Chairman Henry). Congressional opposition was manifested, among other ways, in a bill introduced at the time to strip the Commission of its power to prescribe rules governing the length and frequency of advertsements. *See id.* at 890. Although the Commission in 1964 declined to adopt fixed standards along the lines of those set by the NAB, it recently did announce a policy of requiring licensees to justify a failure to observe NAB Code limits on commercial time (18 minutes per hour for radio, 16 minutes per hour for television). *See* BROADCASTING MAGAZINE, March 6, 1967, at 36–37.

[159] Overcommercialization has on relatively rare occasions occurred in the context of initial applications. *See, e.g.,* Michigan Broadcasting Co., 20 P & F RADIO REG. 667 (1960) (designation for hearing on issues relating to number and length of commer-

It is difficult to know how to assess, from a first amendment viewpoint, the Commission's efforts in the field of advertising controls, since it is doubtful that commercial advertising is "speech" protected by the first amendment.[162] While this reflects a rather circumscribed view of the first amendment, which deserves to receive more critical analysis than it has thus far received, it is beyond the scope of the present article. Even if commercial advertising were within first amendment protection, it is doubtful whether those of the Commission's regulatory actions which impose *direct* restraints on advertising practices involve any serious encroachment on such first amendment protection as is accorded to advertising. Curbs on overcommercialization and on certain techniques of advertising such as overloudness seem generally justifiable in the context of rradio and television to the same extent they are in comparable situations outside the field of radio and television.[163] And, of course, curbs on false or fraudulent advertising are clearly constitutional under established authority.[164] The constitutional implications of the *indirect* restraints on cigarette advertising imposed by the Commission's recent fairness doctrine decision will be discussed below.

B. General program regulation through the licensing process

1. General Program Standards—

The Commission's regulation of programming is, of course, by no means confined to direct proscription of undesirable programs. More often the nature of the FCC's action is indirect, tending to influence the broadcast of certain programming by imposition of general standards or through informal oversight of the licensee's programming policies. While the Commission's actions in the area of direct restraint have been relatively circumspect to date, its indirect influence on program policies evidences a greater control of program choice and this poses far greater constitutional problems.

Typically, the Commission attempts to achieve what it euphemistically referred to as "program balance" and "programming in the public interest." The first comprehensive statement of Commission policy on programming balance and on the responsibility of broadcasters to program in the public interest was the Commission's famous *Blue Book:*

"In issuing and in renewing the licenses of broadcast stations the Commission proposes to give particular consideration to four program service factors relevant to the public interest. . . . (1) the carrying of sustaining programs, including network sustaining programs, with particular reference to the retention by licensees of a proper discretion and responsibility for maintaining a well-balanced program structure; (2) the carrying of local live programs; (3) the carrying of programs devoted to the discussion of public issues; and (4) the elimination of advertising excesses." [165]

Although its policies were invoked in several cases to question renewal applications not meeting the announced standards,[166] the *Blue Book*, as such,

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cials): Sheffield Broadcasting Co., 21 P & F RADIO REG. 507 (1961) (comparative demerit for overcommercialization); Travelers Broadcasting Serv. Corp., 6 F.C.C. 456 (1938) (application for assignment of license denied).

[160] *See* BROADCASTING MAGAZINE, March 6, 1967, at 36–37.

[161] Gordon County Broadcasting Co., 24 P & F RADIO REG. 315 (1962); Mississippi Arkansas Broadcasting Co., 22 P & F RADIO REG. 305 (1961).

[162] *See* Valentine v. Chrestensen, 316 U.S. 52 (1942). For an excellent treatment of the constitutional question, see *Developments in the Law, supra* note 155, at 1027–38.

[163] *Cf.* Kovacs v. Cooper, 336 U.S. 77 (1949).

[164] Donaldson v. Read Magazine, Inc., 333 U.S. 178 (1948); Regina Corp. v. FTC, 322 F.2d 765, 770 (3d Cir. 1963).

[165] FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 55 (1946). For an excellent discussion of the background of the *Blue Book,* see L. WHITE, THE AMERICAN RADIO 182–99 (Comm'n on Freedom of the Press ed. 1947); *see also* 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 689–94 (Comm'n on Freedom of the Press ed. 1947). The *Blue Book* evoked strong condemnation from the broadcast industry. Illustrative is the statement of the Chairman of CBS who denounced it as "government program-censorship" and "the most direct threat yet made by government to interfere with programming." Paley, "Radio and Its Critics." Address to NAB, October 22, 1946, *quoted in* 2 Z. CHAFEE, *supra* at 636.

Strong criticism was also voiced from outside the industry, both on grounds of regulatory wisdom as well as doubtful constitutionality. *See* L. WHITE, *supra* at 193–99, 229–30. Without getting into the question of wisdom, Chaffee did not view the *Blue Book* as posing a serious first amendment problem. 2 Z. CHAFEE, *supra* at 637–38.

[166] The Community Broadcasting Co., 12 F.C.C. 85 (1947); Howard W. Davis, 12 F.C.C. 91 (1947); Eugene Roth, 12 F.C.C. 102 (1947).

never assumed the permanent substantial importance that it was undoubtedly intended to have. Today it is all but forgotten as anything more than an historical source of Commission policy, and is never directly relied on.

However, the basic policies outlined in the *Blue Book* have not been abandoned. The same "program service factors" continue to occupy the Commission's attention although the Commission, learning form its experience with the *Blue Book*, has attempted to avoid stating its standards in terms of absolute demands. Basically the same emphasis on "balanced programming," but with somewhat less emphasis on "sustaining" versus "commercial" programs and the same emphasis on public service programming are inherent in the Commission's "modern" policy statement.[167] and in its current practices. Neither its concern for "local live" programming[168] nor its concern over excessive advertising[169] has in any way abated.

Program balance and programming in the public interest are determined by the Commission principally on the basis of an analysis of past or proposed programming in terms of categories established by the Commission as representative of all of the major different types, and on the basis of an assessment of whether the programs meet the needs, tastes, and interests of the station's service area. Of critical significance in the latter regard is the applicant's efforts to ascertain those needs, tastes, or interests.

Part IV, "Statement of Program Service," of the broadcast applications required for new stations, major changes in facilities, transfer of control, and assignment or renewal of license, is the heart of the Commission's direct regulatory oversight of programming. A detailed statement as to the amount and percentage of *proposed* programming is required and, in cases of renewal or assignment and transfer, a detailed statement supported by station program logs showing the *past* programming in each of the specified program categories is mandatory.[170]

The particular classifications used by the Commission have long been widely criticized in the industry as being arbitrary, vague, meaningless, needlessly detailed, and burdensome to the station. Each station is required (a) to maintain detailed logs in which each of the programs is carefully recorded in one of the categories, and (b) to analyze the logs at renewal time to obtain the information required in the renewal application. Even the Commission has recognized the validity of the criticism directed at the arbitrariness and vagueness of the categories. In 1965 it revised the AM-FM program classifications, and in 1966 it adopted similar changes for television.[171] The validity of the other criticisms has not been recognized. Indeed, the new forms are, if anything, more detailed and more burdensome. The Commission's expanding concern with the nature of the program service presented and its apparent use of program classification as a means of influencing stations to provide programming of a certain type have, however, raised even more troublesome questions.

While the effort of a broadcast station applicant to seek out community interests has long been one of the criteria taken into account in comparative hearings,[172] it did not play a major role in the Commission's consideration of individual applicants until the 1961 *Suburban Broadcasters* decision.[173] Since that time, however, the Commission has given increased attention to the efforts made by an applicant or licensee to become familiar with and to demonstrate how its programming will serve the service area's tastes, needs, and interests.[174] This policy, while theoretically applicable to all programming, has in recent years been reflected principally as a concern for increased local live programming, especially during "prime time" hours.[175]

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[167] *Statement of Policy on Programming*, 20 P & F RADIO REG. 1901 (1960). On program balance and service, the following oft-quoted statement is generally the point of departure for the Commission: "The major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located as developed by the industry, and recognized by the Commission, have included: (1) Opportunity for Local Self-Expression, (2) The Development and Use of Local Talent (3) Programs for Children, (4) Religious Programs, (5) Educational Programs, (6) Public Affairs Programs, (7) Editorializing by Licensees, (8) Political Broadcasts, (9) Agricultural Programs, (10) News Programs, (11) Weather and Market Reports, (12) Sports Programs, (13) Service to Minority Groups, (14) Entertainment Programming." *Id.* at 1913.

[168] *See* note 175 *infra* and accompanying text.

[169] *See* notes 155 161 *supra* and accompanying text.

[170] The Commission's recently revised programming forms for AM, FM, and television prescribe the following primary categories of programming: agricultural, entertainment, news, public affairs, religious, instructional, sports, and others. Three secondary categories are established: editorials, political programs, and educational institution programs. Under this revised procedure, a station maintains logs classifying each program into the above categories but is required to show overall amounts of programming only in the following: news, public affairs, and all other programs exclusive of entertainment and sports.

[171] *AM-FM Program Forms*, 5 P & F RADIO REG. 2d 1773 (1965); *Television Program Forms*, 8 P & F RADIO REG. 2d 1512 (1966).

2. Licensing New Facilities: Single Applicant—

Despite constant protests by the Commission that it is not concerned with the content of particular programs or that it does not require a station to broadcast a certain amount of any type of programming, its actions belie these disclaimers. This is most clearly indicated in the Commission's practice of pressing all applicants onto the procrustean bed of "acceptable" program categories.

A seeming exception to this attitude might be seen in the fact that the Commission has been willing to allow AM and FM stations to engage in specialized programming in one or a few of the standard program categories, on a showing that overall program balance is provided by complementary program schedules.[176] However, the exception only proves the rule. Absent very special circumstances, the broadcaster who fails to provide a respectable percentage of programming in the categories which the Commission has selected as representative of balanced programming in the public interest does so, or, what is substantially the same, reasonably believes that he does so, at his peril.

The Commission's decision in *Lee Roy McCourry*[177] illustrates this. In *McCourry* the applicant applied for a license for a new UHF television station, proposing a specialized programming format comprised of seventy per cent entertainment and thirty per cent education programs. Based principally[178] on the applicant's failure to offer any special justification for not providing for religious, agricultural, news, discussion, or similar programming,[179] the Commission set the application down for hearing on the issues, *inter alia*, of whether the applicant had investigated community needs and whether the applicant's specialized format would meet these needs. The immediate effect of the Commission's action was simply to require McCourry to justify his programming. However, as noted by the dissent, this was virtually tantamount to denial of the application in this case or was, in any event, a heavy sanction for failing to conform to the Commission's idea of a proper pattern of programming.[180]

The *McCourry* case is certainly no *cause celebre*. Despite a strong dissent, the case probably cannot be regarded as a significant departure from the

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[172] Under the so-called "planning and preparation" criteria. *E.g.*, WHDH, Inc., 13 P & F RADIO REG. 507, 555-59, 576–77 (1957), *remanded on other grounds sub nom.* Massachusetts Bay Telecasters, Inc. v. FCC, 261 F.2d 55 (D.C. Cir. 1958).

[173] 20 P & F RADIO REG. 951 (1961), *aff'd sub nom.* Henry v. FCC, 302 F.2d 191 (D.C. Cir.), *cert. denied*, 371 U.S. 821 (1962). The decision was purportedly based on the comprehensive program policy announced a year earlier in its *Statement of Policy on Programming*, 20 P & F RADIO REG. 1901 (1960), which emphasized the preeminent importance of a "diligent, positive and continuing effort [by the licensee] to discover and fulfill the tastes, needs and desires of the service area."

[174] *E.g.*, Washington Broadcasting Co., 5 P & F RADIO REG. 2d 653 (1965) (assignment of license); Chapman Radio & Television Co., 4 P & F RADIO REG. 2d 532 (1965) (application for new facilities); WCSC, Inc., 1 P & F RADIO REG. 2d 619 (1964) (dissent to renewal without hearing).

[175] *See, e.g.*, Address by Commissioner Ford, Virginia Association of Broadcasters, June 20, 1963, reprinted in FCC Release No. 37,118; *Omaha Local Television Programming Inquiry*, 1 P & F RADIO REG. 2d 1901 (1963); WCSC, Inc., 1 P & F RADIO REG. 2d 619 (1964) (dissent).

[176] *See, e.g.*, Herbert Muschel, 23 P & F RADIO REG. 1059 (1962). At least a theoretical distinction should be drawn between specialized programming in this sense and programming oriented towards the special needs of a minority group in the station's service area which may still be accomplished by adherence to a "balanced" program schedule with programs in each of the various categories. The Commission has also approved this type of "special audience" programming. *See* Voice of Charlotte Broadcasting, 6 P & F RADIO REG. 2d 355 (1965).

[177] 2 P & F RADIO REG. 895 (1964).

[178] In addition to the programming issue, issues as to adequacy of staffing, financial qualifications, and main studio location were involved. *Id.* at 897.

[179] *Id.* at 896.

[180] *Id.* at 901–02.

Commission's longstanding insistence on the ascertainment of community needs and on basic conformity to a balanced program format in the context of comparative hearings and renewal proceedings.

3. Licensing New Facilities: The Comparative Hearing—

The Commission's procedure for determining which of two or more applicants for the facility[181] is by comparison more deserving of a broadcast permit has long been held up by critics as a classic example of the administrative process at its worst.[182] Inadequately guided by Commission procedures and standards, the prodigious efforts by the parties to compile a complete and comparatively superior record produce little more than staggering records.[183]

It is not the purpose of this Article, however, to criticize the comparative hearing process or the comparative criteria. The concern here is only with those aspects of the comparative hearing process which relate to program regulation and its constitutional implications.

The Commission's focus on an applicant's proposed programming in a comparative hearing is not essentially different from its examination of the program proposals of a noncomparative single applicant. The Commission typically evaluates comparative applicants on the basis of their efforts to survey and ascertain community needs and interests and on the basis of a quantitative evaluation of each applicant's program balance based on the respective percentages of time to be devoted the various program types defined by the Commission.[184] Where the applicants each show respectable balance in the various categories,[185] the Commission is quick to deny any judgment of *qualitative* difference between particular programs.[186]

It is true, however, that the comparative hearing has a somewhat different impact on program discretion than does the hearing in a noncomparative situation. Unlike the *McCourry* type of situation, for example, there is no occasion here for setting an application for hearing on the basis of insufficient balance or other assumed defects in proposed programming, since mutually inconsistent applications must go to hearing anyway. Every application set for a comparative hearing is set for a hearing on the standard comparative issue.[187]

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[181] The term "comparative hearing" is often used, inaccurately, to designate all hearings on mutually inconsistent applications. There are significant differences, however, between the scope of a true comparative hearing involving two or more applicants for the *same* frequency in the *same* location and a hearing on mutually inconsistent applications for stations in different communities which propose the mutually incompatible use of co-channel or adjacent channel frequencies—generally referred to as a "307(b) hearing." The comparative hearing is focused on the so-called "standard comparative issue," a broad issue encompassing comparisons between *applicants* on numerous criteria. *See* note 187 *infra*. However, the more limited 307(b) hearing is focused on a comparison of the service needs of the respective communities and considerations of relative efficiency in the utilization of frequencies. *See, e.g.*, Bible Institute of Los Angeles, Inc., 24 P & F Radio Reg. 205 (1962). Thus, the 307(b) hearing does not contemplate a comparison of the respective proposed programming or program-related operations (such as staffing, etc), although under certain circumstances programming issues may be added. *See, e.g.*, Saul M. Miller, 24 P & F Radio Reg. 550 (1962); Granite City Broadcasting Co., 18 P & F Radio Reg. 852 (1959).

[182] *E.g.*, W. Jones, Licensing of Major Broadcast Facilities by the Federal Communications Commission, Report to the Administrative Conference of the United States, Committee on Licenses and Authorizations 198–204 (1962); Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards*, 75 Harv. L. Rev. 1055, 1065–72 (1962); Schwartz, *Comparative Television and the Chancellor's Foot*, 47 Geo. L.J. 655 (1959).

[183] WHDH, Inc., FCC 66 D-47, at 264 (1966). Some idea of the magnitude of the hearing in *WHDH* (resulting from the reopening of a decision based on earlier hearings held in 1954–1955!) may be gleaned from the size of the examiner's opinion, 252 pages of which are devoted to findings of fact alone.

[184] *See, e.g.*, Central Coast Television, 1 P & F Radio Reg. 2d 237, 247 (1963); Jefferson Standard Broadcasting Co., 24 P & F Radio Reg. 319, 331–32 (1962); Florida Gulfcoast Broadcasters, Inc., 23 P & F Radio Reg. 1, 8 (1962).

[185] *E.g.*, *Policy Statement on Comparative Broadcast Hearings*, 5 P & F Radio Reg. 2d 1901 (1965); Sunbeam Television Corp., 5 P & F Radio Reg. 2d 85, 87 (1965); Florida Gulfcoast Broadcasters, 23 P & F Radio Reg. 1, 8 (1962).

[186] *E.g.*, Jefferson Standard Broadcasting Co., 24 P & F Radio Reg. 319, 332 (1962). The Commission's eschewing of "qualitative" comparisons is criticized in Irion, *FCC Criteria for Evaluating Competing Applicants*, 43 Minn. L. Rev. 479, 492–94 (1959). It is perhaps significant that Irion, one of the most highly regarded FCC hearing examiners, evidently sees no major first amendment problem involved in the evaluation of the quality of particular programming and program proposals.

[187] The "standard comparative issue" is an exceedingly broad statement of the key issue in *comparative* hearings (not in "307(b) hearings"). The formulation of the standard comparative issue is as follows:

To determine on a comparative basis which of the operations proposed in the above-entitled applications would best serve the public interest, convenience, and necessity in

On the other hand, the Commission may add other issues directed to specific questionable aspects of a party's application.[188] An applicant proposing what the Commission regards as questionable program policies may have the application set for a hearing on the so-called "Suburban issue," theoretically designed to investigate what efforts the applicant has made to determine and satisfy the needs and interests of its proposed service area. Although the standard comparative issue substantially includes this investigation, the significance of the additional "Suburban issue" is that it is a potentially disqualifying issue unrelated to the *comparative* merits of the applicants. If one applicant buys out or merges with competing applicants, the standard comparative issue becomes moot, but the disqualifying issue does not.[189] In such a case, the Commission will insist on investigating whether the remaining applicant has met its burden on the disqualifying issues.

4. Renewal of License: In Terrorem Control—

The discussion above focused on the method by which the Commission controls programming by setting standards to which a broadcast applicant must conform if he is to succeed in obtaining a license. The process of license renewal every three years adds a new dimension to this control. The renewal process is the primary tool used by the Commission to enforce continuing compliance with the demands initially made on an applicant. Without this instrument it would be difficult if not impossible to effect any real control of programming operations. If a licensee fails to adhere to the standards of its promised performance, the Commission may, of course, revoke the license. Such a procedure is, however, too cumbersome to be practical. A license revocation proceeding entails initiation by the Commission of a formal hearing in which the Commission must bear the burden of proof of noncompliance with the law or unsatisfactory performance by the licensee.[190] The procedural burdens of a revocation proceeding would impede and deter Commission enforcement, and would eliminate any real *in terrorem* effect from the threat of revocation.

The effectiveness of the renewal process in influencing a licensee's operations, including his program operations, arises from two facts. First, the *licensee* has the burden of coming forth, in a formal application, to show compliance with Commission standards and fulfillment of prior promises;[191] second, this process is routine and relatively frequent, thereby eliminating any doubt that the Commission will scrutinize the actual performance of the station in relation to the performance promised.

The manner in which the renewal process is carried out by the Commission makes it far more than merely a periodic inspection. Rather the renewal process has become the primary method through which the Commission exer-

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light of the record made with respect to the significant differences between the applicants as to:

(a) The background and experience of each of the above-named applicants having a bearing on its ability to own and operate the proposed television station.

(b) The proposals of each of the above-named applicants with respect to the management and operation of the proposed station.

(c) The programming service proposed in each of the above-entitled applications.

WHDH, Inc., 13 P & F Radio Reg. 507, 515 (1957).

Within this broad formulation, criteria have crystallized which are supposed to be relevant in deciding among applicants (although many of these criteria are petty and not conceivably important and several are mutually contradictory). Prior to the Commission's 1965 *Policy Statement on Comparative Broadcast Hearings,* the accepted criteria were: (1) local residence; (2) civic participation; (3) diversification of occupations of principals; (4) experience; (5) integration of ownership with management; (6) past broadcast record; (7) planning and preparation; (8) program policies; (9) program proposals; (10) studio and equipment; (11) staff; (12) diversification of ownership of mass communications media. WHDH, Inc., *supra* at 566–85. *See generally,* Leon, *FCC Criteria for Evaluating Competing Applicants,* 43 Minn. L. Rev. 479 (1959). The 1965 *Policy Statement* retains most of these criteria but purports to establish some degree of priority among them and explain their proper implementation. Whether the 1965 *Policy Statement* has really clarified or resolved the contradictions and erased any of the nonsense that has characterized the interpretation and implementation of these criteria remains to be seen

[188] These may be added on the Commission's own motion or by motion of the parties to enlarge issues. *See, e.g.,* Springfield Telecasting Co., 3 P & F Radio Reg. 2d 727 (1964).

[189] *See, e.g.,* Tri-Cities Broadcasting Co., 6 P & F Radio Reg. 2d 1, 2 (1965).

[190] *See* 48 Stat. 1086 (1934), *as amended,* 47 U.S.C. § 312(c) (1964).

[191] In the event the application is set down for hearing, the licensee has the burden of proof. *E.g.,* Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

cises day-by-day control over virtually all broadcast operations, and particularly over program practices and program operations. Thus, the fact that the licensee must go through the trial and prove himself every three years is in a very real sense a "Sword of Damocles" over the broadcaster's head. If the sword does not often fall, neither is it ever lifted and the *in terrorem* effect of the sword's presence enables the Commission to exercise far-reaching powers of control over the licensee's operations.

It is this *in terrorem* aspect of periodic renewal which one former FCC Commissioner labeled "regulation by the lifted eyebrow,"[192] a label which has since gained considerable currency in the field of administrative regulation. A letter to the station from the Commission or even a telephone call to the station's Washington attorney from the Commission's staff indicating the Commission's "concern" over a particular practice of the licensee and asking for the licensee's justification will generally be all that is necessary to bring the licensee around to the Commission's way of thinking. If not cultivated, the technique is at least used to great advantage by the Commission, which almost invariably makes a point of informing the licensee that its inquiry and the licensee's response will be associated with the licensee's file and given "due consideration" upon his next application for renewal.

If a Commission inquiry or expression of concern over a licensee's practices can be expected to have an influential effect on the licensee, the effect is even greater when the Commission makes such inquiry at renewal time or notifies the licensee that it is deferring action on pending renewal applications until it has received answers to its questions. An example is the Commission's action in *Local Live Programming of Television Stations*[193] where the Commission sent letters to five stations deferring renewal applications because of an inadequate showing of local live programming in prime time and requesting information as to local live programming presentations and plans and efforts to ascertain community needs. In spite of the Commission's request for further information, it is extremely doubtful whether the Commission really expected to receive any information which would add meaningfully to what the licensee had already reported. What the Commission seeks in such cases is not information but assurance that future operations will conform to Commission standards, and it would be incredible if the experienced broadcaster or his Washington counsel would mistake the Commission's handwriting on the wall.[194]

For the more recalcitrant, there are stronger methods short of revocation. One is the frequently employed short-term renewal (generally for one year) during which time the licensee is made aware that he is "on probation."[195]

The practice of informal control over or influence on individual licensee practices is also followed on an industry-wide basis through statements of Commission concern over particular practices or announcements of proposed action.[196] This is enhanced by speeches of individual commissioners. Former

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[192] Commissioner Doerfer dissenting in Miami Broadcasting Co. (WQAM), 14 P & F RADIO REG. 125, 128 (1956).

[193] 25 P & F RADIO REG. 482 (1963).

[194] *Cf.* Pierson, *The Need for Modification of Section 326*, 18 FED. COM. B.J. 15, 19–20 (1963): "The lawyer [advising his client as to type of program] has a number of guides. First, in his day-to-day dealings with the Commission and its staff, he learns of their attitudes toward various kinds of proposals. He knows that certain program proposals are accepted and favorably processed with alacrity. Other program proposals create problems not only of getting expeditious action but of getting favorable action. On occasion his client is almost directly threatened with costly litigation unless program proposals are changed. In addition, Commission decisions, statements of policy and the public statements of its members afford insight into Commission attitudes toward various types of programming. With these as guides, the lawyer can quite unerringly outline to his client the programs that the Commission favors and disfavors . . . . To deny that this constraint exists is to indulge pure myth. To say that . . . an applicant proposes or 'promises' programs on the basis of his independent judgment of the needs and wants of his area compounds the myth."

[195] *See, e.g.*, Lamar Life Broadcasting Co., 5 P & F RADIO REG. 2d 205 (1965) (one year renewal because of questionable "fairness" in presenting views on controversial public issues); Loyola Univ., 24 P & F RADIO REG. 766 (1962) (one year renewal because of significant deviations from previous program promises).

[196] *See, e.g.*, 6 TELEVISION DIGEST 2–3 (1966) (press report that staff "reportedly" urges Commission to send letters to ten AM stations inquiring as to their failure to carry political broadcasts); 6 TELEVISION DIGEST 2 (1966) (report of staff proposing to send letters to nineteen AM stations which proposed to devote less than 5% of their time to "public affairs" and "other," *i.e.*, agricultural, religious, and similar nonentertainment categories programming).

Chairman Minow's famous "Wasteland Speech" is a classic example.[197] However, less sweeping and dramatic speeches in which some comment is made on program policies have become almost a matter of routine. While some of these speeches are inconsequential, there can be no doubt that many are valuable as a source of at least one commissioner's thinking on a given subject.

5. First Amendment Implications—

The Commission's insistence on the licensee's presenting "balanced" programming, although done in the name of promoting diversity, has had largely the opposite effect. Notwithstanding repeated criticism by various commissioners of the undeniable sameness of programming among broadcasters, the Commission's own policies do little to encourage diversity or originality either in the style or content of individual programs or in the overall format of a station's program operations. Indeed, its policies have, if anything, added to the inherent tendency of broadcasters to conform to safe, established patterns of operation and programming.

Insistence by the Commission that the licensee maintain respectable percentages of its total programming in the various program categories is one example of such a policy. Adherence to these categories by the licensee does not necessarily fix the content of specific programs within each category. The unmistakable result of prescribing categories in which all licensees are expected to present some programming is, however, sameness of program formats among licensees. Following the Commission's guidelines, for example, *each* station will generally present a religious discussion program or coverage of a church service at least one Sunday a month; a regularly scheduled farm news or discussion program, no matter how urban the area; and, to satisfy the ambiguous category of "talks," a "homemaker" show at least once a week. There emerges a pattern of sameness in conformity with safe and acceptable standards bearing the FCC seal of approval. While the licensee may decide the particular content of programs within each accepted category, he must maintain a balance among the accepted categories. He deviates at his peril as is illustrated by the *McCourry*[198] case where the applicant was required to justify, in a formal hearing, his deviation from the Commission's standard of "balance" because of his failure to conform to the pattern of programming in each of the accepted categories.

Commissioner Cox, one of the most vigorous and articulate defenders of the Commission's programming policy, has attempted to justify the Commission's action in *McCourry* on the ground that the Commission has the responsibility to ensure that licensees ascertain and serve the needs and interests of their service areas, and the failure of the applicant in *McCourry* to justify its failure to show "balanced" programming fully warranted and indeed required the Commission to hold a hearing to determine whether the applicant would serve the public interest.[199] This simply begs the question.

Even under the most expansive interpretation of the first amendment, the Commission is not forbidden to insist that an applicant show that it has made an effort to ascertain the general needs and interests of the community to be served and that its operations will serve those needs and interests. Moreover, it does not seem either unconstitutional or unreasonable for the Commission to require that, in attempting to ascertain and serve the needs of the community, the *licensee* must apply his own judgment, not that of the network or some other program supplier. *Simmons v. FCC*[200] illustrates this problem. There the Commission denied an application on the ground that a proposal to broadcast the complete, unaltered CBS network schedule would be an abdication of licensee responsibility and would not serve the public interest. In affirming, the court held that there was no censorship involved.[201]

But it is one thing to require an applicant or licensee to demonstrate that it has made, by *itself*, a good faith, reasonable effort to ascertain and serve the needs of the public; it is quite another for the Commission to set forth a catalogue of the types of programs which it considers the public interest to require, and then to require that an applicant or licensee conform its programming to these standards unless it can offer compelling reasons for a varying format. Notwithstanding the fact that this action was purported to be merely an inquiry into whether McCourry had really investigated the needs of his prospective service area and whether his programming would serve those needs, no one familiar with FCC practice could doubt that the action was intended to influence McCourry—and other future applicants who could be counted on to take due note of the Commission's actions—to modify the program format to conform with the Commission's concept of balanced programming.

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[197] Address to the 39th Annual Convention of the National Association of Broadcasters, May 9, 1961.

[198] 2 P & F RADIO REG. 2d 895 (1964).

[199] Cox, *The FCC, the Constitution and Religious Broadcast Programming*, 34 GEO. WASH. L. REV. 196, 207 (1965).

[200] 169 F.2d 670 (D.C. Cir. 1948); *cf.* Churchill Tabernacle v. FCC, 160 F.2d 244 (D.C. Cir. 1947).

[201] 169 F.2d at 672.

That the threat of an agency hearing is in itself, regardless of potential outcome, an effective method of imposing program standards is even more persuasively demonstrated in cases involving applications for renewal of existing licenses. The threat of a hearing on renewal is virtually certain to induce the licensee to conform to the established standards of balanced programming, except in those cases where, for good cause shown, the Commission has approved specialized programming.

The conformity principle can also be seen at work in the comparative hearing process. Here, however, the effect of an evaluation of the applicants' respective program proposals is not immediately apparent. Although the program proposals, formats, and policies of the applicants are among the criteria for choosing between them, the Commission never gives express decisional importance to the superiority of one applicant's program proposals, even in "quantitative" terms. Indeed, it is unusual to find a decision in which the Commission even awards a preference to one applicant in the area of programming. Generally, any preferences granted in the area of programming are expressed as preferences for a superior showing as to an applicant's efforts to survey and ascertain community needs. On the basis of the Commission's decisions, then, it might appear that there is no problem of restraint, since the Commission purports to give so little attention to a comparative evaluation of programming proposals. But appearances are deceptive, as are the Commission's published decisions.

In many, if not most cases, no preference could be granted on the basis of program proposals since there is no discernible difference of substance between them. This sameness is largely attributable to similar network program fare, particularly where both propose an affiliation with the same network. To some extent, sameness of programming is also attributable to the fact that radio and television stations, like other commercial enterprises, generally strive to meet the widest possible market. To a significant degree, however, the sameness is also attributable to the Commission's own efforts to supervise programming operations. The trend to conformity and sameness is inherent in the Commission's insistence on adherence to "balance," defined as devoting respectable percentages of program time to each of the categories prescribed by the Commission. The trend to conformity and sameness is particularly encouraged by the comparative hearing process itself.[202]

It takes relatively little imagination on the part of an applicant competing for a license to realize that he must develop a format of balanced programming which will pass muster under the Commission's examination. It takes even less imagination, talent, or creativity to put such a format into effect. It is small wonder then that most applicants, with the help of Washington counsel, develop program proposals which will pass the balance test and which will compare, neither more nor less favorably, with any other applicant's balanced proposals.[203] The Commission encourages this practice. If some applicant gets carried away with the idea of something special in the way of programming, the Commission is likely to discount his proposals as impractical and unlikely to be effectuated.[204]

In defense of the Commission's use of program types, Commissioner Cox has suggested that the program categories are not the Commission's creation but that they reflect the basic program interests of the public, as reported by broadcasters before the time when such categories were established. According to this argument, the categories were developed simply for convenience to broadcasters in reporting the programming which they presented and for ease of processing applications by the Commission.[205] The thrust of this argument is that the use of specified program categories is simply a convenient method of getting information.

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[202] *See* Pierson, *The Need for Modification of Section 326*, 18 FED. COM. B.J. 15, 19–21 (1963).

[203] *Id.*

[204] *See, e.g.*, Veterans *Broadcasting Co.*, 4 P & F RADIO REG. 2d 375 (1965).

It may be that the mere requirement that a licensee report his programming in the various categories, as an incident to recordkeeping activities by the Commission does not raise any significant first amendment problem. But Commissioner Cox's suggestion that the licensee's report of programming is purely a recordkeeping exercise seems to be less than a candid explanation of the purpose of the report and the use to which it is put, and as the Supreme Court has on more than one occasion emphasized, the fact that an inquiry can be justified as merely routine cannot be accepted as a cloak which shields such activity from constitutional objection if the character of the inquiry, or the manner and circumstances in which it is done, accomplish a restraint on free speech.[206]

Perhaps more basically troublesome than the encouragement of conformity is the fact that it is impossible to tell whether the Commission is in fact making value judgments about programming while its published opinions deny that it is doing so. One can scarcely accept the gratuitous and self-serving statements made by the Commission in its opinions that it has not recognized or given any decisive significance to any difference between program proposals. Since the Commission is not wholly oblivious to the constitutional implications of the close supervision of programming, it is not surprising that the opinions, written to be as "appeal-proof" as possible, attempt to show an abundance of caution and restraint in this area.

It is sometimes suggested that, whatever the constitutional limits on direct program regulation or even on indirect program influence, the Commission has full constitutional authority to consider and pass judgment on the programming of two or more applicants in a comparative hearing, as a basis for choosing between them. Such a distinction between comparative program evaluation and other forms of program regulation is suggested by two of the leading cases on FCC regulatory authority in the field of programming, *Bay State Beacon, Inc. v. FCC* [207] and *Johnston Broadcasting Company v. FCC*.[208] In *Bay State* the court held it was not a violation of the first amendment or section 326 [209] for the Commission to consider, as a factor in selecting one comparative applicant over another, a quantitative analysis of the amount of time to be devoted by the respective applicants to commercial vis-a-vis noncommercial programs. The court reasoned that the program analysis merely indicated how the applicant would perform in the public interest and that, if the Commission could not make such an inquiry as to programming, it would be unable to perform its duty to ensure that the public interest, convenience, and necessity were being served. The court went on to state that if denial of a license to the unsuccessful applicant on the basis of inferior program proposals violated the first amendment, "then every unsuccessful applicant would have the right of free speech throttled and abridged." [210] In *Johnston* the court again approved the Commission's preference for one comparative applicant over another on the basis of program proposals. The court reasoned "It is true that the Commission cannot choose on the basis of political, economic or social views of an applicant. But in a comparative consideration, it is well recognized that comparative service to the listening public, is the vital element and programs are the essence of that service. So, while the Commission cannot prescribe any type of program (except for prohibition against obscenity, profanity, etc.), it can make a comparison on the basis of public interest and, therefore, of public service.[211] "

Insofar as the courts in *Bay State* and *Johnston* intended to distinguish between evaluation of programming in the context of comparative hearings and other forms of direct or indirect program supervision by the Commission, the reasoning is something less than clear. Implicit in the suggested distinction is the assumption that because there must be *some* basis for selection between applicants it is proper, indeed necessary, to weigh the comparative merits of the applicant's respective program proposals.

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[205] Cox, *supra* note 199, at 199–201.

[206] *See, e.g.*, Talley v. California, 362 U.S. 60 (1960); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); *cf.* Brown, *Character and Candor Requirements for FCC Licensees*, 22 LAW & CONTEMP. PROB. 644, 654–55 (1957).

[207] 171 F.2d 826 (D.C. Cir. 1948).

[208] 175 F.2d 351 (D.C. Cir. 1949).

[209] 47 U.S.C. § 326 (1948).

[210] 171 F.2d 826, 827 (D.C. Cir. 1948).

[211] 175 F.2d 351, 359 (D.C. Cir. 1949).

As to any supposed *necessity* for choosing between applicants on the basis of program proposals, it is sufficient first to note the numerous other bases for comparative evaluation which in no way involve judgments as to programming. There is scarcely any inherent necessity in basing a selection on an evaluation of program proposals. Second, the convenience or even necessity of evaluating program proposals to fulfill the *statutory* mandate of effecting the public interest, convenience, and necessity can scarcely warrant an intrusion into constitutionally prohibited areas. In the final analysis there is no basis whatsoever for singling out the comparative hearing process as some special justification for control of program choice. The Commission's program regulation policies are just as questionable in this area as in a noncomparative hearing context.

The ultimate ostensible aim of the Commission's emphasis on program balance and its general insistence on programming in all of the key program categories is the advancement of diversity of viewpoints, ideas, and entertainment. This same general aim is the underlying rationale for regulation of more direct impact and more far-reaching implications: regulation of the broadcasting of political and controversial public issues. It is here that the constitutional problems of the Commission's program regulation are brought most sharply into focus.

C. Regulation of political broadcasts and controversial public issues programming

Few areas of broadcast regulation have been as controversial as the regulation of political broadcasts and controversial public issues programming. Acting under the equal time requirements of section 315 of the Communications Act fo 1934 and pursuant to its so-called "fairness doctrine," the Commission has come under increasingly heavy criticism from the industry, Congress, and even some of its own members because of its interference with broadcasters' discretion and responsibility in this area of programming.[212] Although political broadcasts and controversial public issues programming may appear in many respects to pose but a single regulatory problem, they in fact pose two distinct, though related, problems with distinct, and somewhat different, constitutional implications.

1. Equal Time—

Section 315 of the Communications Act of 1934 provides:

"(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station. . . .

"(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

"(c) The Commision shall prescribe appropriate rules and regulations to carry out the provisions of this section."[213]

An exception from the equal time requirement is provided for appearances by candidates on bona fide news, interview, or documentary programs, so long as the licensee continues "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[214]

The concept of equal time in itself is essentially a simple one, and in most cases its requirements are relatively clear and direct.[215] The Commission's key rulings on the principal problems of scope and interpretation are summarized in its *Equal Time Primer*[216] and have been quite fully explored by others.[217] It is, therefore, sufficient here merely to sketch the outline of the equal time requirements. The equal time requirements are much more limited than is popularly supposed. First of all, the duty to provide equal opportunity arises only when a legally qualified,[218] bona fide candidate *himself*[219] makes an appearance on the station either live or on tape for any purpose[220] except an appearance in connection with a news program or interview.[221] There is no specific obligation on the station to carry political broadcasts in the first instance, although a refusal to carry any political broadcasting may be considered against the licensee at renewal time when the Commission decides whether the station has been operated in the public interest.[222] In addition, the station is not required to seek out the opposing candidites. The initiative is on the opposing candidate to request equal time[223] within one week of the broadcast.[224]

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[212] *See, e.g., Hearings on Equal Time Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 88th Cong., 1st Sess., ser. 29 (1963); *Hearings on Political Broadcasting before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. (1959); *see also* Dean, *Political Broadcasting: The Communications Act of 1934 Reviewed*, 20 Fed. Com. B.J. 16, 38–43 (196

[213] 48 Stat. 1088 (1934), *as amended*, 47 U.S.C. § 315 (1964).

[214] 48 Stat. 1088 (1934), *as amended*, 47 U.S.C. § 315(a)(4) (1964).

[215] Those problems of construction which have been raised in the application of equal time can be generally summarized under the following questions: (1) who are legally qualified candidates?; (2) what constitutes "equal" opportunity?; (3) what constitutes a "use" by a political candidate?; and (4) what is a bona fide "newscast," "news interview," "news documentary," or "news events"?

Enforcement of section 315 generally arises on complaint[225] to the Commission by a candidate who has been denied equal time. The licensee is notified of the complaint and given time to reply. Once an order is issued, the order can be enforced through the usual means of fines, cease and desist orders, and even denial of license renewal or license revocation for willful and repeated violations.[226] However, the issuance of a ruling that a candidate is entitled to equal time has apparently sufficed in all or virtually all cases. No case has been found in which any formal sanctions were invoked. The reason for this is obvious since compliance, or attempted compliance in good faith with a prior ruling is all that is required. Since judicial review can be had from the informal ruling,[227] a refusal to comply in order to test the correctness or the constitutionality of the ruling is unnecessary. In any event, the sanctions risked by noncompliance are quite evidently regarded as more important to the broadcaster than his right not to accord equal time.

Notwithstanding the fact that section 315 is quite limited, not only as to the period in which it is operative but also as to the scope of the obligation imposed, the equal time requirements have been the subject of unrelenting critisism over the years, and a number of attempts have been made to modify or repeal section 315.[228] Probably the most severe attacks have been aimed at the Commission's interpretation of section 315, which has generally tended to expand the scope of the section. The classic example is the Commission's *Lar Daly*[229] decision, holding that the appearance of an incumbent political candidate on a newscast and a separate announcement on behalf of the March of Dimes constituted a "use" entitling all other candidates to equal time. This remarkably obtuse decision called forth a flood of criticism which was quickly followed by congressional reversal of the decision, and the present exemptions for bona fide news events.

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[216] *Political Broadcasts*, 24 P & F RADIO REG. 1901 (1962) (incorporating earlier summaries).

[217] *E.g.*, Friedenthal & Medalie, *The Impact of Federal Regulation on Political Broadcasting: Section 315 of the Communications Act*, 72 HARV. L. REV. 445 (1959); Comment, 30 GEO. WASH. L. REV. 63 (1961).

[218] *See Political Broadcasts*, 24 P & F RADIO REG. 1901, 1913–15 (1962).

[219] Equal time is not required where another person appears on behalf of the candidate. Felix v. Westinghouse Radio, 186 F.2d 1 (3d Cir. 1950), *cert. denied*, 341 U.S. 909 (1951).

[220] The Commission has ruled in numerous instances that a candidate who appears for any purpose or in any capacity, even in that of a station announcer, is a use by the candidate requiring equal time. *See Political Broadcasts*, 24 P & F RADIO REG. 1901, 1908–12 (1962). *But see* Brigham v. FCC, 276 F.2d 828 (5th Cir. 1960), where the Fifth Circuit held that a station weatherman's appearance on a program to present the weather report was not a use although the weatherman was also a candidate. This may be rationalized, however, on the exemption for bona fide news broadcasts rather than any exemption for candidates who make appearances for nonpolitical purposes.

[221] 47 U.S.C. § 315 (1964); *see Political Broadcasts*, 24 P & F RADIO REG. 1901, 1908–13 1962).

[222] *Licensee's Obligation to Carry Political Broadcasts*, 25 P & F RADIO REG. 1731 (1963).

[223] "Equivalent" time means equivalent in terms of rates charged (or absence of rates), length of time, desirability of the time spot offered, and any other conditions of use. *See Political Broadcasts*, 24 P & F RADIO REG. 1901, 1919–21 (1962).

[224] 47 C.F.R. § 13.657(e) (Supp. 1966).

[225] The Commission does, when asked, also render declaratory decisions without any complaint. *E.g.*, Columbia Broadcasting Sys., 3 P & F RADIO REG. 2d 623 (1964).

[226] *See* 47 U.S.C. §§ 307(d), 312(a) & (b), 504(b) (1964).

[227] *See* Felix v. Westinghouse Radio, 186 F.2d 1 (3d Cir. 1950), *cert. denied*, 341 U.S. 909 (1951).

[228] *See, e.g.*, S. 1010, 89th Cong., 1st Sess. (1965); S. 1696, 88th Cong., 1st Sess. (1963). For criticism before Congress of § 315, see *Hearings on Equal Time before the Subcomm. on Communications of the Senate Comm. on Commerce*, 88th Cong., 1st Sess., ser. 29 (1963). The critics of § 315 include at least one former Commissioner. *See Hearings on Political Broadcasting before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 81 (1959) (testimony of Commissioner Ford).

Despite this swift reversal the Commission has continued to adhere to an extremely broad interpretation of the word "use." Thus it insists that any appearance by a candidate for any purpose whatsoever, other than in connection with a bona fide news program, constitutes a use irrespective of whether the appearance has any bearing on his political candidacy.[230] This interpretation is based on the rather tenous theory that any exposure of a candidate over radio or television ultimately accrues to the candidate's benefit or that, in any event, the licensee should not be permitted to judge whether the candidate has benefited from the appearance.[231] Consistent with their expansive reading of section 315, the Commission has also placed some rather narrow interpretations on the news exemption established by Congress in 1959 with respect to such appearances as press conferences and reports from Congressmen.[232] These limited interpretations have justifiably invoked criticism from members of the Commission as well as the industry.[233]

While the Commission has been severely criticized on many occasions for its interpretation of section 315, probably as much criticism has been levied at the statutory requirements themselves. This criticism has centered chiefly on the problem of giving equal time to minority candidates. Although Congress suspended section 315 for presidential and vice-presidential candidates in 1960,[234] every attempt thus far to modify or repeal section 315 permanently[235] has failed. An attempt to suspend section 315 again for presidential and vice-presidential candidates in the 1964 election campaign failed despite some strong support for following the 1960 pattern.

2. *The Fairness Doctrine*—

Closely akin to, but distinct from the equal time requirements is the Commission's so-called "fairness doctrine." Stated most generally, the fairness doctrine is on obligation imposed on the broadcaster to present contrasting responsible points of view on controversial issues of public importance.[236]

The history of the fairness doctrine is rather uncertain since it depends on how one defines what now passes for a doctrine. The Commission maintains that the fairness doctrine has, in essence, been in effect from the first days of regulation by the Federal Radio Commission.[237] A statement in the 1929 *Annual Report* of the Federal Radio Commission does suggest an early origin of the doctrine: "It would not be fair, indeed, it would not be good service to the public, to allow a one-sided presentation of political issues of a campaign. Insofar as the program consists of discussion of public questions, public interest requires ample play for the fair and free competition of opposing views, and the Commission believes that the principle applies not only to addresses of political candidates but to discussion of issues of importance to the public."[238]

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[229] CBS, Inc., 18 P & F Radio Reg. 701 (1959). For industry criticisms of the *Lar Daly* case, see *Hearings on Political Broadcasting Before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce,* 86th Cong., 1st Sess (1959).

[230] *See* note 219 *supra.*

[231] *See* WMCA, Inc., 7 P & F Radio Reg. 1132 (1952).

[232] *See, e.g.*, Columbia Broadcasting Sys., 3 P & F Radio Reg. 2d 623 (1964); Letter to Congressman Thompson, 23 P & F Radio Reg. 178 (1962).

[233] *See, e.g.*, dissenting opinions of Commissioners Ford and Loevinger in Columbia Broadcasting Sys., 3 P & F Radio Reg. 2d 623, 630–31 (1964).

[234] Act of Aug. 24, 1960, Pub. L. No. 86–677, 74 Stat. 554.

[235] *See, e.g.*, S. 252; S. 1696; *Hearings on Equal Time Before the Communications Subcomm. of the Senate Comm. on Commerce,* 88th Cong., 1st Sess., ser. 29 (1963).

[236] *Fairness Doctrine,* 2 P & F Radio Reg. 2d 1901, 1904 (1964). For extensive comments on the fairness doctrine reflecting different attitudes toward it, see Barron, *The Federal Communications Commission's Fairness Doctrine: An Evaluation,* 30 Geo. Wash. L. Rev. 1 (1961); Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma,* 32 Geo. Wash. L. Rev. 719 (1964).

[237] *See Fairness Doctrine,* 2 P & F Radio Reg. 2d 1901, 1903 (1964). The Commission also interprets § 315, as amended in 1959, to give statutory sanction for the doctrine. *See id.* But this seems a somewhat dubious interpretation of congressional intent. *See* text accompanying notes 250–51 *infra.*

While a general obligation to be fair in presenting opposing viewpoints on controversial issues may be inherent in the broadcaster's duty to serve the public interest, there is an important difference between a general moral responsibility—enforceable, if at all, only by self-regulation—and a specific legal requirement enforceable by Commission sanction.[239] Despite the Commission's early insistence that the broadcaster is obligated to present all sides of a controversial issue, it was really not until the Commission's opinion in *Mayflower Broadcasting Company*[240] in 1940, which imposed a ban on broadcast editorializing as inherently unfair, that the Commission articulated something like the fairness doctrine, enforceable by direct sanction or specific admonishment, as it is now understood.[241] The *Mayflower* decision represents a crude first attempt on the part of the Commission to enforce fairness in the treatment of controversial issues by broadcasters. The case did not, however, lay down any specific requirements other than the negative commandment: thou shall not be an advocate. Apart from condemning editorializing, it spoke only in very sweeping and general terms:

> "Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues. Indeed, as one licensed to operate in a public domain, the licensee has assumed the obligation of presenting all sides of important public questions, faily, objectively and without bias."[242]

The scope of the licensee's obligation to ensure the fair presentation of all sides of controversial issues and the manner in which the Commission intended to enforce that obligation remain as vague as the broadcaster's duty to serve the public interest. Few stations were hurt by the ban on editorializing, since the practice was not widespread in the industry and was generally frowned upon.[243] Thus, the *Mayflower* opinion did not evoke as overwhelming a protest from the industry as might have been expected.

Apart from the flat ban on editorializing, little effort was made by the Commission to clarify the scope of the licensee's obligation to be fair or to set forth any guidelines as to what would be deemed controversial or what was required in order to be fair. In fact, the Commission quite evidently did not really know what fairness meant. Thus, in 1946 it decided not to require a station to give an atheist opportunity to "give the other side" of views reflected in the station's religious programs, while at the same time instructing the station to be fair in presenting religious issues even though this would require the station to permit expression of highly unpopular minority views including those of atheists.[244] The confusingly vague scope of the fairness obligation was compounded by the fact that the Commission had, in 1945, issued a statement of policy to the effect that stations could not avoid the problem by refusing to carry programs dealing with controversial public issues.[245]

In 1947 the Commission, prompted by the evident need to clarify the fairness obligation with respect to controversial public issues generally, instituted hearings on the relationships between editorializing and a broadcaster's obligations under the Act. These culminated in the Commission's *Report on Editorializing by Broadcast Licensees*,[246] released in 1949, in which the Commission reversed *Mayflower* and reestablished the right of the broadcaster to editorialize. In addition, this report dealt generally with the licensee's overall duty of fairness in treating controversial issues. It set forth the licensee's twofold obligation: first, to speak out on controversial public issues, although not necessarily in the format of station editorials; and, second, an affirmative obligation to ascertain and seek out all responsible viewpoints on controversial issues and to afford the opportunity for such contrasting viewpoints to be heard.[247] It is this two-fold obligation which constitutes the modern fairness doctrine.

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[238] 1929 FRC ANN. REP. 33.

[239] Sullivan, *supra* note 236, at 728.

[240] 8 F.C.C. 333 (1940).

[241] In Red Lion Broadcasting Co. v. FCC, 10 P & F RADIO REG. 2d 2001, 2011 (D.C. Cir. 1967), the court attempts to give an earlier genesis for the fairness doctrine by finding it in such cases as *Shuler* and *Brinkley*. Trinity Methodist Church, South v. Federal Radio Comm'n, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933); KFKB Broadcasting Ass'n v. Federal Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931). However, the denial of licenses in these cases was based on a far more flagrant conduct than simple failure to present both sides of a public controversy and neither was grounded on any articulated fairness doctrine as that term is understood today. So also the Commission's refusal to license the applicant in Young People's Ass'n for the Propogation of the Gospel, 6 F.C.C. 178 (1938), which announced its intention to pursue a flat, general policy of not permitting use of its facilities for presenting *any* view differing from that of the applicant, bears but slight resemblance to the fairness doctrine today but is more akin to the *Brinkley* and *Shuler* cases and the principle that a licensee cannot operate the station in its purely private interests to the exclusion of any public interest.

[242] 8 F.C.C. 333, 340 (1940).

[243] Sullivan, *supra* note 236, at 730–32.

[244] Robert Harold Scott, 3 P & F RADIO REG. 259 (1946).

[245] United Broadcasting Co., 10 F.C.C. 515 (1945).

The 1949 *Editorializing Report* remains the basic expression of policy for the fairness doctrine. Congress recognized the fairness doctrine in its 1959 amendments to section 315. Amended section 315, after establishing the exemption for bona fide news broadcasts, provides: "Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." [248]

Although the Commission has read the above provision as a ratification of the fairness doctrine, it seems doubtful that Congress, in amending section 315, actually intended to give specific statutory sanction to the Commission's fairness doctrine. More probably, Congress intended neither approval nor disapproval of it, but merely intended to ensure that section 315 would not interfere with it. There was no other consideration of the fairness doctrine as such and no consideration was given to the statutory authority for the doctrine as then applied.[249]

In recent years the Commission has attempted to furnish some more specific guidance in its *Fairness Primer*, a collection of ad hoc rulings implementing the fairness doctrine.[250] The Commission's ad hoc rulings are at best an uncertain guideline. In order to set forth the basic theory of the fairness doctrine and to distinguish it from section 315, a few generalizations may be made.

Unlike section 315, the fairness doctrine does not necessarily require a station to grant *equal* time to all opposing viewpoints. A ten-minute commentary by the station on one side of a controversial school bond issue, for example, does not necessarily require that the station grant ten minutes to all other sides. This flows from the fact that the obligation is to ensure *fair* treatment, not necessarily precisely equal time, to the various sides. Moreover, unlike section 315, the fairness doctrine does not necessarily require the station to offer time to any outside person, group, or agency. If the station's programming is such that fairness is accorded to all sides *over a reasonable period of time*, then the station's obligations are at least theoretically met.

An exception to the above is the so-called "personal attack" rule which requires that, where a station makes a personal attack on a specific individual or group, it must provide the individual attacked with a script or tape of the broadcast prior to or at the time of the broadcast and with a specific offer of time to reply.[251] This rule has now been codified into specific regulations which have extended it not only to require opportunity to reply to personal attacks but also to require the station to offer rebuttal time in the case of editorial endorsements of or opposition to qualified political candidates.[252] These rules reflect an evolving crystallization, if not rigidification, of the fairness doctrine from a general obligation of responsibility into fixed regulations prescribing specific licensee duties. The wisdom of such regulatory policy is certainly open to question.

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[246] 1 P & F RADIO REG. 91:201 (1949).

[247] *Id.* at 91:206.

[248] 48 Stat. 1088 (1934), *as amended*, 47 U.S.C. § 315(a)4 (1964).

[249] For a brief discussion of the question see Dean, *Political Broadcasting: The Communications Act of 1934 Reviewed*. 20 FED. COMM. B.J. 16, 29–31 (1966).

[250] *Fairness Doctrine*, 2 P & F RADIO REG. 2d 1901 (1964).

[251] Billings Broadcasting Co., 23 P & F RADIO REG. 951 (1962); Clayton W. Mapoles, 23 P & F RADIO REG. 586 (1962); Times-Mirror Broadcasting Co., 24 P & F RADIO REG. 404, 407 (1962).

[252] *Fairness Doctrine Rules*, 10 P & F RADIO REG. 2d 1901, 1903 (1967). Appeals challenging the rules have been taken in the Second and Seventh Circuit Courts of Appeals. BROADCASTING MAGAZINE, July 31, 1967, at 23–24.

The Commission's enforcement of the fairness doctrine is substantially similar to its enforcement of section 315, except that it is possibly even more informal. Upon complaint that a licensee has not accorded fair coverage to a controversial public issue, the Commission forwards the complaint to the licensee and demands a reply. If the reply does not satisfy the Commission, it informs the station of the error of its ways, indicating perhaps that the matter may be considered at renewal time.[253] In addition, it may demand from the licensee a statement of how it will comply with the fairness doctrine in the future.[254]

A notification to the applicant that the matter will be considered at renewal time is precisely the kind of "lifted eyebrow" technique which the Commission has successfully employed in other aspects of broadcast regulation. Generally, it is not so much the possible loss of its license as the possibility of being forced through the ordeal of a hearing which makes the informal letter-telegram procedure effective. To reinforce this informal procedure, the Commission has in one recent case issued a one-year renewal where a station's presentation of controversial public issues had been of questionable fairness.[255] Finally, if the fairness doctrine has been incorporated into section 315, then enforcement methods such as cease and desist orders and fines should be at least theoretically available. The Commission has not as yet resorted to these methods although it may well do so in the future, particularly in enforcing its new personal attack regulations.[256]

2. *First Amendment Implications*—

The operation of the equal time rule imposes a significant restraint on broadcasters' discretion and responsibility in choice of programming. Its effects are to compel the licensee to offer time for political programs which, if left to his own discretion, he might not otherwise broadcast, and to compel the licensee to refuse to present programs which he would otherwise broadcast in order to avoid the burden of complying or the risk of not complying with this requirement. The latter restraint is probably the more significant because it is here that the requirement for equal time to all candidates, including minority and fringe candidates, has its most immediate impact upon political broadcasting. CBS President Frank Stanton, one of the most persistent and vocal critics of section 315, has contended that "The inescapable conclusion is that Section 315 does far more harm than good, and that its result is neither to increase diversity of opinion nor expand free speech but rather as a practical matter of practical necessity is compelled suppression and blackout. This compulsion is as simple as it is obvious: Time and time again radio and television have been unable to present candidates to the American people because broadcasters have known that under Section 315 a half hour to a Democratic or Republican candidate can mean a total of 4, 8 or 16 half hours to obscure and unknown opponents. So when a half hour has had to be multiplied to 8 hours, we have had to forego the half hour, the result has been less, not more, broadcasting in the public interest.[257]"

Congress recognized the significant restraint imposed on broadcasters by the equal time requirements in 1960 when it suspended section 315 for presidential and vice-presidential candidates.[258]

As in the case of the equal time requirements of section 315, it seems undeniable that the fairness doctrine acts as a significant restraint on the broadcaster's choice of programming and represents a substantial intrusion by the Commission into the area of program selection. While the nature of the restraints imposed is basically similar for both the equal time requirements and the fairness doctrine, there are important substantive differences.

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[253] *See* 1965 FCC Ann. Rep. 89–92.

[254] *E.g.*, Letters to Taft Broadcasting Co. and WBRE-TV, Public Notice-G No. 73,787 Sept. 24, 1965); New Broadcasting Co. (WLIB), 6 P & F Radio Reg. 258 (1950).

[255] Lamar Life Broadcasting Co., 5 P & F Radio Reg. 2d 205 (1965).

[256] A major purpose for the Commission's recent codification of the "personal attack" rule is to crystallize its policy sufficiently that it can be enforced by specific sanction such as fine. *See Fairness Doctrine Rules*, 10 P & F Radio Reg. 2d 1901, 1904 (1967).

[257] *Hearings on Political Broadcasting Before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 97 (1959) statement of Frank Stanton, President of CBS).

[258] Pub. L. No. 86–677, 74 Stat. 554 (1960).

First, the equal time requirement focuses on personalities rather than directly on program content, though it may indirectly affect program content to some extent. There is no requirement, for example, that the Commission examine the content of a particular broadcast to determine whether its standards are met in the case of equal time. On the other hand, the fairness doctrine is predicated on just such an examination, evaluation, and judgment by the Commission of specific program content. The fairness doctrine cannot be applied without the Commission making a determination that the content of the program is of such nature as in its judgment requires opportunity for presentation of opposing views. This aspect of the fairness doctrine is crucial from a first amendment viewpoint since the restraint on free speech grows directly out of an examination and judgment by the Commission of program content.

Second, unlike the equal time requirement, which has a narrow scope and correspondingly imposes only a limited degree of restraint, the scope of the general fairness doctrine is sweepingly broad. While equal time is limited to a relatively short period prior to elections, the fairness doctrine is always applicable. While equal time affects only programs involving a legally qualified candidate for public office, the fairness doctrine affects all programming which involves controversial public issues. Thus the effect upon program choice is infinitely greater in the case of the fairness doctrine. A broadcaster, faced with the possibility that he may have to give time to candidates *B*, *C*, and *D* if he makes time available to candidate *A* may well forego giving time to *A*. The program choice foreclosed is limited. Compare, however, the alternatives faced by a broadcaster who is considering a public discussion program, a commentary series, or editorials. He is met at the outset with the possibility that if he touches on any significant public issue, even if *he* does not judge it to be controversial, it may give rise to an obligation to provide time to opposing viewpoints. The problem will not arise just once or twice, but may arise on hundreds of occasions. Virtually every topic which might be worth discussing or commenting upon is likely to be considered by the Commission to be a controversial issue of public importance which obligates him to seek out and provide an opportunity for the expression of opposing viewpoints. The most conscientious broadcaster may well have very substantial qualms about presenting controversial public issues when he is required to be fair by someone else's standards, particularly if the someone else happens to be the government.

The almost infinite reach of the fairness doctrine is most graphically illustrated by the Commission's recent ruling that a station which presents cigarette advertising "has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health."[259] This is the first time the fairness doctrine has been held applicable to routine advertising. To say the least, such an application of the doctrine raises a question whether there is any kind of broadcast message which, in any context, touches even tangentially on a controversial issue to which the fairness doctrine does not apply. For example, does the advertising of automobiles give rise to an obligation to permit Ralph Nader to present his views on automotive safety?[260] The Commission rejected such implications of its ruling as simply a "parade of horribles" and emphasized that here the decisive criteria were the "governmental and private reports and congressional action" stressing the danger of smoking and urging persons to cease.[261] But the distinction seems paper-thin, particularly since nothing in the way the fairness doctrine has been applied in other contexts suggests that the presence or absence of governmental action or concern is of decisive importance. And even if it is, the ruling still has potentially limitless ramifications considering the range of issues with which the government is concerned. For example, does the advertising of vitamin supplements require a station to give air time to Dr. Goddard to present the FDA's views[262] on the questionable need for such supplements?

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[259] Letter to WCBS-TV, 9 P & F RADIO REG. 2d 1423, 1424, *petition for reconsideration denied,* 11 P & F RADIO REG. 2d 1921 (1967). The ruling was issued on complaint. An appeal has been filed by the NAB on behalf of the broadcasting industry (and, by reasonable assumption, on behalf of the cigarette industry) in the Fourth Circuit challenging the ruling on essentially the following grounds: (1) it conflicts with the Cigarette Labeling and Advertising Act of 1965, (2) it exceeds the Commission's statutory authority, (3) it violates the first and fifth amendments, and (4) it is procedurally defective. These are the same grounds urged before the Commission in seeking reconsideration. *See* BROADCASTING MAGAZINE, Sept. 18, 1967, at 34–38. Complainant, a lawyer in the vein of Ralph Nader, has also filed an appeal in the District of Columbia Circuit claiming that the ruling does not go far enough. *Id.* The latter appeal is an obvious race-to-the-courthouse attempt to get review in a sympathetic court.

[260] *See* R. NADER, UNSAFE AT ANY SPEED (1965).

[261] 11 P & F RADIO REG. 2d at 1929–30 (1967).

Perhaps the most startling thing about the cigarette ruling is that it requires *continuing* presentations by the station of the viewpoint that smoking is a health hazard because cigarette commercials are presented on a continuing basis. The Commission made clear that the station must allocate sufficient time to the opposing viewpoint each week. Moreover, the obligation to present the opposing view extends to giving time on the air without charge if that is necessary to achieve the requisite fairness: Indeed, it is evident from the Commission's letter-opinion that it contemplated that the obligation would be met at least partially by public service announcements of the American Cancer Society or HEW in this field.[263] Thus the impact which can logically be expected from this ruling is a continuing one.

However, notwithstanding the above objections, it is possible that on the present state of the law the ruling is immune from first amendment attack insofar as it involves advertising, although arguably this should make no difference here where the Commission is applying a rule applicable generally to the dissemination of ideas regardless of whether the particular ideas happen to be embodied in an advertising message.[263a] The restraining effect of the fairness doctrine is compounded for the broadcaster by its vague and indefinite standards. The vagueness and uncertainty are inherent first in the definition of what constitutes a controversial public issue giving rise to the obligation to be fair. The cigarette advertising ruling is an illustration of the potential sweeping inclusiveness of this element. There is also uncertainty as to what fairness requires the licensee to do in any particular circumstances. Uncertainty as to the elements of the doctrine and what it requires must inevitably cause a greater restraint on broadcaster discretion than would otherwise be the case. Thus the broadcaster may forego a wider range of programming in order to guard against the *possibility* that the fairness doctrine might apply, or he may broadcast programs expressing viewpoints opposing those of an original broadcast where it may not actually be necessary under a reasonable interpretation of the doctrine. The fairness doctrine is likely to have a particularly dampening effect on the quality of station advocacy such as editorializing. Advocacy by its nature seldom involves a complete and unbiased exposure of all contrasting views by the advocate. Were every advocate required to give such a full and unbiased treatment of all views, few would find advocacy and controversy worth the effort.

Under these circumstances, it is not surprising that many broadcasters forego controversial public issue programming, being content to play it safe with planned, noncontroversial subjects of the "mother-and-home" variety. But even this alternative may not avoid trouble since the Commission takes the position that the presentation of controversial public issues programming is an affirmative duty of every licensee.[264]

A distinction somewhat similar to that between equal time and the fairness doctrine can arguably be made between the fairness doctrine as it is applied to controversial public issues and the so-called personal attack principle,[265] which has developed out of the fairness doctrine. The personal attack principle represents a considerable extension of the fairness doctrine as traditionally applied insofar as it fixes an absolute duty to offer to the person attacked an opportunity to reply. It is in this respect basically similar to the equal time requirements of section 315, except that it is not confined to political candidates. While the personal attack principle is an extended application of the fairness doctrine, it does not represent quite the same constitutional problems. The vagaries and sweeping scope of the fairness doctrine are not inherent in the personal attack principle. Correspondingly, the compulsion to present ideas and speech which the broadcaster would otherwise not present is far less sweeping, and the inhibition on ideas and speech is far less broad where the broadcaster is required to afford the right to reply only to one who is personally attacked than where the broadcaster is required to give a fair presentation of controversial public issues. Moreover, a case can be made for the right to reply to a personal attack, at least where the attack is libelous, near-libelous, or arguably libelous. Professor Chafee persuasively argued that in such cases a legislative requirement imposing a duty to permit a reply to such statements is preferable to punishing or inhibiting defamation through libel and slander suits, and probably no more unconstitutional.[266] It should be emphasized, however, that this argument does not single out radio and television stations: it applies equally to newspapers and other mass communication media.[267] Indeed, one state has a statute imposing such a duty on newspapers.[268] However, even this limited right to reply to defamatory statements, whether applied to broadcasters or newspapers, seems to be of questionable wisdom and even more doubtful constitutionality. Moreover, even if its constitutionality were recognized, it would not justify either the fairness doctrine as it is generally applied or the rule which requires stations to afford an opportunity to reply to editorial endorsement of or opposition to political candidates. In the case of the personal attack principle, justification and constitutional sanction might be found in a long tradition of remedying defamation, antedating the first amendment. No such tradition affords a remedy in the case of one who merely takes a stand on controversial public issues. No such tradition compels one always to give all sides of the story.

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[262] *See, e.g.*, "Health and the Consumer," Address by Goddard, Annual Meeting of the Food Industries of the Nutrition Foundation, June 8, 1967.

[263] 9 P & F RADIO REG. 2d 1423 (June 2, 1967).

[263a] *See* note 162 and accompanying text *supra*. The Commission only noted in passing the question of whether advertising is protected speech, but did not rule that it is not protected. 11 P & F RADIO REG. 2d at 1908 n.4 (1967).

[264] *Editorializing by Licensees*, 1 P & F RADIO REG. 91:201, 91:206 (1949).

[265] *See* text accompanying notes 251–52 *supra*.

The basic rationalization for the Commission's fairness doctrine, as for its general standards for presenting "balanced" programming, is that the licensee, bound by statutory policy to serve the public interest, must fairly present balanced and diversified programming so as to meet the needs and interests of all of the public. This rationalization rests on the assumption that, because the licensee has something of a monopoly in regard to access to and use of broadcast facilities, it is necessary and justifiable to compensate for this monopoly by requiring that he present all types of programming and all points of view which, by hypothesis, would be presented if there were no technological barriers to entry into broadcasting.

On this assumption, the Commission generally refuses to acknowledge any of the significant first amendment implications posed by its regulation of programming. Perhaps the most succinct single statement of its view is set forth in its 1949 *Editorializing Report*:[269]

> "We believe . . . that a requirement that broadcast licensees utilize their franchises in a manner in which the listening public may be assured of hearing varying opinions on the paramount issues facing the American people is within both the spirit and letter of the First Amendment [T]he Supreme Court of the United States . . . pointed [this] out in the Associated Press monopoly case. (*Associated Press vs. United States*, 326 U.S. 1, 20).
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> * * * * * * *
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> "We fully recognize that freedom of the radio is included among the freedoms protected against governmental abridgement by the First Amendment. . . . But this does not mean that the freedom of the people as a whole to enjoy the maximum possible utilization of this medium of mass communication may be subordinated to the freedom of any single person to exploit the medium for his own private interest."

Despite this army of high-sounding words and phrases, the basic premise on which the Commission justifies its intrusion into the program field is simply too tenuous to sustain such potentially far-reaching powers. Notwithstanding the Commission's rationalization in terms of the right of the public to receive diversified and balanced presentation of public issues, it has refused to consider whether or not, on a given issue, the public has received such a balanced presentation from all the various public media taken as a whole. It has ruled that each licensee must present all sides of a public issue irrespective of what other media and other radio and television stations present.[270] If the right of the public to receive diverse and balanced viewpoints is the decisive desideratum, it is curious, to say the least, that the Commission purposely insists on ignoring the question of whether the public is in fact receiving diverse and balanced presentations from existing communications media as a whole.

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[266] 1 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS MEDIA 172, 184–90 (Comm'n on Freedom of the Press ed. 1947). Professor Chafee points out, however, that there are some very serious difficulties with and objections to a legislative command to afford a right of reply. *Id.* at 180–84.

[267] *Id.* at 184–90.

[268] NEV. REV. STAT. ch. 200.570 (1965).

[269] *Editorializing by Licensees*, 1 P & F RADIO REG. 91:201, 91:210–11 (1949).

Moreover, the Commission's concern over licensees' use of public facilities for private purposes at the expense of the public is something of a red herring. The real issue is not whether the licensee has a right to exploit his license or to abuse its privileges, for example, by using the station to broadcast his own private views or to promote his own biases or interests, ignoring all public interests and needs. Those who oppose the Commission's fairness doctrine are not arguing for the rights of the licensee to be unfair or to use licensed facilities for a purely personal cause or aim. The question is who should have the responsibility; whose concept of fairness should be applied? If it is "unfair" for an advocate to put forward his own views without giving full and unbiased exposure to other opposing views, one may wonder whether any true advocacy is or can ever be "fair."

Finally, the Commission's reliance on the *AP* antitrust case is misplaced. As previously discussed,[271] the first amendment does not proscribe general economic and social regulation of the type involved in the *AP* antitrust case and the *AP* labor law case.[272] There is, however, a marked difference between regulation of the economic structure of a communications industry which is designed to protect the basic minimum conditions in which free, diversified speech may develop and regulation which attmpts directly to ensure such diversified speech by examining the speech itself to see if it meets the tests of balance, fairness, and diversity. It seems more than doubtful that Justice Black, who wrote the majority opinion in the *AP* antitrust case, or indeed any of the justices who joined him, supposed that by affirming the application of the Sherman Act to newspapers, he was affirming the power of the government to pass upon the balance, diversity, or fairness of newspapers, even those enjoying a natural monopoly position. The *NBC* case is no more dispositive than the *AP* case. Despite the Court's rather sweeping opinion which suggests sanction for all manner of Commission regulation in the public interest, the issue before the Court was the Commission's power to adopt essentially economic regulations similar in substance and purpose to the antitrust law sustained in the *AP* antitrust case. In both cases the difference between such broad socio-economic regulation and direct regulation of programming is obvious. To pass from the former to the latter without distinction is to pass beyond the elusive but nevertheless important line which separates speech in a free, open society from speech controlled by the government in the public interest—the earmark of a closed society.[273]

3. The Red Lion Case—

Although a number of court decisions previously discussed[274] have upheld the constitutionality of various aspects of Commission program regulation, some in rather sweeping terms, the constitutionality of the Commission's fairness doctrine went unchallenged in the courts until the recent decision in *Red Lion Broadcasting Company v. FCC*[275] involving personal attacks by a licensee.

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[270] *See* Jorgensen, Schwartz & Woods, *Programming Diversity in Proposals for New Broadcast Licenses*, 32 Geo. Wash. L. Rev. 769 (1964).

[271] *See* Part I *supra*.

[272] Associated Press v. NLRB, 301 U.S. 103 (1937).

[273] The phrases "open society" and "closed society" are borrowed from K. Popper, The Open Society And Its Enemies (4th ed. 1963).

To some the association of the Commission's regulation of radio and television programming with the attitude of the closed society will undoubtedly seem hyperbole. Some—those believing in the good intentions and motivations of the Commission in this concededly difficult and delicate area—will perhaps even treat this association with derision. There should not be any doubt that the Commission has acted on the highest of motivations and good intentions and it has not been altogether insensitive, at least as to some of the more obvious constitutional problems in this area. The fact remains, however, that the first amendment was designed to protect against well-intentioned, well-motivated interference with free speech as well as that which stems from a less well-intentioned social philosophy.

[274] *See, e.g.*, Johnston Broadcasting Co. v. FCC, 175 F.2d 351 (D.C. Cir. 1949); Trinity Methodist Church, South v. Federal Radio Comm'n, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933); KFKB Broadcasting Ass'n v. Federal Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931); text accompanying notes 115–18, 133–35, 208–11 *supra*.

Following the 1964 presidential elections petitioner-licensee broadcast a program which included a discussion of the election and a book by a Mr. Cook about the Republican campaign. The personal attack consisted of a charge that Cook, a newspaperman, had been fired for having made a false charge against an unnamed New York City official. Contrary to the Commission's personal attack policy, the licensee failed to notify Cook of the attack or to furnish him with a transcript of the program and refused Cook's request for free time to respond to the attack. Following receipt of the complaint from Cook, the Commission issued a letter to the licensee ruling that it had violated the fairness doctrine and requested it to advise the Commission of its "plans to comply with the 'fairness doctrine'."[276] In response to the licensee's request for a ruling, the Commission affirmed the constitutionality of the fairness doctrine as it applied to this situation.

On appeal the licensee challenged the constitutionality of the fairness doctrine on four grounds: (1) section 315 of the Act, the chief statutory authority for the fairness doctrine, constitutes an unconstitutional delegation of legislative power; (2) the fairness doctrine is unconstitutionally vague; (3) the fairness doctrine infringes upon the ninth and tenth amendments insofar as it violates the licensee's right to engage in political activity and insofar as it infringes upon powers reserved to the people; and (4) the fairness doctrine violates the first amendment.[277] Each ground was rejected by the court.

As to the first ground, the question of delegation in itself adds virtually nothing to the arguments that the fairness doctrine is unconstitutionally vague and unconstitutionally restrictive of free speech. If the latter arguments can be satisfactorily resolved there seems no tenable basis for attacking the delegation itself and, of course, if either of the latter arguments is upheld, the delegation question loses any significance.[278] As to the argument based on the ninth and tenth amendments, it is difficult to know what to make of the licensee's contentions. Reliance on the ninth and tenth amendments was evidently predicated on Justice Goldberg's concurring opinion in *Griswold v. Connecticut*,[279] and the theory that the ninth and tenth amendments constitute some kind of residuum of protected rights not elsewhere enumerated in the Constitution. The court's rejection of this argument in *Red Lion* seems undeniably correct. There is neither historical authority nor solid constitutional precedent for the proposition that the ninth and tenth amendments embody any specific constitutional rights. While, as Justice Goldberg pointed out, the ninth and tenth amendments indicate that the first eight amendments are not preclusive of other fundamental rights not enumerated, it is impossible to find in them any hint of what such other fundamental rights might be. Moreover, Justice Goldberg's use of the ninth and tenth amendments was dubious enough when applied in *Griswold* as a basis for "filling in" the interstices between specific constitutional guarantees. It would be even more dubious to apply the two amendments to the *Red Lion* situation where other *specific* constitutional provisions are directly in issue. Such an interpretation of the ninth and tenth amendments would cause the entire Bill of Rights to be all but swallowed up in these virtually forgotten amendments.

The licensee's vagueness appears on its face to be somewhat more persuasive. Viewing the fairness doctrine in general, it can hardly be denied that it is vague and uncertain in its scope and application. However, the vagueness argument seems misdirected here.

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[275] 10 P & F RADIO REG. 2d 2001 (D.C. Cir.), *petition for cert. filed*, 36 U.S.L.W 3100 (U.S. Sept. 11, 1967).

[276] *Id.* at 2006-08.

[277] *Id.* at 2004.

[278] Setting aside the issue of free speech, or the issue of vagueness such as would offend due process, the question of the constitutionality of the delegation seems fully disposed of by a line of authority too long to recite in its entirety. The standards of § 315 which were challenged,—"reasonable opportunity," "sufficient time for full discussion," "controversial issues of public importance," and others, *id.* at 2014—may indeed be broad and uncertain, but *considered under the issue of delegability* they are quite obviously no broader or more uncertain than standards which have been repeatedly upheld. *See e.g.*, Lichter v. United States, 334 U.S. 742 (1948) (authorizing recovery of "excess profits" under the Renegotiation Act); Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933) (regulation of licenses under the standard of "public interest, convenience, and necessity" under the Radio Act of 1927); Yakus v. United States, 321 U.S. 414, 423-5 (1944) (administrator under Emergency Price Control Act of 1942 given power to fix prices which "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act)).

[279] 381 U.S. 479, 486 (1965).

In the sense in which it is most widely understood and applied, the void-for-vagueness doctrine is based on the need to give fair notice to the individual as to what is unlawful. The evils sought to be eliminated are twofold: the subjection of a person to threat of punishment when he cannot know that his conduct is unlawful,[280] and the restraint of a person from engaging in protected conduct because of the threat that the broad and vague reach of the statute may proscribe such conduct.[281] In addition to the notice aspect, the vagueness doctrine has been applied as a limitation on the discretionary powers which may be given to a lower court, an administrative agency, or official.[282] In this latter aspect the doctrine assumes a somewhat broader scope and limits grants of overly broad discretion to trial judges and agencies to impose restraints without clear standards by which the lawfulness of their decisions or possible intrusions into areas of protected conduct may be tested.[283]

The court's opinion in *Red Lion* does not analyze the differing applications of the vagueness doctrine. It appears to have regarded the issue as solely a question of fair notice to the individual.[284] But, despite this blurrinb of important distinctions, the court's rejection of the vagueness doctrine may be justified since none of the evils which the doctrine intended to correct were present in this case. While absence of fair notice and the evil of overbroadness may well be present in the fairness doctrine generally, there is no problem of fair notice as to what constitutes a controversial public issue in the personal attack type of case. It would strain credulity for the licensee to assert that it could not determine with fair certainty whether it was engaged in a personal attack. Neither is the standard overbroad in that it gives too much discretion to the agency; the standard of "personal attack" is no more elusive or vague for the agency to apply than it is for the licensee to understand. The same is true of the particular obligations imposed on the licensee here. Unlike the case of the general fairness doctrine, as applied to controversial issues, the personal attack principle is quite definite in the obligations which it imposes on licensees and the standard to be enforced by the agency. Like the equal time requirement of section 315, the personal attack principle requires in all cases a specific offer of rebuttal time. The licensee's duty and the court's mandate under this requirement seem sufficiently clear.

There remains, however, the first amendment issue, and here the court's opinion is clearly less satisfying. Predictably, the Commission in its argument pointed out the public nature of the frequencies, the broadcaster's fiduciary responsibility to present all viewpoints, its duty to serve the public interest and recited the usual cases. In substance the court approved these arguments in rejecting the first amendment challenge.[285]

However, the court did not rest its decision simply on the licensee's duties and public responsibilities, but went on to conclude that the application of the personal attack principle, or the fairness doctrine in general, did not in fact restrain the licensee's freedom of speech. At one place the court noted that "petitioners are not prohibited from broadcasting any program which petitioners think suitable. . . . [they] are not furnished with a mandatory program format, nor does the Doctrine define which if any, controversial issues are to be the subject of broadcasting.[286] "

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[280] *See, e.g.*, Lanzetta v. New Jersey, 306 U.S. 451 (1939); Connally v. General Constr. Co., 269 U.S. 385 (1926).

[281] *See, e.g.*, Herndon v. Lowry, 301 U.S. 242 (1937). On the distinction between the two evils inherent in "fair notice" cases, see Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 76 (1960).

[282] *See* Giaccio v. Pennsylvania, 382 U.S. 399, 402–03 (1966). *See also* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Hague v. C.I.O., 307 U.S. 496 (1939). For a persuasive and well-documented exposition of this and related aspects of the vagueness doctrine see Note, *The Void-for-Vaguness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67 (1960).

[283] Obviously at some point as the vagueness doctrine is applied to strike down broad authorizations by the legislatures to the courts or agencies, it becomes almost impossible to distinguish the vagueness doctrine from the substantive rights, such as free speech, which are ultimately being protected. However, to the extent the vagueness doctrine has any independent significance, such a distinction must be recognized. The court in *Red Lion* appears not to have done so since its opinion tends to fuse the vagueness problem with the free speech question itself.

[284] The licensee relied on Connally v. General Constr. Co., 269 U.S. 385 (1926), a "notice case," and the court dealt with the argument essentially on that basis. 10 P & F RADIO REG. 2d at 2017–20 (1967).

[285] *Id.* at 2022–25; *see also* 2018–20.

Elsewhere is stated: "The petitioners are in no manner exposed to or subject to any prior censorship of their broadcasts. Their latitude in the selection of program material, program substance, program format, and identity of program format, and identity of program personnel is bounded only by their own determination of the public interest appeal of their end product.[287] "

In response to the assertion that a fear of punishment may act as a restraint upon free speech the court stated: "The remedial provisions of Title 47 U.S.C., the Administrative Procedure Act, and the accessibility of the courts guarantee petitioners full redress from illegal, arbitrary, or capricious conduct on the part of the Commission.[288] "

This reasoning is a mixture of naivete, incorrect facts, and faulty legal analysis. The court's assumption that the broadcaster has complete discretion in selection of programming is simply incorrect. Apart from the restrictions discussed in some detail previously,[289] there is the Commission's fairness doctrine itself, one command of which is that the licensee must present controversial public issues programming as part of its duty to serve the public interest.[290] The court's evident conclusion that because there is no direct control and no prior restraint of programming, there is no restraint resulting from the Commission's fairness doctrine is unrealistic and legally erroneous. To the extent the free exercise of speech is conditioned upon the speaker's doing something which he would not otherwise do because of the threat of incurring some penalty, there is a clear restraint. The court's conclusion to the contrary and its apparent insistence on some form of prior restraint is directly contrary to the constitutional principles settled more than thirty-five years ago in *Near v. Minnesota*.[291] Finally, the court's conclusion that the alleged restraint resulting from Commission sanctions and from the fear of punishment is somehow dissolved by the availability of judicial review and adequate safeguards against arbitrary Commission action is naive. Although the availability of review and the applicability of standards may be relevant in deciding whether a restraint is a permissible one, the restraint is no less real by reason of its being reviewable, and no less substantial because it is not arbitrarily imposed. A court cannot avoid its responsibility of deciding whether the action of the agency, including agency sanctions or the threat of such sanctions, constitutes an impermissible restraint on speech merely because it can review the agency's actions. Obviously once the review is made, a decision must be made at least with respect to the agency's action in the case before it. Undoubtedly the court did not mean to suggest that there could never be an impermissible restraint merely because of the availability of judicial review. Yet it seems to have used the availability of review as an excuse for refusing to consider the permissible extent of the restraint imposed by the application of the Commission's fairness doctrine.

The *Red Lion* opinion is simply inadequate. One might argue that whether the general fairness doctrine is valid or not, the personal attack principle is sufficiently different in purpose, scope, and effect to be upheld.[292] Had the court confined itself to the personal attack rules and attempted to so limit the scope of its holding, its decision might be at least defensible, even if questionable. Unfortunately, the court recognized no distinction between the broad scope of the fairness doctrine and the more limited personal attack rule. On the contrary, the court couched its opinion in the broadest terms, reaching conclusions which are not merely unconvincing but plainly erroneous in their generality. The larger questions were passed over too easily with irrelevancies and facile reasoning.

Most notably the court's opinion makes no effort to penetrate the basic assumption on which the Commission's arguments and conclusions rest and which is central to the entire first amendment issue: the assumption that radio communication is unique and, being unique, is subject to interference with freedom of speech that the court would never tolerate if applied to other communications media.

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[286] *Id.* at 2018.

[287] *Id.* at 2024.

[288] *Id.* at 2025.

[289] See discussion, *supra*, Part II: A, B, and C.

[290] Editorializing by Licensees, 1 P & F RADIO REG. 91:201, 206 (1949).

[291] 283 U.S. 697 (1931).

[292] See text accompanying notes 265–68 *supra*.

III. TOWARDS A GENERAL RATIONALE FOR REGULATION: SENSE AND NONSENCE ABOUT THE NATURE OF RADIO AND TELEVISION

The Commission, as has been seen, has little if any well defined policy or philosophy of program regulation as such. Indeed, it has persistently refused to acknowledge that it "regulates" programming or that its actions are in any significant way a restraint of or an interference with free speech. About all one can say is that the Commission requires that: (a) a broadcaster must not permit his station to be used for broadcasting indecent, defamatory, or otherwise unlawful program material; (b) a broadcaster must at least take some steps to ascertain local programming interests and to meet such interests in a responsible manner; (c) a broadcaster must present "balanced" programming in accordance with certain general standards (set by the Commission); and (d) a broadcaster must be "fair" in presenting controversial issues or political broadcasts. These are standards which in themselves may seem difficult to oppose. Indeed, to take issue with them seems almost like attacking the Boy Scout Oath. But the issue here is not whether these standards are acceptable standards of conduct. The question is whether or not the FCC has any right to impose such standards.

Ultimately, the justification advanced for the Commission's vaguely conceived and dimly illumined policies toward nontechnical regulation, particularly in the area of programming, centers around the basic assumption that, whatever may be the application of the first amendment to common forms of expression or to other mass communications media, the rules are different for radio and television because they are unique. There are varying explanations given by the courts, by the Commission, and by critical observers as to why radio and television are unique. The principal explanations can be fairly summarized into four basic arguments.[293] (1) unlike other communications media, private or public, the means of communications which radio and television use are publicly owned;[294] (2) radio and television communications are uniquely affected with the public interest, and the use of airways is a *privilege* to be granted to broadcasters only so long as they continue to serve the public;[295] (3) radio and television are uniquely influential and powerful as communications media;[296] and (4) unlike other communications media, private or public, there are physical and technical limitations imposed on access to and the use of the radio and television media.[297] Without question each of these notions contains some germ of the truth. The problem is that they have become more than just arguments to be analyzed and critically evaluated. They have become ideologies which have taken the place of thoughtful reasoning. Comment about the "unique" nature of broadcasting has become so far removed from practical considerations that it has become a kind of modern-day analogue to the medieval discourses on the number of angels that can stand on the head of a pin.

One of the most persistent of modern shibboleths used in support of virtually every form of FCC regulation has been the proposition that the airways and broadcast spectrum are owned by the public, that is, they are "public domain" administered in trust for the public by the FCC. According to this theory, the broadcast licensee is permitted to use this public domain only so long as it serves the public interest, as determined by the FCC.[298] Because of this public ownership, the Commission has a broad regulatory authority and even a duty to oversee all aspects of the licensee's use of such public property. According to proponents of this argument, this necessarily includes overseeing the station's program operations.

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[293] For a good, brief discussion of the principal arguments, see Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 Geo. Wash. L. Rev. 719, 757–66 (1964). *See also* Pierson, *The Need for Modification of Section 326*, 18 Fed. Comm. B.J. 25–26 (1963); Note, *Regulation of Program Contest by the FCC*, 77 Harv. L. Rev. 701, 713 (1964).

[294] *See, e.g.*, H.R. Rep. No. 281, 88th Cong., 1st Sess. 205–07 (1963).

[295] *See* Television Corp. v. FCC, 294 F.2d 730, 733–34 (D.C. Cir. 1961); S. Rep. No. 994, 87th Cong., 1st Sess., pt. 6, 1 (1962).

[296] *See, e.g.*, *Hearings on S. 1898 Before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. 18 (1960).

[297] *See, e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190, 215–16 (1943); KFKB Broadcasting Ass'n v. Federal Radio Comm'n, 47 F.2d 670, 672 (D.C. Cir. 1931).

[298] H.R. Rep. No. 281, 88th Cong., 1st Sess. 205–07 (1963).

As is true of so many of the concepts which have become encrusted on the law, there is a superficial appeal in the public domain idea which makes it hard to dispel. even in the minds of those whom one would not assume disposed to the type of constitutional intrusions which it is used to support.[299] Little effort has ever been made to look beneath the superficiality of the concept of public ownership of the broadcast spectrum to determine whether it has any practical logic or meaning. Logically the concept is meaningless. To say that the airways or spectrum can be owned by anyone is simply to indulge in fantasy. Surely no one seriously supposes that the airways are a thing of nature which can be possessed, occupied, or used in any normal sense of the word. In actuality, "airways" is merely convenient shorthand, an abstraction for a phenomenon created as a result of the use of privately owned transmission facilities. The "spectrum" is a purely artificial construct of the Commission itself. To give this construct an independent nature and then attempt to justify the regulation itself in those terms is entirely circular. It is like saying that the Commission owns the frequencies because it has the power to regulate their use, and that it has the power to regulate their use because it owns them.

One may perhaps speak with some sense about public ownership of air rights or space through which electrical impulses are trasmitted, but this is quite different. Moreover, even this concept will not support any claim for rightful regulation. All such air space is not publicly owned. And even if it were all publicly owned, this would not support regulation of broadcast communications or speech as distinguished from any other kind of communication or speech. If, for example, this hypothetical public ownership of air space is a basis for regulating broadcast speech, is it not also a basis for regulating virtually all types of speech that similarly use air space—in short, all forms of oral communications from loudspeaker announcements to backyard gossip? This is an absurd proposition. but how would the distinguishing line between broadcasting and other forms of speech be drawn? Clearly reliance on the ownership concept itself provides no basis for such a distinction.

In any event the public ownership concept is plainly insufficient justification for government interference with free speech under well-established constitutional doctrine. The Supreme Court has made it emphatically clear, for example. that public ownership of postal facilities does not justify censorship of the content of private correspondence or other printed matter sent through the mail.[300] Nor does public ownership of parks. streets. or other property justify otherwise unconstitutional restraints on free speech.[301] Public ownership of the airways, whatever it may mean, is surely no exception.

In substance. the public ownership argument seems really to be a paraphrase of a widely held, seldom well-stated assumption that because broadcasting is an activity "affected with a public interest," restraints which would not otherwise be permitted in a purely private sector of society are warrented and even necessary.[302]

While a few would dispute that broadcasting is affected with a public interest. this fact does not justify any intrusion on free speech which would not otherwise be permissible. It is. therefore, neither controlling nor even particularly pertinent that Congress concluded that broadcasting is affected with a public interest, provided for periodic licensing of broadcast facilities, and stated that a license to broadcast is purely a privilege and not a right.[303] The Supreme Court has made it emphatically clear that the right to license does not carry with it the right to place unconstitutional limitations or conditions on the license and particularly that it confers no authority to censor or interfere with free speech, whether or not the license be characterized as a mere privilege.[304] Indeed, far from expanding an agency's powers with respect to first amendmendment freedoms, the authority to license is a basis for even closer scrutiny of the agency's actions in this respect. Recognizing that a degree of censorship may be an inherent tendency in the exercise of administrative licensing powers, the Court has indicated it will scutinize such licensing activities with particular care to ensure that they are not used to override first amendment guarantees.[305]

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[299] Justice Douglas, whom few would accuse of being an apologist for regulation of free speech under any pretext, appears to have accepted the public domain theory in conjunction with the "spectrum scarcity" argument, as justifying different rules for radio and television:

> "We have, of course, a system of licensing for radio and television stations. But the problem there is quite different. The channels all lie in the public domain, the air space above the earth being under the exclusive control of Congress. The channels are restricted in number. It is necessary to regulate all if interference is to be kept at a minimum and service is to be efficient. What the government owns or controls in the airways it can regulate as it sees fit."

W. DOUGLAS, RIGHT OF THE PEOPLE 76–77 (1958).

A more extreme statement of the case for plenary regulation by the FCC could scarcely have been made by the FCC itself. It should be emphasized, however, that the loose, even offhand, observations in a book are not the same as a carefully considered judicial decision.

[300] Hannegan v. Esquire, 327 U.S. 146 (1946).

[301] *See, e.g.*, Kunz v. New York, 340 U.S. 290, 293–4 (1951); Saia v. New York, 334 U.S. 558 (1948) (by implication); Hague v. CIO, 307 U.S. 496, 515–16 (1939).

[302] Television Corp. of Michigan, Inc. v. FCC, 294 F.2d 730 (D.C. Cir. 1961). It should be pointed out that the context in which this statement was made was not one involving any constitutional or even statutory question of Commission authority. Rather, it was a wholly gratuitous remark made in the course of admonishing the licensee and the FCC that broadcasting must serve the public.

Implicit in many, if not most, of the arguments advanced for a greater governmental interference with broadcast speech than is permitted for other types of communications media is the usually unarticulated assumption that broadcasting is uniquely influential and powerful as a medium of communication.

There is perhaps a degree of truth in this belief, at least in the case of television.[306] First, there is the immediacy of a televised message as compared with the printed word. For example, few who watched the classic televised political campaign debates between Kennedy and Nixon in 1960 would seriously question that television had a far greater impact on each viewer than any verbatim newspaper coverage would have. This is not to say that news, editorials, and other public affairs information are necessarily more effectively covered by broadcasting. But item for item, a well-done television program is likely to have far greater impact on the average person than is a comparable newspaper article.[307] Second, the impact of radio and television in terms of the size of audience far exceeds that of any other mass communications medium. Consider, for example, a well known, regularly scheduled news program, the "Huntley-Brinkley Report." Nielson audience ratings for January 1967 indicate that during this period each broadcast reached an average of nearly ten million homes.[308] This is more than three times the combined average daily circulation of the *New York Times*, the *Washington Post*, the *Chicago Tribune*, the *Los Angeles Times*, and the *St. Louis Post Dispatch*,[309] five of the largest and most influential newspapers in the country. Obviously it cannot be denied that television is an influential and powerful communications medium.

It remains to be seen, however, whether adequate justification has been shown for greater government interference with speech in the case of broadcasting than in the case of less powerful media. Although television may have a great effect in terms of its immediacy and the extent of its audience, radio is not nearly so effective. Yet no one has suggested that radio and television might be regulated in differing degrees. In addition, the influence and importance of any single television station, which is the basic regulatory unit, has been misunderstood and exaggerated. The audience test mentioned above, for example, does not take into account that the audience reached by the program is not the result of a single, monolithic voice but actually the voices of more than 700 individual stations.[310] Even narrowing this number down to take into account those stations under common ownership, it is apparent that there are a substantial number of different entities responsible. It may be argued that since most local stations are merely outlets for the three major networks and a handful of program suppliers that it is the net effect of broadcasting as an industry which is the essential fact in determining to what extent the FCC should interfere with programming. But if this approach is accepted, one must alter the comparative picture since newspapers, too, have their networks. Like broadcast stations, newspapers often speak with one voice—that of the Associated Press, United Press or other news service or, more accurately, that of the originating source. The relative impact of television would thus seem comparable not to one newspaper or even five, but more realistically to all newspapers subscribing to a major wire service.

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[303] S. Rep. No. 994, 87th Cong., 1st Sess., pt. 6, 1 (1962) (emphasis in last sentence added). For the concurring view of former FCC Chairman Minow, see FREEDOM AND RESPONSIBILITY IN BROADCASTING 173 (Coons ed. 1961).

[304] *E.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Hannegan v. Esquire, 327 U.S. 146, 156 (1946); Terral v. Burke Constr. Co., 257 U.S. 529 (1922); *see generally* Note, *Unconstitutional Conditionals*, 73 HARV. L. REV. 1595 (1960).

[305] *See* Saia v. New York, 334 U.S. 558 (1948); Hannegan v. Esquire, 327 U.S. 146, 156 (1946); Hague v. CIO, 307 U.S. 496 (1939).

[306] I would be inclined to doubt that the impact of a radio message is anywhere near as strong as that of a well-written newspaper or magazine story.

[307] See Fairly, *Can You Believe Your Eyes?*, IX HORIZON 24 (1967), for a persuasive commentary on the impact of television news programming. However, it must be admitted that the presumed impact of television can be and sometimes is highly exaggerated. To many people, television has, like radio, become largely a part of the din of civilization which many need to hear but not necessarily pay any attention to.

[308] BROADCASTING MAGAZINE, February 13, 1967, at 68. An entertainment special covered by the same reporting period, "The Bob Hope Christmas Show," reached nearly 21 million homes. *Id.* at 66.

[309] Based on the then current ABC circulation data, AYER & SONS, DIRECTORY OF NEWSPAPERS AND PERIODICALS 106, 189, 284, 600, 767 (1965), indicates the combined average daily circulation of these newspapers to be 3,087,547.

Even if one unrealistically aggregates all of the television stations under four headings according to their affiliation with one of the three major networks or their independent status, and even if one considers this as a potential of four distinct and potentially different voices accounting for all broadcast programming, is this in itself grounds for government interference with programming? Is it constitutionally necessary, in short, to have at least a possibility of more than four distinct voices on all subjects? We have only two national political parties which, based on the same theory which leads us to believe that there are only four potentially distinct broadcast voices, give us only two political viewpoints. Does this warrant some form of government interference with political speech or perhaps government subsidization of a third party point of view? In all but a handful of American cities there are, at the most, two daily newspapers and thus, in theory, only two distinct and potentially different viewpoints from the daily press. Does this perhaps warrant government interference through subsidizing more local newspapers or controlling the content of those newspapers which do exist?

In the final analysis it is doubtful that the Supreme Court would ever hold that the application of the first amendment's protection of free speech depends on any subtle and tenuous evaluation of the influence of the speaker. Justice Douglas, concurring in *Superior Films v. Department of Education* stated: "Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas. On occaision one may be more powerful or effective than another. . . . Which medium will give the most excitement and have the most enduring effect will vary with the theme and the actors. It is not for the censor to determine in any case.[311] "

Although all of these various rationalizations concerning the uniqueness of radio and television have occupied an important place in the ideology of broadcast regulation, ultimately the rationale to which almost all return is that of "spectrum scarcity." As Justice Frankfurter stated in the *NBC*[312] case, "Unlike other modes of expression, radio inherently is not available to all . . . and that is why, unlike other modes of expression, it is subject to governmental regulation."

The most obvious shortcoming of Justice Frankfurter's logic is that, notwithstanding conceded physical limitations on frequency availability and the corresponding limitation on the number of broadcast facilities which can be operated, the fact remains that radio and television stations are more numerous than any of the other competing mass communications media. For example, as of June 30, 1966, there were 5,881 radio and 721 television stations operating.[313] The number of radio and television stations is substantially greater than, for example, the number of daily newspapers, of which there were

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[310] 1966 FCC Ann. Rep. 116–18 shows 721 television stations operating as of June 30, 1966.

[311] 346 U.S. 587, 589 (1954) (concurring opinion).

[312] National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943). For an excellent critical analysis of *NBC* and the spectrum scarcity argument, see Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 Geo. Wash. L. Rev. 719, 757–66 (1964).

[313] 1966 FCC Ann. Rep. 116–18. This figure does not include television translators and boosters. As of that date, there were an additional 318 radio and 158 television stations (exclusive of translators and boosters) authorized but not operating. Most of these latter are stations which had received construction permits but had not then received licenses or "program test authority."

1,751 operating as of January 1, 1966.[314] The disparity between the number of newspapers and the number of radio and television stations is most strikingly evident when it is noted that only the largest cities can boast two or more daily newspapers not under common ownership.[315] By contrast virtually every city large enough to have a daily newspaper is served by at least two television stations and several radio stations.[316] While the number of daily newspapers has slowly declined, the number of competing radio and television stations has rapidly increased and continues to increase.[317]

It is often said that the limitations on access to and use of the newspaper medium is an economic limitation, not a technical one. The distinction, however, is entirely specious. Contrary to common assumption, the spectrum is not nearly saturated. There are few, if any, areas of the country today where additional radio and television stations are not technically possible.[318] Moreover, it is at least doubtful whether, given the present structure of the industry, the spectrum will ever be completely saturated with radio and television stations.[319] Although there is currently a trend towards an increased number of stations, particularly UHF television stations, it seems unlikely that the trend will continue to the technical saturation point. In almost all radio and television markets, economic barriers to entry will come into play before the technical barriers. The economic limitations have already become the dispositive factor in the growth of radio and television stations in many, if not most, small and medium-sized markets. The barrier to entry to further stations in those areas is not the technical unavailability of frequencies, but rather the economic inability of the area to support an additional station and the unavailability of sources of programming different from that which is already being provided by the existin gstations. This situation then is identical to the situation in all large mass communications media. It is impossible, therefore, to distinguish radio and television from newspapers, movie theaters, or magazine and book publishers on this basis. If the barriers to entry and limitations on access to the use of mass communications media are to be relied on as a basis for imposing regulation of free speech which would not otherwise be justified, such regulation should not discriminate against radio and television but should extend to all communications media.

One commentator, recognizing that the natural barriers to entry into and the limitations on access to the newpaper industry are as great as those which surround broadcasting, has recently proposed that newspapers should also be subject to some kind of general editorial regulation, similar to the fairness doctrine, to ensure that a diversity of viewpoints is presented to the public.[320] According to this proposal, by Professor Barron, such regulation would not only be consistent with the first amendment but it would promote the essential spirit of the first amendment which, in his view, was not designed to protect the right to speak freely so much as to protect the right of the public to hear a diversity of viewpoints.[321] Since barriers to entry and limitations on access effectively limit the right of the public to receive such a diversity of views, newspapers and presumably all other mass media should be required to present all sides of an issue. Despite a certain superficial appeal, Professor Barron's proposition is unsupportable. His theory fits well with John Stuart Mill's utilitarian defense of free speech and with the traditional thinking which conceives of free speech as a surer way to the truth,[322] but it is inadequate as an exposition of the meaning and thrust of the first amendment and free speech today. One major justification for free speech is, of course, the benefit which the public at large derives from hearing a diversity of viewpoints and ideas. But if the sole or even the paramount aim of the first amendment is merely to ensure that the public is able to hear a Babel of voices, the first amendment is not the great libertarian principle it has been thought to be. Freedom of speech is a justifiable aim in itself insofar as it helps to create the individual freedom and security essential to a free society. It need not be buttressed by any apologies that it will assure the dissemination of a diversity of viewpoints, that it will ensure a free marketplace for ideas, or that it is a surer means of advancing the truth.

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[314] U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 523 (87th ed. 1966).

[315] *See* AYER & SONS, *supra* note 309, at 1250–71 (1965).

[316] *See* 1967 TELEVISION FACTBOOK; 1967 BROADCASTING YEARBOOK. Although, except as the information is set forth throughout the above standard references, there is no single published source which clearly identifies the number of radio and television services which each city receives, a fair idea of the multiple television service available is given in a 1960 Nilson study, *Television '60,* which shows that some 94% of all television homes (94% of all homes in the United States, *see* 1967 BROADCASTING YEARBOOK 18) can receive at least three television stations and some 81% can receive at least four. No distinction is drawn here between a city to which a station is licensed and a city which receives service. Drawing such a distinction as a general proposition is unrealistic, at least so far as television is concerned. As a practical matter, a station need not be physically located in or technically assigned to a city in order to serve that city adequately, particularly where the cities are part of the same culturally and socially integrated metropolitan area.

[317] From 1950 to June 30, 1966, the number of radio stations on the air more than doubled from 2,897 to 5,881; and the number of television stations (exclusive of translators and boosters) increased seven times, from 104 to 721. 1966 FCC ANN. REP. 116–18. By contrast, from 1950 to January 1, 1966, the number of daily newspapers declined from 1,772 to 1,751. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 523 (87th ed. 1966).

[318] On February 9, 1966, the Commission adopted its newly revised, computer-determined Table of Assignments for television channels. *Fifth Report, UHF Channel Assignments,* 6 P & F RADIO REG. 2d 1643 (1966). The revised Table at that date provided for 1,756 fixed VHF and UHF assignments (in 792 cities). *Id.* at 1667. However, the Table made only two assignments in the upper UHF frequency band, Channels 70–83, these channels proposed to be used for small "community" stations on an ad hoc basis. *Id.* at 1666. Thus, the 1,756 assignments (stations) do not include some 17% of the spectrum. Moreover, even as to channels below 70, the Table is not "saturated" and thus there is space for additional assignments over and above the 1,756 reflected in the Table. *Id.* at 1649, 1673–74. *See, e.g., UHF Channel Assignments in Palm Springs,* 6 P & F RADIO REG. 2d 1533 (1966) (adding another UHF channel to Palm Springs). In short, even with present technology, there is, at a *conservative* estimate, room for three or more times the 721 stations operating as of June 30, 1966. *See* note 318 *supra.*

[319] *See Second Report* 1772.

It is suggested that if the government does not place some direct editorial control on mass communications media, it is in essence allowing them to be censors,[323] given the effective limits on entry into such media. According to Barron, this problem cannot be met by general legislation such as the antitrust laws, but must be dealt with by some kind of direct editorial control.[324] In short, we are told to replace the private censor with a government censor. The portrayal of the mass media as all-powerful private censors, subject to no one's influence but their own, is greatly exaggerated. Moreover, the supposed inability of the antitrust laws or, in the case of broadcasting, the various diversification policies and multiple ownership rules to increase competition is due more to the manner in which they are presently being applied than to any inherent deficiency in their approach.

Finally, if it is true that the barriers to entry and the limitations on access to the use of mass communications media give too much control to the mass media, this still does not resolve the problem. The question of what kinds of corrective regulation should be provided and how much government supervision should be permitted remain. What are we to conclude from the fact that there are, for example, not sufficient finances to provide every city of a quarter million population with more than three local television stations or two local newspapers? Do we infer from this fact that the government must take upon itself the responsibility of guiding, if not controlling, the program policies of these stations or the editorial policies of the newspapers? If so, does this extend equally to stations in communities which have ten stations and four newspapers? What kind or degree of control would be permitted on this basis? At what point is the line drawn between complete control and mere "influence" of program choice? What standard shall underlie the Commission's judgement in acting on such matters? If, for example, audience surveys show that eighty-five per cent of the population in a given market prefers light entertainment, should the Commission be guided by this or must it take upon itself the role of a "leader" in guiding popular choice by setting down more elevated, "enlightened" standards? I would agree with those who strongly protest the slavish attitudes with which most broadcasters follow the lowest common denominator of public taste, as represented by audience ratings. I emphatically agree with the idea, as expressed by one critic, that "the first task of the purveyors of entertainment and intelligence is to anticipate, gamble on, whet, stimulate, elevate, and/or broaden the public taste."[325] But how can this responsibility be adequately enforced by a government agency without seriously compromising on the first amendment?

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[320] Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

[321] *Id.* at 1648–49.

[322] Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

J. S. MILL, ON LIBERTY, IN UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT 104 (Everyman Lib. 1951). *Compare* Justice Holmes' dissent in Abrams v. United States, 250 U.S. 616, 630 (1919).

[323] Barron, *supra* note 320, at 1648.

[324] *Id.* at 1654.

Neither society as a whole, Congress, nor the FCC has ever formulated any principles which satisfactorily guide judgement on such matters consistent with the aims of an open society. There have developed, in a long Anglo-American tradition of legal and social thinking, various controls on the abuse of free speech, but nowhere in this tradition has there been any developed thinking going beyond sporadic and occasional restraints, such as prohibition of defamatory speech, obscenity, fraud, and otherwise patently harmful or socially disrupting speech. There is no tradition of establishing, for example, standards of "fairness," "diversity," or "balance." These are judgements which, for better or for worse, have been left to the admittedly sometimes quixotic judgment of the public, unguided by their "enlightened" cultural, social, or political leaders.

There may be little reason to trust the judgment of broadcasters or the managers of other mass communications media but is there any more reason to have an abiding faith in the judgment of the FCC or any other governmental agency? The probability of the mass media's being responsive to public needs is, I think, as great, if not greater than the probability that the FCC's judgement will adequately reflect those needs. And ultimately, the danger to a free society from a reliance on the judgment of private broadcasters is less than from a reliance on the judgement of the FCC. Barron has expressed a realistic concern over the tendency of the mass media to avoid the controversial, novel, and heretical ideas whose expression is so crucial to a vital growing society.[326] It is, however, naive in the extreme to suppose that government supervision, through the fairness doctrine or other means, would ultimately promote heterodoxy. As has been pointed out above, government intervention in broadcast programming has in fact been a major impetus toward conformity and orthodoxy.

Where does the foregoing evaluation, if correct, lead us? There are undoubtedly some who would conclude that these considerations must lead ineluctably to the conclusion that the Congress and the Commission should be allowed to regulate only the technological aspects of radio and television. This conclusion, however, seems as extreme in principle as it is naive. There is no constitutional principle which says that, merely because some forms of regulation of free speech are unconstitutional, all forms of regulation which might affect or in some manner restrain free speech are similarly unconstitutional. The first amendment does not forbid the Commission from going beyond its role as "traffic cop" of the airways. Radio and television are certainly not constitutionally exempt from general social and economic regulation merely because their business is the business of communication.

Thus radio and television, like newspapers, are subject to the general laws which bind all persons, institutions, and businesses, such as the antitrust laws, labor laws, and laws governing libel, slander, fraud, and other socially disruptive conduct and speech. Concededly there are first amendment limitations on the application of such laws, but the limitations are not unique to radio and television. They extend as well to newspapers, movie theaters, or soap box orators.

Moreover, it does not necessarily follow that because the Commission may not constitutionally impose its own standards of orthodox programming or its own standards of balance, fairness, and diversity that it may not in general insist that a licensee investigate and be responsive to demonstrated needs of his community. The first amendment does not require that a licensee must be permitted to operate a radio facility purely in his private and selfish interest with no concern for public needs and interests. The first amendment comes into play, however, when the Commission, in the name of reviewing a licensee's responsiveness, begins to concern itself with programming or program operations to the point of establishing standards of acceptable and nonacceptable programming. It has already reached and gone beyond this point.

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[325] L. White, The American Radio 221 (Comm'n on Freedom of the Press ed. 1947).
[326] Barron, *supra* note 320, at 1645–47.

Although some supporters of strong Commission regulation predict dire consequences in the event the Commission should relinquish any of its regulatory oversight of licensee program operations, it is doubtful that the Republic will falter should the Commission's thus for unfettered powers in this area be curbed to conform to the first amendment as interpreted for and applied to other communications media. On the basis of the first forty years of regulation, it may be difficult to say that the cause of free speech has suffered egregiously at the hands of the FCC. But there is every indication that the problem is serious and becoming increasingly more so. The fairness doctrine which the Commission seems bent on applying and interpreting with increasing rigidity, cases such as *Palmetto*, and an increasing preoccupation with. if not fetish for, balanced programming are three very strong reasons for taking a less sanguine view of FCC regulation in the next forty years and for implementing more vigorous first amendment limitations on regulation in this field.

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RIGHT OF ACCESS TO MASS MEDIA—GOVERNMENT OBLIGATION TO ENFORCE FIRST AMENDMENT

BY CLIFTON DANIEL*

Mr. Daniel contends that any judicial or legislative regulation of access to the press would be unconstitutional. He admits that there is a problem, but his solution is intra-industry diversity or increased competition with the numerical growth of media voices.

What I am about to say here will come as no surprise to Professor Barron. He has heard or read it all before. Since he and I last met, however, he has gained an ally, in the person of Vice President Agnew. Mr. Barron has somewhat gingerly embraced this new alliance. He is right to be cautious. The Vice President is not a very good example of a man who has been denied access to the press; nor is President Nixon.

In the very speech in which he attacked the television networks, Mr. Agnew remarked that the President had a television audience of 70 million Americans for his policy statement on Vietnam. In that same speech Mr. Agnew raised the question whether his own remarks would be allowed on the air by the "small and unelected elite," as he called it, that runs the networks. As he spoke, his words were being broadcast in full on all three national networks, and they were printed in full in *The New York Times*. Mr. Agnew was not demanding access to the networks for President Nixon. He has that any hour of the day or night. The Vice President was really complaining that access had been given to the networks' own employees, who had the temerity to analyze, interpret, and criticize—very mildly criticize—the President's speech.

Even though the Vice President makes a poor case, there is a problem of access to the press in this country. However, the dimensions of the problem have been greatly exaggerated, and the proposed legal remedies are improper or impractical. My contention is that the remedies should be left largely to the press itself and to the reading public, and that adequate remedies are available. About the dimensions of the problem: I suppose there are some publishers and editors who capriciously and arbitrarily refuse to print material with which they disagree. But I don't know them. In an adjudication made two years ago, the British Press Council, which is the official British forum for complaints against the press, had this to say:

> We are finding more and more that even quite large localities cannot support more than one newspaper. We are satisfied, however, that most editors of such newspapers are now accepting it as a duty to see, as far as possible, that events and views of interest to all shades of opinion are impartially reported while reserving the editorial right to come down on one side or the other.[1]

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[1] PRESS COUNCIL OF LONDON, ENGLAND, 15TH ANN. REP., THE PRESS AND THE PEOPLE 111 (1968).

Exactly the same thing could be said—and truthfully said—about the press in this country. More than thirty years ago, Eugene Meyer, who had quarreled with the New Deal, resigned from the Federal Reserve Board, and bought *The Washington Post*, set out deliberately to find a New Deal columnist for his newspaper. He thought his readers were entitled to get the New Deal point of view as well as his own. Hundreds of American publishers and editors take the same attitude today. They go out of their way to find columnists and commentators who are opposed to their own editorial policies. This is true of both liberal and conservative newspapers.

New ideas are not being suppressed. On the contrary, a hurricane of dissent is blowing through the world. It is shaking the foundations of all our institutions. Can anyone doubt the truth of that statement? When and where has it ever before been possible for a man like the Reverend Ralph D. Abernathy to reach an audience of millions by simply painting a few signs, assembling 150 poor people, and appearing before the television cameras at the gates of Cape Kennedy?

I thought until I got into this argument that the main complaint against the press was that we were giving too much access to the unorthodox—hippies, draft-card burners, student rioters, black militants, and the people who make dirty movies and write dirty books. At least, that is the message I get both from the mail that comes across my desk and from Mr. Agnew.

Recently I came upon a two-page advertisement in *Newsweek*. It was an ad for the Westinghouse Broadcasting Company, and it said:

> 50 years ago, Martin Luther King's voice would never have gotten past these walls.
>
> Martin Luther King, Jr. started out in a simple Alabama church. With a congregation no larger than his father had before him.
>
> Unlike his father, he was heard throughout America. At a time when Americans of all races had need of hearing him.[2]

That is true. The voices of protest and dissent are being heard. Even so, I still concede that there is a problem of access to the press. But its dimensions are not great and the solutions proposed are not practical.

Advocates of the right of access blandly ignore the problems and techniques of editing a newspaper. Professor Barron speaks of the press as having "an obligation to provide space on a nondiscriminatory basis to representative groups in the community."[3] Note the key words: (1) space; (2) nondiscriminatory; and (3) representative groups.

Space! How much space? Last year, *The New York Times* received 37.719 letters to the editor. At least eighty-five to ninety percent of these letters were, in the words of our slogan, "fit to print." However, *The Times* was able to accommodate only six percent. If we had printed them all—all 18 million words of them—they would have filled up at least 135 complete weekday issues of *The New York Times*. Yet, every letterwriter probably felt that he had some right of access to our columns. Some letterwriters and readers have been aggressively trying to enforce that presumed right. For many months the adherents of an artistic movement called Aesthetic Realism have been petitioning and picketing *The New York Times*, demanding reviews for books and paintings produced by members of the movement. Criticism, incidentally, would be meaningless if critics were required to give space to artistic endeavors they consider unworthy of it.

Art galleries in New York plead for reviews. They contend that it is impossible to succeed in business without a critical notice in *The Times*. That is probably true. But no one, surely, is entitled to a free ad in the newspapers. No artist has a right to a clientele. He has to earn his audience by the forcefulness of his art, the persuasiveness of his talent. How much more cogently does this apply to political ideas!

Nondiscriminatory! Discrimination is the very essence of the editing process. One must discriminate or drown. Every day of the year *The New York Times* receives an average of one million, three hundred thousand words of news material. At best, a tenth of it can be printed. A highly skilled, high-speed process of selection is involved—a massive act of discrimination, if you like—discrimination between the relevant and the irrelevant, the important and the unimportant. Actually, 168 bushels of wastepaper, most of it rejected news, are collected and thrown away every day in the editorial departments of *The New*

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[2] NEWSWEEK. Dec. 15. 1969. at 86–87.

[3] Barron *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1666 (1967).

York Times. Do you imagine that the courts have the time to sort it all out? Do they have the time and, indeed, do they have the wisdom? Even if judges do have the time to do my job as well as their own, I think Ben Bagdikian, the leading critic of the American press, is right when he says that "judges make bad newspaper editors." [4]

Representative groups! What constitutes a representative group? Who is to decide? I would say that representative groups already have access to the press. It is the unrepresentative ones we have to worry about. I am not prepared to argue that it is easy for anybody with a cause or a grievance to get space in the newspapers. Indeed, it is not easy—it should not be. When you begin editing by statute or court order, your newspaper will no longer be a newspaper. It will be "little more than a bulletin board," as Richard W. Jencks, President of CBS Broadcast Group, has said, "a bulletin board for the expression of hateful or immature views." [5]

Nowhere in the literature on access to the press is there any conspicuous mention of the hate groups. Does this newfangled interpretation of freedom of the press mean that an editor would be obliged to give space to ideas that are hateful to him? Must he give space to advertisements that are offensive to his particular readers? Must a Jewish editor be forced to publicize anti-Semitism? Must a Negro editor give space to the Ku Klux Klan?

I can assure you that the hate-mongers are as eager as the do-gooders to gain access to the press—the bad guys are as eager as the good guys—and I think Professor Barron knows that. It seems to me that he looks at these problems in a very simplistic way and defines them in parochial terms. All but the most localized media have national connections of some sort: they broadcast network television programs, they buy syndicated columnists, and they subscribe to the services of the great national news agencies. In determining who is to have access to the press, who would decide how widely an idea should be disseminated? Must it be broadcast in prime time on the national networks? Must it be distributed by the Associated Press and United Press to all their clients? And must all the clients be required to publish or broadcast it? Just asking these questions shows how impractical it is to enforce access to the press by law or judicial fiat. It is impractical in another sense. In contested cases, it might take a year or more to gain access to the press for a given item of news. If there is anything deader than yesterday's news, it is last year's news.

Perhaps Professor Barron senses these practical difficulties. His proposals for legislation are very vague and generalized. He does not say exactly what kinds of material must have access to the press and who would administer the access statutes. Also, his remedy is illusory in that it does not make available any additional newspaper space. It would only redistribute the existing space—probably to nobody's satisfaction, including his. Not only is it impractical to edit newspapers by statute and judicial interpretation, but it would, in my view, be improper—that is to say, unconstitutional—because freedom of the press, as defined by the first amendment, means freedom of the press. It does not mean freedom if or freedom but. It means freedom period. Professor Barron's proposition, however exhaustively elaborated, cannot disguise that it involves regulation of the press—freedom but.

I defy Professor Barron, as good a lawyer as he is, to write an access statute that would not entail some measure of official control of the press. Professor Barron cannot have it both ways: either the press is going to be required to do something or it is not. To do him credit, it seems that Professor Barron shrinks from the ultimate and inevitable consequences of his own theories. He says that "[o]perators of the media, whoever they are, will always have to resist the temptation not just to inform or to persuade opinion but to capture it." [6] What would be the logical result of his own proposal? We can find the answer in Russia, in China, and, most recently, in Czechoslovakia. Control of the press is one of the first aims of a dictatorship. It was the crucial issue between Prague and Moscow.

Professor Barron says—and I believe him—that he does not want a controlled press. He only wants to make the press legally responsible and accountable for its news and views. That is precisely what the Constitution says we must not do. The first amendment very plainly states that Congress shall make no law abridging freedom of the press. It is impossible to guess what the makers of our Constitution would have said about television, but I have a pretty good idea of what they meant by freedom of the printed word, and they certainly did not mean that should be controlled, regulated, restricted, or dictated by government officials, legislators, or judges. Indeed, the makers of the Constitution meant exactly the opposite—that officialdom, constituted authority, should keep its hands off the press, that it should not tell newspapers what to print or what not to print.

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[4] Bagdikian, *Right of Access: A Modest Proposal,* 8 Colum. Journalism Rev. 10 (1969).

[5] Address by Mr. Jenks, The General Conference of CBS Television Network Affiliates in New York, May 20, 1969.

[6] Barron, *Access—The Only Choice for the Media,* 48 Texas L. Rev. 766, 782 (1969).

To repeat: my proposition does not mean that there is no need for greater access to the press. *It simply means that legislators and judges should not be—indeed cannot be—the ones to decide how much access there should be.* Editors should decide, under the constant and conscientious pressure of public and official opinion. There are effective devices that newspapers and their readers could employ and do employ: a page of dissenting opinions; more letters to the editor; no restrictions on political advertising; an ombudsman for the readers; a column to deal with readers' complaints and queries; a press council of community representatives to meet regularly with the editors; hiring reporters from minority groups to bring the views of their communities into the newsroom; and establishing a grievance committee—as the American Society of Newspaper Editors is now proposing to do—to receive complaints about the press. My own special remedy is diversity—the remedy envisioned by the Constitution and advocated by Judge Learned Hand—a diversity of voices in the community, a diversity of outlets for opinion, more newspapers, more broadcasting stations, and more competition.

Professor Barron says that "[i]n the American press, the number of dailies has steadily dwindled." [7] That is not true. Last year there were four more dailies in the United States than the year before. As someone has said, newspapers are not dying; they are just moving to the suburbs. The decline in the number of newspapers has been arrested.

The number of media voices in the country—newspapers, radio and television stations, and local magazines—has vastly increased. In 1968, Dr. Raymond Nixon of the University of Minnesota completed a study of recent trends in newspaper ownership.[8] Dr. Nixon found that more than 1,500 cities had daily newspaper service, as compared to 1,396 cities in 1945. He further reported that, while there were only forty-five cities that had commercially competing local dailies, there were 1,298 daily cities with a total of 4,879 competing "media voices." A "media" voice is any separate ownership of communications media. This trend—decentralizing the opinion-making process—should be encouraged. Freedom of speech is better served by a multiplicity of media than by attempts to control the existing media.

I am aware that not everybody with a cause can afford a newspaper to promote it. It is not as difficult, however, to launch a new newspaper as some people have you believe. In 1896 a smalltown publisher, Adolph S. Ochs, came to New York from Chattanooga, Tennessee, borrowed 75,000 dollars, brought the moribund *New York Times*, and converted it into an enterprise now worth 400 million dollars on the American Stock Exchange. They say nobody will ever be able to do that again. I wonder.

Fourteen years ago, Norman Mailer, the novelist, and Edwin Fancher each put up 5,000 dollars to start an offbeat, neighborhood weekly in Greenwich Village. Altogether, only 70,000 dollars—less than Adolph Ochs needed to gain control of *The New York Times*—had to be invested in the *Village Voice* before it turned a profit. Its circulation is now more than 127,000—greater than the circulation of ninety-five percent of United States dailies. Its annual profit is considerably more than the capital that was required to launch it. From the beginning, the *Village Voice* has been a forum for those unorthodox opinions that are said to be seeking access to the press. It was the *Village Voice* that blazed the trail for the underground press. While some may think that the underground press is scandalous, its existence is nevertheless welcome proof that our press is indeed free and that the first amendment does not have to be reinterpreted, rewritten, or wrenched out of context to give expression to unorthodox ideas.

Until now, I have said nothing about the right of reply—the right of reply to group and personal attacks. I have left it to the last because it does not provide as much of a problem for newspapers as enforced access to the press. Indeed, the right of reply is widely recognized and accepted. In practice, most newspapers recognize a prior-to-publication right of reply when dealing with controversial matters. On *The New York Times*, we have a standing rule that anyone who is accused or criticized in a controversial or adversary situation should be given an opportunity to comment before publication. The rule is sometimes overlooked in the haste of going to press. It is often not possible to obtain comment from all interested parties, but the principle is there and the effort is required. More importantly, the same is true of the news agencies that serve practically every daily paper and broadcasting station in the United States.

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[7] *Id.* at 772.

[8] Nixon, *Trends in U.S. Newspaper Ownership: Concentration with Competition*, 14 GAZETTE 181 (1968).

The right of reply after publication is also widely accepted. However, I would caution against creating an absolute right of reply or trying to enshrine such a right in law. I would particularly caution against guaranteeing a right of reply to large, ill-defined, hypersensitive population groups. Newspapers must have the right to refuse to publish a reply, provided they are willing to accept the consequences of doing so—a suit for damages, for example.

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THE EDITORIAL RESPONSIBILITY OF THE BROADCASTER: REFLECTIONS ON FAIRNESS AND ACCESS

By LOUIS L. JAFFE*

Professor Jaffe explores the soundness of the recent application of the fairness doctrine to broadcast advertising and of the recent decision of the Court of Appeals for the District of Columbia creating a first amendment right to purchase broadcast time for political advertising. He concludes that since broadcasting has only a marginal impact on the public's political consciousness and that since extension of the fairness and access doctrines may exact significant costs in terms of other important values, the logic of those recent decisions must be carefully limited.

Television is under heavy pressure from consumer, environmental action and other groups to increase its availability as a forum for discussion. This pressure has produced a judicial response. Two developments in particular raise complex problems: the extension of the fairness doctrine to advertising[1] and the right, recently established by a panel of the Court of Appeals for the District of Columbia Circuit to buy time for noncommercial advertisements,[2] "advertorials" as this *Review*[3] has recently called them. The doctrines of fairness and access do have some beneficial value in expanding the scope of public debate on issues of importance. But the grounding and scope of these doctrines is uncertain and if pressed too tendentiously their contribution might be outweighed by their cost in other important values.

I. TELEVISION AND POLITICAL CONSCIOUSNESS

The significance which we attach to fairness and access depends on an estimate of the impact of television on behavior and attitudes, a subject on which there is sharp controversy. Most of the ardent advocates of fairness and access entertain the view that the potential of TV for good and bad is enormous. They speak of it as a resource for enlightenment and reform which is being wasted. They begin by equating its influence with its ubiquity. "There are 60 million homes in the United States," says Commissioner Nicholas Johnson, "and over 95 percent of them are equipped with a television set . . . In the average home the television is turned on some five hours forty-five minutes a day. The average male viewer, between his second and sixty-fifth year, will watch television for over 3000 entire days. . . . ."[4]

Although there is no doubt that Americans spend a great deal of time in front of television screens, there is considerable doubt that their behavior and attitudes are influenced proportionately. Most research has established little to justify, or even demonstrate, Johnson's estimate of television's unique and crucial influence.[5]

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[1] Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971); Applicability of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C.2d 921 (1967), *aff'd sub nom.* Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

[2] Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971), *petition for cert. filed*, 40 U.S.L.W. 3317 (U.S. Jan. 11, 1972) (No. 864).

[3] 85 HARV. L. REV. 689, 692 (1972).

[4] N. JOHNSON, HOW TO TALK BACK TO YOUR TELEVISION SET 13 (1970).

Students of communications theory believe that the possibility of persuasion bears a direct relation to both the latent and expressed resistance of the individual, and that his resistance is a function of his character, his experience, his loyalties, his values, his personal strengths and weaknesses.[6] In persuading people to buy goods, the influence of broadcast advertising is probably great because resistance is low.[7] But resistance to political persuasion is probably much higher. The task of selling a tube of toothpaste to a five star general is much simpler than convincing him that war is wicked. Most of the research findings point to the conclusion that television and other mass media reinforce preexisting ideas rather than change them.[8] Indeed, viewers may be skeptical even of *information* which runs contrary to their political beliefs: a great number of persons were convinced that television pictures of police action in Chicago in August, 1968 had been so selective as to be simply untruthful.[9] And those whose minds *are* swayed by a television whiff on Tuesday are likely to be changed back by a contrary whiff on Thursday. Who among us advocating withdrawal forthwith from Vietnam will be persuaded by an argument to the contrary by Mr. Agnew over television or via any other medium? Such field studies as have been devised suggest that individuals may blank out what they do not wish to hear[10] and that it is no more difficult to do this with television than with other media.

I do not wish to leave the impression that I believe that all argumentation is futile. There is a small but significant group of persons, usually known as intellectuals, who are seriously committed to the pursuit of truth and are prepared to subject themselves to a continuous dialogue. These persons can profit from television as they can from other media, formal and, even more importantly, informal. Nor do I mean to argue that majorities cannot be ultimately persuaded away from their earlier commitments. They will not be entirely insensitive to the views of their neighbors. They will take instruction from their acknowledged leaders, and, even more importantly, they will be influenced by the accumulation of experiences which invalidate the premises of their earlier beliefs. Television can play an important role in such a transformation. Televised news of the horrors of the Vietnam War have had an important impact on public opinion. Continued exposure to obnoxious or alien views may erode conviction and finally lead to the discovery that one has taken for granted what he does not or cannot believe. The important point, however, is that the influence of television broadcasting on the public's political consciousness should not be exaggerated; it is only one among many bearers of experience.

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[5] For example: "It is our tentative judgment that the social role played by the very existence of the mass media has been commonly overestimated." Lazarsfeld & Merton, *Mass Communications, Popular Taste and Organized Social Action*, in Mass Communications 495 (2d ed. W. Schramm 1960).

[6] *See* Berelson, *Communication and Public Opinion*, in Mass Communications, *supra* note 5, at 43; Lazarsfeld & Merton, *supra* note 5. *See also* Janis, *Personality as a Factor in Susceptibility to Persuasion*, in The Science of Human Communication 54–64 (W. Schramm ed. 1963).

[7] *But cf.* Note, *Cigarette Advertising and the Public Health*, 6 Colum. J. Law & Social Prob. 99, 112–16 (1970) (cigarette advertising seems to have little impact on whether people in fact smoke). The success of broadcasting in increasing *total* consumption should not, however, be exaggerated. Advertising may simply allow a competitor to maintain his present market position. It is fashionable to attribute the consumption-minded character of our society to commercial television. *Cf.* J.K. Galbraith, The New Industrial State 208–09 (1971). But, as H.G. Wells pointed out long ago in fictionalized form, *see* H.G. Wells, Tono-Bungay (1908), our society was consumption-oriented long before the advent of television.

[8] *See* Pool, *The Effect of Communication on Voting Behavior*, in The Science of Human Communication, *supra* note 6, at 128–37. *See generally* J. Klapper, The Effects of Mass Communications (1960). This is not to say broadcasting cannot have a great influence in rallying those *already committed* to a cause. For example, after KING-TV in Seattle broadcast a series of programs on local ecology problems more than five thousand people joined the station's Puget Sound Coalition to work in independent groups to improve the local environment. *See* Alfred I. DuPont-Columbia University, Survey of Broadcast Journalism 25 (1970–71) [hereinafter cited as Columbia Survey].

[9] *See* R. Baker & S. Ball, Mass Media and Violence: A Staff Report to the National Commission on the Causes and Prevention of Violence 37–38 (1969) (news commentators hypothesized public simply chose not to believe the scenes of disorder broadcast during the convention); Gould, *Intruders in the Newsrooms*, N.Y. Times, Nov. 17, 1968, § 2, at 29, col. 1 (various government inquiries sparked by adverse public response to television coverage of the turmoil surrounding the 1968 Democratic National Convention); N.Y. Times, Oct. 29, 1968, at 94, col. 5 (FCC orders networks to respond to protests over news coverage of Convention).

[10] *See* note 8 *supra*.

Indeed, even as an organ for disseminating information on political affairs, the power of television broadcasting should not be overestimated. True, it reaches a larger audience than any other medium: those who cannot read adequately or at all, those who are too lazy to read, those who can never get enough news. But a mass audience which relies entirely, or to a great extent, on TV news is by its very nature not prepared to listen to or digest news of any great complexity or detail. John Whale, who has covered the news in England and in the United States for Independent Television News, has this to say of the limited potential of television news in spreading political information:[11]

> There is by now not much serious argument left about whether it is a good thing to promote racial harmony, or rebuild slums, or keep down inflation, or avoid foreign military involvements. The argument is about how, not whether. It is about the how of these questions that people must vote. Yet television is not well equipped to help them with the how. Mass literacy has promised a slow advance towards an educated electorate which would have some hope of making reasonably well-based decisions. That advance will not be sustained by an electorate which looks principally to television for its news.

The short of this discussion is that legal doctrines should be developed and assessed free from any grandiose conceptions of the influence of television on political life. Broadcasting has at best an incremental and at worst a marginal effect on political consciousness. Too high a price in administrative and judicial inefficiencies, or in broadcasting revenues, should not be paid for doctrines designed to increase the number of voices heard on the air.

II. THE FAIRNESS DOCTRINE AND ADVERTISING

The continuing and evolving difficulty of defining the editorial responsibility of the broadcaster is in large measure, though not entirely, a function of the technology of the industry. From the very beginning radio was conceived not only as an organ of communication, but as a unique, as well as a scarce, facility of intercommunication comparable to the telephone. It is this dual function which has made it so difficult to define its status either in practice or law. The very special status of broadcasting was recognized by the Federal Radio Commission as early as 1929.[12] The doctrine was developed that the broadcaster must give adequate coverage to public issues and that it must fairly represent opposing views.[13] This has come to be called the fairness doctrine, which has continued to be part of the common law of the Commission [14] and has been enforced by warnings that persistent violation might result in a refusal to renew a station's license. The Commission has, however, made the point again and again that the broadcaster has considerable discretion in operating the doctrine.[15] He is to decide whether a question raises an issue of public importance. Similarly committed to the discretion of the broadcaster is the format, the amount of time, and, most importantly, who shall speak.[16] To be sure, the

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[11] J. WHALE, THE HALF-SHUT EYE 203 (1969).

[12] Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. denied*, 281 U.S. 706 (1930).

[13] *See generally* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249–50 (1949) and cases cited therein.

[14] In 1949, the Commission abandoned its rule that the broadcaster could not express his personal opinions on the air, *see* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1253 (1949), over the opposition of the American Civil Liberties Union, which feared that an unsatisfactorily administered fairness doctrine would not be an adequate check on the risk broadcasters would become propagandists. *See* AMERICAN CIVIL LIBERTIES UNION, OUR UNCERTAN LIBERTIES 53–54 (28th Annual Report 1947–48). The prohibition against the expression of personal opinion stil applies in British broadcasting. Television Act of 1964, c. 21, § 3, sched. 2.

[15] The Commission requires only that the licensee act "reasanobly and in good faith." *See* Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415, 10424 (1964) [hereinafter cited as Fairness Regulations]; Madalyn Murray, 5 P & F RADIO REG.2d 263 (1965).

[16] *See* Fairness Regulations at 10416; Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1251–52 (1949). The Supreme Court has indicated that opposing points of view should be expressed by individuals committed to them. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 392 n.18 (1969), quoting J.S. MILL, ON LIBERTY 32 (R. MacCallum ed. 1946) Licensees can fulfill their obligation by announcing thir willingness to broadcast opposing views by volunteers, which will suffice if a response is brought forth *See* Mid-Florida Television Corp., 40 F.C.C. 620, 621 (1964). The Commission has proposed that where an announcement does not bring forth a spokesman, particularly if the controversial ideas expressed are the subject of a series of broadcasts, the licensee must notify specific individuals of the opportunity to present contrasting views. *See* Obligations of Broadcast Licensees Under the Fairness Doctrine, 23 F.C.C.2d 27, 29 (1970). Where the licensee rejects a volunteer spokesman as inappropriate, he must seek out others. Richard G. Ruff, 19 F.C.C.2d 838 (1969). But if his good faith efforts are fruitless, he may continue to broadcast his own point of view. Obligations of Broadcast Licensees Under the Fairness Doctrine, *supra* at 30–31.

Commission will review the licensee's performance. Some of its rulings, however, have led cynics to charge that the Commission reflects popular prejudices in making these determinations.[17]

Perhaps in partial response to such cynicism, in 1967 the Commission enacted a regulation embodying two particular applications of the doctrine, one dealing with personal attacks [18] and one with political editorials,[19] a violation of which would be punishable by a fine of not more than $10,000.[20] "When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group," the licensee within one week must transmit a copy of the script and offer gratis an opportunity to reply.[21] A similar rule applies to an editorial endorsing a candidate.[22] The regulation does not apply to attacks made by candidates or their spokesmen or to newscasts and interviews.[23]

These regulations, and the fairness doctrine in general, were challenged by the broadcasters, but were upheld by the Supreme Court in *Red Lion Broadcasting Co. v FCC*.[24] The broadcasters contended that the fairness doctrine violated their first amendment rights by chilling their free expression.[25] They argued that a broadcaster might hesitate to broadcast views which would lay the basis for a claim for free time.[26] In fact, the constitutional shoe turned out to be on the other foot. The court held that the fairness doctrine, and even a right to command time, is not only tolerated by the first amendment but is required by it.[27] "It is the right of the viewers and listeners, not the right of the broadcasters which is paramount. . . ." The fairness doctrine promotes "the purpose of the First Amendment to preserve an unhibited marketplace of ideas. . . . That right [of viewers and listeners] may not constitutionally be abridged either by Congress or by the FCC." [28] Although it may seem anomalous to posit a right of the people which is not the right of any person in particular, we are becoming more and more familiar with the judicial enforcement of public or group interests at the suit of individuals and groups who may or may not be direct beneficiaries of the judgment.[29] We must therefore conclude on the basis of the pronouncements in *Red Lion* that the fairness doctrine is in a somewhat loose sense a first amendment requirement.

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[17] *See, e.g.*, Friends of the Earth, 24 F.C.C.2d 743, 757–58 (1970) (Commissioner Johnson, dissenting), *rev'd* 449 F.2d 1164 (D.C. Cir. 1971). For example, it might be argued that the Commission reflected popular prejudices when it permitted broadcasters to deny time to atheists to reply to religious broadcasts, *see, e.g.*, Madalyn Murray, 5 P & F Radio Reg.2d 263 (1965); Robert H. Scott, 11 F.C.C. 372 (1946), and in its apparent holding that arguments against Communism do not require an equal time response. *See* Fairness Regulations at 10419–20.

[18] 47 C.F.R. § 73.123(a) (1971) (standard broadcast stations); *id.* § 73.300(a) (FM broadcast stations); *id.* § 73.598(a) (noncommercial educational FM broadcast stations); *id.* § 73.679(a) (television broadcast stations).

[19] *Id.* §§ 73.123(c), .300(c), .598(c), .679(c).

[20] 47 U.S.C. § 501 (1970).

[21] 47 C.F.R. §§ 73.123(a), .300(a), .598(a), .679(a) (1971).

[22] *Id.* §§ 73.123(c), .300(c), .598(c), .679(c). A copy of the script of the editorial must be transmitted to ther qualified candidates, or to the candidate opposed, within 24 hours, or if the editorial is broadcast within 72 hours of an election, in advance of the broadcast. *Id.*

[23] *Id.* §§ 73.123(b), .300(b), .598(b), .679(b).

[24] 395 U.S. 367 (1969).

[25] Brief for Petitioners at 18–23.

[26] Brief for Petitioners at 28; Brief for National Broadcasting Company, Inc. as micus Curiae, on Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia Circuit, at 8–9. The broadcasters, to be sure, did not allege they were acting so selfishly. Furthermore, they are, to some degree, legally bound to broadcast controversial programs. *See* Fairness Regulations at 10424; Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949) (requirement that broadcasters operate in the public interest includes a duty to present programs devoted to the discussion and consideration of public issues). Nonetheless, there is considerable possibility the broadcaster will exercise a large amount of self-censorship and try to avoid as much controversy as he safely can. The *Red Lion* Court argued that the Commission could penalize at renewal time any broadcaster who failed to discharge his responsibility. 395 U.S. at 393–94. It seems doubtful, however, that except in cases of glaring failure to discuss paramount issues, the Commission could detect editorial caution. In any case, it must have been the Court's view that whatever the risks, they were worth taking. The rather unrealistic assumption that the Commission can deal successfully with editorial caution is otherwise some evidence of wishful thinking.

[27] 395 U.S. at 390.

[28] *Id.*

[29] *See, e.g.*, Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 C. Cir. 1966) (listeners to broadcasts have standing to sue as persons "aggrieved" under the Communications Act); Scenic Hudson Preservation Conference v. FPC, 354 2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (conservation group had standing to attack licensing of power installation where aesthetic concerns were allegedly given inadequate consideration). *See generally* Jaffe, *Standing Again*, 84 HARV. L. REV. 3 (1971).

Although I have in the past raised some question about the crucial importance of the fairness doctrine,[30] I do not question that it serves some useful purposes. In an occasional case, such as the enforced anticigarette campaign, the fairness doctrine appears to have had considerable success in public education. It has also had an educational effect in improving the character of public discussion by providing a model exemplified by the panel discussion. But these benefits must be placed in context. Although the most zealous advocate of fairness treats each broadcast as weaving an almost magical spell around the cocooned listener, as I have previously noted, the total influence of broadcasting on political attitudes is at best marginal.[31] Certainly, the impact of any *particular* response broadcast will not be too great. Moreover, it is sheer chance that any individual who has heard one side of a controversial broadcast will be in his chair to hear the required reply. I would conclude, therefore, that there is very little point in the Commission spending as much time as it does in reviewing the discretion of the broadcaster, and even less in the court of appeals reviewing the Commission's exercise of discretion. This is not based on any concern for the broadcaster or belief in his righteousness, but simply on the proposition that a little more or less discussion of this or that is of negligible significance and time spent over it is wasteful.

This brief review of the history and utility of the fairness doctrine brings us to the story of the cigarette advertisement and the controvery which rages over the application of the fairness doctrine to advertisements. The cigarette story has been told many times[32] but it is worth telling again. A then recent graduate of the Columbia Law School, John F. Banzhaf III, now a professor at George Washington Law School, petitioned the Communications Commission for a ruling that cigarette advertisements impliedly asserted the healthfulness of smoking and required the broadcaster under the fairness doctrine to broadcast statements to the contrary. The Commission, in one of its boldest actions, upheld the claim and ordered the broadcasters to give free time for anticigarette statements.[33] Having provided a forum for one side in a controversy, the broadcasters were placed under a duty to present the opposing view. The decision was affirmed by the Court of Appeals for the District of Columbia Circuit [34] and has ever since haunted the Commission. Its logic can be expanded to justify so many demands for free time as to threaten broadcasting's advertising base. It can be argued that almost all advertising places a product in its most favorable light and does not communicate its significant and controversial countervailing costs. Automobiles pollute the air and overcrowd the cities. Drugs may induce too much reliance on drugs. Cereals may not be as nourishing as some think they should be, quite apart from whether false claims are made.

Several recent cases highlight the problem. The first involves broadcasts urging youths to join the military. Over the extensive dissent of Nicholas Johnson, the Commission rejected both a tenuous claim that the advertisement implied the propriety of our military policy in Vietnam and elsewhere and a more plausible claim that the advertisement asserted the controversial proposition that being a soldier was a useful thing for the country and for the soldier.[35] The majority of the Commission had previously treated the cigarette decision as sui generis [36] on the ground that cigarettes have been officially established as a prime health hazard and that the saturation advertising for smoking reinforced the danger. That distinction was applicable to the military recruiting ads. There is no question, I think, that as compared with any other case so far presented cigarette advertisements are exceptional, at least in degree. Cigarettes undeniably present a health hazard of major proportions. Other countries, England for example,[37] have arrived at the same conclusion and entirely forbid the broadcasting of cigarette advertising as we now do.[38] Furthermore, before the recent ban, it is my impression cigarette advertisements saturated the airwaves to a far greater extent than advertisements for military recruitment. Finally, as the Court of Appeals for the District of Columbia Circuit noted in affirming the Commission majority,[39] it was inconceivable that any American was uninformed that the desirability of the draft, military service, and the Vietnam War was a controversial issue. Petitioners' voices on the airwaves would not have furthered the goal of informing the public that controversy existed. In contrast, before the massive anticigarette campaign began few Americans were aware of the connection between cigarettes and health dangers.

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[30] Jaffe, *The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation: Implications of Technological Change*, 37 U. CIN. L. REV. 550 (196[illegible]).

[31] *See* pp. 769–71 *supra*.

[32] *See, e.g.*, THE NEW YORKER, Dec. 19, 1971, at 46.

[33] WCBS, 8 F.C.C.2d 381, *aff'd on rehearing*, 9 F.C.C.2d 921 (1967).

[34] Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

[35] San Francisco Women for Peace, 24 F.C.C.2d 156 (1970); David C. Green, 24 F.C.C.2d 171 (1970), *aff'd*, 447 F.2d 323 (D.C. Cir. 1971); Alan F. Neckritz, 24 F.C.C.2d 175 (1970), *aff'd*, 446 F2d 501 (9th Cir. 1971).

[36] *See* WCBS, 9 F.C.C.2d 921, 942–43 (1967) (industry claim that the cigarette decision could be extended to advertisements for automobiles, detergents, and high cholesterol foods dismissed as a "parade of horribles").

[37] *See* INDEPENDENT TELEVISION AUTHORITY, ANNUAL REPORT AND ACCOUNTS 1965–66, at 50 (1966).

In a more recent decision, the Commission has not fared so well with a different panel of the same Court of Appeals. In connection with advertisements for high-powered automobile motors and gasoline the Commission had taken the position that the link between the product advertised and environmental pollution was too tenuous to justify a right of reply.[40] The Commission refused to follow the cigarette decision on grounds not of logic but of general policy. Very simply it saw the spectre of fairness seriously undercutting the advertising base of television if the logic were pressed to the extremes of consumerist thinking. The Court of Appeals reversed the Commission in *Friends of the Earth v. FCC* [41] and held that an advertising display of the prowess of a high-powered motor car raised the issue of air pollution. The court simply appealed to the logic of the cigarette decision without apparent concern that so extended an application might implicate all advertising. The Commission had balanced the likely gain for public enlightenment against the threat to revenue. The court never so much as considered whether this balancing might not be a reasonable exercise of discretion.

But advertising for the time being does support most broadcasting; extensions of the fairness doctrine must take that into account. It is part of the problem that the "little" licensee may not be able to afford quite the same cutbacks as the immensely privileged and lucrative stations in the great markets. The cost to them must be balanced against the marginal benefits of the fairness doctrine in heightening political consciousness.[42] Nevertheless, there will be extensions of the fairness doctrine of a gradual and incremental character. The weaker licensees must suffer the risks involved in being part of an industry which on balance enjoys an exceptionally profitable monopoly.

What then should be the rule as to the application of the fairness doctrine to advertisements? There is some demand for its abolition. I think that it should be retained. The cigarette case attests to its potential for good. That case, however, is exceptional when compared to other instances in which its application has been urged. If the mere advertisement of gasoline, automobiles, or electrical energy were to be held to raise an issue of environmental pollution, the cases might be similar. But such a holding would press far the rationale of the cigarette case, since the environmental impact of these products is a function of many variables.

But it is not easy to formulate a fully satisfactory rule for applying the fairness doctrine to advertising. Its application is most obvious where the advertisement is explicitly controversial. But the advertiser may avoid the explicit precisely to foreclose a claim to rebuttal, or because he believes the subliminal is more effective. It should suffice to trigger the doctrine that by implication he intends to speak to a current, publicly-acknowledged controversy. However, with rare exceptions, such as cigarettes, at least that much should be required.[43] Mere advertising of a product, unless as with cigarettes its malignity is well-established, should not suffice; I therefore question the extension of the fairness doctrine to permit antipollution rejoinders to automobile ads. The broadcaster in deciding whether to accept an advertisement should be able to forecast the applicability of the fairness doctrine. This he can do if a reading of the advertisement reveals an intention to address, even though only implicitly, a current controversy. Once he accepts an advertisement of this character, he understands that he must expect to make time available for a reply.

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[38] Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1335 (1970). As an ironic sidelight, it should be mentioned that when the broadcasters challenged the constitutionality of the total ban on cigarette advertising, Judge Wright, one of the most zealous judicial proponents of the fairness doctrine, dissented from a three-judge court's holding that the statute was constitutional on the grounds that it infringed the public's right to hear procigarette commercials. Judge Wright argued that if procigarette advertising raised an issue of public importance requiring a fairness reply it was inconsistent to now hold the making of such statements could be constitutionally forbidden. *See* Capital Broadcasting v. Mitchell, 333 F. Supp. 582, 587–94 (D.D.C. 1971) (Wright, J., dissenting).

[39] *See* Green v. FCC, 447 F.2d 323, 329 (D.C. Cir. 1971). *See also* Neckritz v. FCC, 446 F.2d 501 (9th Cir. 1971).

[40] *See, e.g.*, Friends of the Earth, 24 F.C.C.2d 743 (1970), *rev'd*, 449 F.2d 1164 (D.C. Cir. 1971).

[41] 449 F.2d 1164 (D.C. Cir. 1971).

[42] *See* pp. 769–71 *supra*.

[43] In the present inflammed state of public opinion even this "intention to address" limitation may create problems. Suppose that General Motors engages in institutional advertising to foster a benign public image without any intention to address a particular

In another recent case the Commission itself, in a unanimous opinion,[44] made an important concession to the Johnson position by holding that a series of ads of Standard Oil of New Jersey, by emphasizing the need for developing petroleum reserves in Alaska, impliedly constituted an argument for building the hotly debated Alaska Oil Pipeline. More significantly, however, the case addressed the issue of the timing and exposure that had to be given the reply ads to satisfy the fairness doctrine. On rehearing, NBC was able to convince a majority that it had presented and was fairly presenting opposing views in its general programming.[45] This, however, did not satisfy Commissioner Johnson, who would have held that as applied to paid ads NBC should place response material which would reach the same audience as saw the original spots—Meet the Press, Saturday Night News, Sunday Night News—with the same force and same regularity as the original spots.[46] However, anticigarette spots were broadcast on the basis of only about one to every five cigarette advertisements and not necessarily to the same audience as the original commercial. Since, however, the anticigarette ads reminded an individual that he endangered his immediate personal health if he did not give up his smoking habit, they were likely to be effective no matter when broadcast. In contrast, the force of antigasoline, antiautomobile, and various other environmental messages is much more remote, since the individual does not feel as directly threatened by the advertised evil. The lesser impact of the antipollution ads suggests Commissioner Johnson is clearly right in his contention that the environmental countercommercial should be given a position comparable to the commercial with sufficient exposure to make likely public awareness of the controversy.

Johnson's suggestions are moderate compared to those of the National Citizen's Committee for Broadcasting (NCCB). It demands that twenty percent of available advertising time be set aside for free rebuttals, that *all* time be available for sale for rebuttal commercials and that countercommercials follow the original ad immediately "whenever possible."[47] There is merit in setting aside a gross amount of free time for countercommercials. But the problems of rationing it, of deciding what groups are representative and how much air time should be devoted to any one subject are great. It could only work, I think, if the broadcaster were given very large discretion in its administration. A number of broadcasters are already setting aside periods of free access, though not specifically for countercommercials.[48]

I conclude, after this impressionistic examination, that the logic of applying the fairness doctrine to advertisements should not be expansively exploited. To do so would encourage constant recourse to the Commission and promote uncertainty in the industry. In 1966 the FCC received 409 fairness complaints: in 1970 it received just over sixty thousand.[49] The consequent cost in energies expended is not worth the marginal gains in public enlightenment. Furthermore, the general public does not share what I believe is the root cause of the drive for extension of the fairness doctrine: a distaste for advertising as the basis of television because of a belief that it promotes false values, distorts priorities, and must be consistently fought.

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current controversy. Ralph Nader, however, may logically claim the right to a fairness response on the grounds that the character of General Motors as an institution is a controversial issue to which the GM ads intended to speak. Arguably the Commission applied the fairness doctrine to a case analogous to our GM hypothetical when it held that a local action group protesting the operation of a local charity had a right to a fairness reply to the charity's advertisements. *See* United People, 32 F.C.C.2d 124 (1971). The *United People* case is perhaps distinguishable from the GM hypothetical on the grounds that in *United People* the controversy was far more immediate and sharply focused and occurred within the local community a licensee is especially obligated to serve.

[44] National Broadcasting Co., 30 F.C.C.2d 643 (1971).

[45] Wilderness Society and Friends of the Earth, 31 F.C.C.2d 729 (1971).

[46] *Id.* at 742 (Commissioner Johnson, dissenting).

[47] Reply Comments of NCCB Submitted to the FCC in Docket No. 19,260—Fairness Doctrine at 2-3.

[48] *See* p. 790 *infra*. These problems of implementing the NCCB scheme are the same as those which would arise under any system of free "access" to air time. *See* pp. 787–92 *infra*.

[49] BROADCASTING, Dec. 27, 1971, at 21.

III. Access

The Commission has recently been required to wrestle with a question somewhat akin to fairness, yet significantly different—that of access. The broadcaster satisfies the fairness requirement when he puts on a program adequately reflecting a viewpoint in opposition to the one previously aired. The broadcaster, however, retains control of the program format and the selection of the opposition speaker. In contrast, one who claims a right of access argues there is a public or constitutional interest in *his* particular voice being heard on the air even over the opposition of the broadcaster. There is under the statute an access right for an opponent after a broadcaster sells time to a political candidate.[50]

A controversy now rages as to whether a licensee must sell time for "advertorials," spot announcements or noncommercial advertisements involving the broadcasting of opinion on controversial issues. A number of broadcasters have refused to accept advertorials carrying an anti-Vietnam War message. They gave as their reason that a spot announcement on an issue of public importance is superficial sloganeering.[51] But such reasoning may be thought an expression of intellectual snobbery. The uncomplicated truths and falsehoods most apt for mass media may be better and more succintly said in one than five minutes. The message at least alerts the listener to the issue and, if it comes from a source which he trusts or distrusts, helps him to find his way to the taking of sides. It may thus form one legitimate link in the intricate, drawn-out process of opinion formation. The broadcasters' real reasons for hostility to advertorials may center around their fear that the average listener, bored or angered by the political message, may not watch the commercials or programs that follow. They may also fear that the application of the fairness doctrine to advertorials may compel enormous amounts of free time for rebuttals.

For a time the broadcasters' fears must have been assuaged by the Commission, which refused to compel broadcasters to accept the one minute anti-war advertorials proferred by a group called the Business Executives' Move for Vietnam Peace (BEM).[52] Dissenting Commissioner Johnson emphasized the first amendment irony of the Commission's position, which resulted in preference for commercial as opposed to political speech.[53] But it is perverse to attribute the broadcasters' practice to an evaluation of the comparative worth of commercial and political expression. Rather, the practice reflected the fact that commercial advertising has been and is the financial base of the industry. Commissioner Johnson's dissent presaged further trouble for the broadcasters. A divided panel of the Court of Appeals of the District of Columbia Circuit reversed the Commission's decision.[54] It first held that broadcasting constituted state action; therefore first amendment obligations attached to a licensee's actions.[55] It then held that although no one person—whether this plaintiff or another—had a right of access, a flat ban on all editorial advertising was invalid. It basically adopted the position of Commissioner Johnson: "[I]f the First Amendment prohibits anything at all, it must be a censorial discrimination among ideas."[56] The matter was remanded to the FCC to formulate "a scheme of reasonable regulations"[57]—the one that would "avoid any possibility of chaos and confusion"[58] and would prevent domination [of the airwaves] by a few groups or a few viewpoints."[59] Judge McGowan, dissenting, could not find such compulsions in the first amendment. He estimated the task imposed on the Commission as one of "heroic proportions,"[60] "one whose very complexities may undermine the premise upon which it is founded."[61] The obligations of the fairness doctrine, he felt, adequately satisfied the public's right to know.

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[50] Communications Act of 1934, 47 U.S.C. § 315(a) (1964). The Commission has extended this right to a candidate's supporters where spokesmen for other candidates are permitted to buy time. *See* Nicholas Zapple, 23 F.C.C.2d 707 (1970).

[51] Business Executives' Move for Vietnam Peace, 25 F.C.C.2d 242 (1970), *rev'd*, 450 F.2d 642 (D.C. Cir. 1971), *petition for cert. filed*, 40 U.S.L.W. 3317 (U.S. Jan 11, 1972) (No. 864).

[52] *Id.* In a companion case, the Commission ruled in part that a station could not arbitrarily deny time for the solicitation of funds for political purposes. Democratic Nat'l Comm., 25 F.C.C.2d 216 (1970) *rev'd on other grounds sub. nom* Business Executives Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971), *petition for cert. filed*, 40 U.S.L.W. 3317 (U.S. Jan 11, 1972) (No. 864).

[53] Business Executives' Move for Vietnam Peace, 25 F.C.C.2d 242, 252 (1970).

[54] Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971).

[55] *Id.* at 651–54.

[56] *Id.* at 660.

[57] *Id.* at 663.

[58] *Id.*

[59] *Id.* at 664.

[60] *Id.* at 666.

A. ACCESS AND STATE ACTION

The first issue before the *BEM* court was whether broadcasting and licensee actions are state action. Proponents of the view that it is[62] and the court[63] relied to some extent on holdings that transportation systems,[64] and school newspapers[65] operated by a *public authority* could not, if they accepted advertising at all, refuse paid editorials. But is a broadcaster a public authority? On this question Commissioner Johnson, dissenting below,[66] derived comfort from *Marsh v. Alabama*[67] and *Amalgamated Food Employees v. Logan Valley Plaza.*[68] In *Marsh* the Court held that the industrial proprietor of a "company town" could not forbid meetings and speeches on its "public" streets. The proprietor functioned as a municipality and had to afford its inhabitants the usual rights and opportunities available to residents in more conventional municipalities. *Logan Valley* extended *Marsh* to the sidewalk complex surrounding a suburban shopping center. The center could not, the Court held, insulate its shops from the labor picketing to which shops are normally subject. Here private property serving functions which are normally and traditionally public—for example, as streets and squares—was held to acquire the status of public property. But the transmission of information by electromagnetic waves has not in that specific sense seemed a commonly accepted public function. *BEM*, therefore, does not flow naturally from *Marsh* and *Logan Valley*.

Indeed, Judge Wright, speaking for the court, refused to hold that broadcasting was inherently a public forum analogous to the streets in *Marsh* or the shopping center in *Logan Valley*.[69] Rather he grounded his rationale on the fact that broadcasting is licensed to use the airwaves, and is regulated in that use; and the airwaves, he said, "are 'a limited and valuable part of the public domain,' leased out temporarily by the federal government which retains ultimate control over them."[70]

The popular cliché that the broadcaster is using "the public's airwaves" is a vague, indeterminate concept. I think we would have heard little of it had not the existing technology required regulation of broadcasting to avoid interference. For in one way or another we all use air and space. To speak of owning such resources is a solecism.

Judge Wright's further argument, that broadcasting is state action because it is regulated, is also not entirely satisfactory. The argument does have some force when what is being regulated is a public utility like a transportation system whose very premise is universal public service.[71] Broadcasting, however, is not such a public utility. Furthermore, we are all regulated in thousands of ways in our use of our houses and our streets. We are all inextricably and ultimately dependent upon and interdependent with government. Yet because we believe it to be important to distinguish the private and public spheres, our acts, our failures to act, our prejudices, and our misconducts do not become acts of government. If we discriminate, indeed, if we are permitted to discriminate, against blacks, government has not therefore discriminated. We are each of us private centers of power and initiative, and it would be ironic to conclude that if in the public interest a person or an enterprise must be very much regulated, his actions by reason of that very liability become the actions of the state. By merely tolerating my action the state does not adopt it as its own; the failure of a court to prohibit such conduct does not make it the conduct of the court.[72] Although *Shelley v. Kraemer*[73] held that enforcement of a restrictive covenant against black occupancy was state discrimination, that case is distinguishable from *BEM* and was correctly decided because in effect a seller was *compelled* to discriminate against his will.[74] As support for an affirmative obligation on government to act against discrimination, moreover, it stands alone in the case law.[75]

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[61] *Id.*

[62] *See* Johnson & Westen, *A Twentieth Century Soapbox: The Right to Purchase Radio and Television Time*, 57 VA. L. REV. 574, 590–91 (1971) [hereinafter cited as Johnson & Westen].

[63] 450 F.2d at 659.

[64] Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal.2d 51, 434 P.2d 982, 64 Cal. Rep. 430 (1967); Hillside Community Church, Inc. v. City of Tacoma, 76 Wash.2d 63, 455 P.2d 350 (1969).

[65] Lee v. Board of Regents, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969).

[66] 25 F.C.C.2d at 258.

[67] 326 U.S. 501 (1946).

[68] 391 U.S. 308 (1968).

[69] 450 F.2d at 659.

[70] *Id.* at 652, quoting Office of Communication of United Church of Christ v. FCC 359 F.2d 994, 1003 (D.C. Cir. 1966).

[71] *See* Public Util. Comm'n v. Pollack, 343 U.S. 451 (1952).

In sum, the arguments of Judge Wright stretch the concept of state action very far. I would have preferred to place the decision on a more modest basis. Advertorials do serve a legitimate purpose. In a monopoly-based video system there should be some provision for them. It would therefore be legitimate to interpret the statute as making some room for them. This might have been done by the Commission as a matter of policy, and it is always open to a reviewing court to transmute desirable policy into propositions of law.[76] Putting *BEM* on a statutory ground would have left the way open for Congress to reformulate the broadcaster's advertorial obligations should experience or the political process dictate change. To be sure, arguments based on the Constitution are very fashionable these days and might be seen by a judge as protection against congressional or administrative manipulation. But if we are to live with this ruling, the regulatory scheme will have to be flexible, and flexibility is more difficult to achieve under the mighty connotations of the first amendment.

Another problem that could have been avoided by placing the *BEM* holding on statutory grounds is the inevitable question whether printed publications are also state action. The current legal status of the fairness and access obligations of printed publications is mixed. In a few states, statutes require a paper to print replies to a defamatory attack on an individual.[77] Last Term a plurality opinion of the Supreme Court commented approvingly on such statutes arguing that they took "into account the individual's interest in access to the press." [78] A legislative proposal has been made to extend to newspapers the broader fairness obligation of presenting balanced coverage on issues of public importance.[79] But two recent federal courts of appeals decisions have refused to compel newspapers or magazines to accept advertorials.[80]

As discussed shortly, there is some danger in one-newspaper towns that the press will suppress *local* news for corrupt reasons, and the risk is aggravated if the newspaper and the TV station are commonly owned, a situation which should not be tolerated. It is probably feasible to require newspapers to print advertorials and replies to attacks on individuals, although additional administrative burdens would thereby be created for enforcement. However, even Professor Emerson, a most zealous proponent of free speech, believes that "any effort to solve the broader problems of a monopoly press by forcing newspapers to cover all 'newsworthy events' and present all view-points under the watchful eyes of petty officials is likely to undermine such independence as the press now shows without achieving any real diversity." [81]

But how then to distinguish the press from television? The air-waves are limited? There is more monopoly? It is sometimes said in reply that in fact there are more radio and TV stations than newspapers: over ninety-five percent of American cities do not have competitive newspapers.[82] But it is not the number of broadcasting stations and newspapers that should be compared. Rather, as Professor Emerson suggests,[83] the comparison should be with printing presses; they far outnumber television stations. That numbers do play a significant role in the need for a fairness doctrine is indicated by the fact that radio is no longer seriously monitored for fairness doctrine compliance. If monopoly is not accepted as adequate to explain the difference in theory and practice between broadcasting and the press, another justification may be hazarded. Radio did not originate as an organ of expression and made no claim to be such. It was seen as a facility somewhat comparable to the telephone and the telegraph or as a forum where entertainment and debates could be presented. Initially the FRC refused even to allow radio to editorialize.[84] Though the Supreme Court has confirmed the broadcaster's right of free speech,[85] broadcasting, or at least TV, continues to be conditioned by its original historic function as a facility of dissemination, not of expression for its owner.

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[72] There is respectable law review commentary to the contrary. *See* Black, *The Supreme Court, 1966 Term, Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967). But law review commentary is all it is.

[73] 334 U.S. 1 (1948).

[74] *See* Pollack, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 13 (1959).

[75] *Cf.* Evans v. Abney, 396 U.S. 435 (1970).

[76] *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 575 (1965).

[77] *See, e.g.*, MISS. CODE ANN. § 3175 (1942); WIS. STAT. § 895.05(2) (1961).

[78] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 47 n.15 (1971) (Brennan, J.).

[79] H.R. 18927, 91st Cong., 2d Sess. (1970).

[80] Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971); Chicago Joint Bd., Amalgamated Clothing Workers v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971). *See also* Resident Participation of Denver, Inc. v. Love, 322 F. Supp. 1100 (D.C. Colo. 1971).

[81] T. EMERSON, THE SYSTEM OF FREE EXPRESSION 670–71 (1970).

[82] *See* Note, *Resolving the Free Speech-Free Press Dichotomy: Access to the Press through Advertising*, 22 U. FLA. L. REV. 293, App. I, Table I, at 317 (1969).

[83] T. EMERSON, *supra* note 81, at 670–71.

There is a broader rationale for holding broadcasting to be state action which, although not advanced by the *BEM* court, has been utilized by commentators. Professor Barron,[86] Nicholas Johnson,[87] and most recently Professor Walden [88] subscribe to the proposition that today—as distinguished from some never-identified halcyon age—great decision-making powers are lodged in the hands of a few who operate without defined legal responsibilities or any formal duties of public accountability.[89] Such great private power, it is reasoned, must be brought under constitutional control. This rationale would obviously make the print, as well as the broadcast media, state action. These commentators further assert that the mass media, the networks, and the newspaper chains practice "private censorship" and that it, not governmental censorship, poses the greatest threat to our free society.

The proposition that the threat of government censorship is much less than that of private censorship cannot withstand the lesson of the government's attempt to suppress publication of the Pentagon Papers.[90] An argument of this sort can only be made by one who, not having lived under a system of government censorship, appears to have no idea what it really means. If one private person suppresses a fact there are others who may publish. Not so if government forbids!

It must be conceded that particularly in cities with a single newspaper—a situation aggravated if the paper owns the only TV station—there is a considerable risk of suppression of *local* news because of a likely tie-in of the newspaper with the local power structure. Here there may be more need for the finding of state action and the ensuing first amendment obligations than in the great national concerns, though ironically it is in connection with the latter that the question has been raised. Yet even this need should not be exaggerated. A reading of the most recent report of the *Alfred I. Dupont-Columbia University Survey of Broadcast Journalism* shows that a number of local stations are developing bold and independent news and public affairs programs in areas such as race relations, slum housing, and environmental pollution.[91] Newsmen in Indianapolis reported a belief that "professionalism is increasing steadily at the local level." [92] There is, I think, no question that both the networks and the local stations are doing very good work in journalism, at least as compared with the painfully dull and shoddy character of their entertainment programs.

To say that the media have great decision-making powers without defined legal responsibilities or any formal duties of public accountability is both to overestimate their power and to put forth a meaningless formula for reform. How shall we make the *New York Times* "accountable" for its anti-Vietnam policy? Require it to print letters to the editor in support of the war? If the situation is as grave as stated, the remedy is fantastically inadequate. But the situation is not that grave. The *New York Times*, the *Chicago Tribune*, NBC, ABC, and CBS play a role in policy formation, but clearly they were not alone responsible, for example, for Johnson's decision not to run for re-election, Nixon's refusal to withdraw the troops from Vietnam, the rejection of the two billion dollar New York bond issue, the defeat of Carswell and Haynsworth, or the Supreme Court's segregation, reapportionment and prayer decisions. The implication that the people of this country—except the proponents of the heory—are mere unthinking automatons manipulated by the media, without nterests, conflicts, or prejudices is an assumption which I find quite madden-ng. The development of constitutional doctrine should not be based on such ysterical overestimation of media power and underestimation of the good ense of the American public.

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[84] *See* note 14 *supra*.

[85] *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969); United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

[86] *See* Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 Geo. Wash. L. Rev. 487 (1969); Barron, *Access to the Press — A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967).

[87] *See* Johnson & Westen 603–07.

[88] *See* Walden, Book Review, 24 J. Legal Ed. 111 (1971).

[89] *See id.* at 115–17.

[90] *See* New York Times Co. v. United States, 403 U.S. 713 (1971).

[91] Columbia Survey 24–27.

[92] *Id.* at 30.

B. THE PROBLEMS OF IMPLEMENTING BEM

Pursuant to the remand in *BEM*, the Commission and the networks will ave to formulate regulations implementing the right of access created by that ecision.[93] There first will be the question of rationing the available time. Com-issioner Johnson has suggested first-come, first-serve.[94] But, the fee system ould mean that the rich will hog the available time. Judge Wright recognized his problem but felt it could be remedied by the fairness doctrine, which would equire acceptance of "at least some advertisements on the other side of the ssue, free of charge if necessary." [95] This need not, said the Judge, alarm the roadcaster since the question is simply the acceptance of "some" editorials. But the broadcaster in this situation cannot control potential fairness claims s he can with the ordinary commercial. He cannot, therefore, control the allo-ation of his most precious resource, advertising time. If advertorials engender airness obligations, the number the broadcaster is required to take must be imited by some quota, perhaps graded to his profit level.

Judge Wright's "fairness" solution to the problem of access for those who annot afford commercial rates, as problematical as it is, does not satisfy this *eview*,[96] which has argued that to permit broadcasters to charge the going ate for advertorials will favor the rich proponents of the status quo. Unless he poor are able to get on the air at no cost or at submarket rates, the argu-ment continues, their views will go unrepresented, thwarting to that extent the ery purpose of access.

The notion that the regular rate will necessarily exclude unpopular views r representation of the disadvantaged is only partly true. *BEM* itself was a ase of a demand to present advertorials against the Vietnam War, views hich were at one time extremely unpopular and to some extent are still so oday. As this *Review* recognizes,[97] there are well-funded groups devoted to he cause of the disadvantaged. Only those groups who cannot convince wealthy atrons to support them will not be able to purchase advertorial time. Finally, s Judge Wright emphasized, to some extent the fairness doctrine does require he presentation of diverse views. Indeed, one gets the feeling the *Review* is reating the advertorial in particular and broadcasting in general as if it were he only rather than just one more more avenue of expression.

This *Review* has further suggested that market rates might discriminate gainst the poor in the exercise of a "fundamental" first amendment right and herefore might not withstand an equal protection challenge.[98] The Supreme ourt has on occasion struck down arrangements which discriminated against he poor in the exercise of certain "fundamental" rights. Thus the Court has nvalidated a one year residency requirement for public assistance,[99] a poll tax n voting,[100] the payment of fees to perfect a criminal appeal.[101] Most recently n *Boddie v. Connecticut*,[102] the Court split between equal protection and due rocess grounds in relieving an indigent civil plaintiff seeking a divorce from filing fee. The Court's due process majority—seeking to restrict its ruling—mphasized "the basic position of the marriage relationship . . . and the con-omitant state monopolization of the means for legally dissolving" it.[103]

But the Court has made it clear that its capacity to alleviate the disadvan-ages of poverty is limited. Schemes which work out to the detriment of the oor are not ipso facto invalid.[104] First, even when a legislative scheme affects fundamental interest of the poor, it may stand if it has a "compelling" justifi-ation. Here, the broadcaster's interest in maintaining their revenues, or the to-be-discussed difficulties of administering any non-market access system might constitute such a justification. Second, the first amendment interests of the indigent here are marginal. Their freedom of speech is not totally suppressed. Unlike the divorce courts in *Boddie*, television is not an exclusive forum; there are many other avenues of expression.

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[93] 450 F.2d at 665.

[94] Democratic Nat'l Comm., 25 F.C.C.2d 216, 234–35 (1970) (dissenting opinion).

[95] 450 F.2d at 664.

[96] 85 HARV. L. REV. 689, 694 (1972).

[97] *Id.* at 694–95.

[98] *Id.* at 694 n.28.

[99] *See* Shapiro v. Thompson, 394 U.S. 618 (1969).

[100] *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[101] *See* Griffin v. Illinois, 351 U.S. 12 (1956).

[102] 401 U.S. 371 (1971).

[103] *Id.* at 374.

[104] *See* James v. Valtierra, 402 U.S. 137 (1971).

The concept of a special rate for those unable to pay the going rate, furthermore, would raise incredible administrative problems. There is no very obvious standard for setting the rate. This *Review* argues the rate should be set so as to keep down the number of frivolous access requests and yet not make the desired access too difficult to achieve.[105] But that means an arbitrary guess. And how would one define the group whose ability to pay is to be determined? Are any five, one hundred, or one thousand people gotten together to claim access a "group"? Should there be a minimum number of individuals? And do we then inquire into the resources of the five or the one hundred or the one thousand to determine their ability to pay or simply go by what they choose to call their treasury? In suggesting the going rate, Commissioner Johnson may have meant to avoid this hornet's nest of unanswerable questions.[106] He may have realized that to encumber the new device with such a load would bring the whole concept into question.

C. ACCESS TO SUBSTANTIAL LENGTH PROGRAMMING

As distinguished from the question of access for advertorials, there is also the question of access for substantial length programming. Commissioner Johnson has suggested that five percent of prime time, a total of six hours per week, be set aside for issue programs.[107] Applicants would probably command time on a first-come, first-serve basis and would pay the amount charged for the commercials generally aired with the time bloc. Johnson adds the qualification that they might have to meet "pre-established quality standards."[108] This qualification, of course, highlights the administrative difficulties of access devices, difficulties which would be increased if they were mandated or reviewed by the Commission. He suggests that as to these programs the fairness doctrine could be suspended and time for reply would have to be bought at the going rates.[109] I find this suggestion attractive. A device of this sort would recognize the public sense of television as both a provider of programs and a means of face-to-face communication.

Some stations have taken steps to implement substantial length access on their own. At least one public station, WGBH in Boston, makes thirty minutes available to any group or individual five times a week. With a two month backlog of applicants, WGBH has not yet had to cut off anyone for breaking the program's four rules forbidding identification of private persons, incitement of violence, obscene language, or solicitation of funds.[110] A few commercial stations have introduced more modest access programs, such as the reading out of letters to the station. Furthermore, cable television, with its many-channeled capacity, will increase the potential access of individuals to broadcast programming. Practically all cable franchises require that one or more channels be reserved for individual communication. Two New York City cable companies are each making two channels available for public-access programming, which in one case will be supported by foundation grants.[111] It will, however, for a long time be the case that the traditional over-the-air broadcast reaches many more people, particularly those of a class who cannot or will not pay for cable. For this reason, minority groups will not regard access to cable as adequate.

D. ACCESS AND MINORITIES

But access for minority groups to express their own life styles is probably even more important than opportunities to present positions on specifically defined issues. *BEM* recognized that there is a constitutional interest in self-expression involved in the access question,[112] although the problem before the court was access for political positions. Minorities, particularly blacks, see broadcasting as a means of communicating to their own people and to whites their style of expression. The broadcasting industry is almost entirely controlled by whites and its modes of expression for the most part are those of the dominant white culture.[113] Recently Michael Novak has reminded us that television personnel are predominantly professional and do not mix with "ordinary people." [114] Thus, television's style is the style of the educated class. Its speech and manner unconsciously express its own imagination and sense of reality. "Even when it tries to be pluralistic and diverse and objective, it places its own distinctive limitations and stamp on what it touches." [115] "The controlling style is one of 'fairness,' 'objectivity,' 'dispassionateness,' 'balance,' 'hard evidence.' One tries to present 'both sides.'" [116] But "[n]ot everybody has the same faith in 'facts' or in 'contradictions.'" Blacks do not trust the objectivity of the educated, neither do ethnics. Novak concludes that "[c]ountless Americans never hear their own accents, emotions, doubts, hatreds, aspirations, loyalties, reflected on the screen: ethnics as well as blacks feel the lack poignantly." [117] Access to broadcasting, either by affording minorities opportunities to produce their own programs, or by affording them some say in the programming choices made by predominantly white, professional television personnel, may help to overcome or to minimize these limitations.

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[105] 85 HARV. L. REV. 689, 695 (1972).
[106] Johnson & Westen 605.
[107] Democratic Nat'l Comm., 25 F.C.C.2d 216, 235 (1970) (dissenting opinion).
[108] *Id.*
[109] *Id.*
[110] COLUMBIA SURVEY 26–27.
[111] *See* N.Y. Times, Oct. 26, 1971, at 83, col. 1; *id.*, Sept. 25, 1971, at 62, col. 2.
[112] 450 F.2d at 655.

Both legal doctrines and licensee actions have begun to respond to the need for minority self-expression. Black groups have been effective in holding up license renewals until they received assurances that money would be spent on black programming and that they would be asked to participate in formulating the programs.[118] The recent decision of Judge Wright assuring a full hearing for those challenging incumbent licensees will substantially increase the leverage of these challenging groups.[119] An agreement recently negotiated with WBAP-TV in Dallas provides for one black and one Mexican-American news anchorman to be "seen and heard regularly." [120] More than one hundred community groups are being assisted by the Office of Communication of the United Church of Christ in securing similar concessions from broadcasters.[121]

But some demands of minorities and special interest groups may be both dangerous and preposterous. The Chicanos are mounting an attack on stations throughout the Southwest seeking to improve their image on television. In Los Angeles, a Chicano group charges that ABC-TV has portrayed Mexicans in a demeaning manner and demands that it be allowed to monitor all scripts and veto any program it considers racist.[122] This group also seeks to promote shows featuring Chicanos in significant roles, to promote group pride.[123] One can sympathize with these attempts and yet worry about programming that must offend no one, particularly those who are most sensitive. Other values must be balanced against the desirability of minority group access.

[From The Washington Post, July 13, 1971]

Esso, the FCC, and the Fairness Doctrine

Government-television relations simply cannot be viewed in black and white, as Congressman Staggers and the FCC have proved in recent weeks. Congressman Staggers raised one aspect of the issue of government supervision by attempting to subpoena unused film from the CBS documentary "The Selling of the Pentagon," said the answer in this case seems simple enough—the first amendment protects against government intrusion of this sort into programing.

Now the FCC has raised quite a different, and less clear-cut aspect of the question of government supervision of the airways by ruling that NBC has an obligation to present views contrary to those expressed in three Esso commercials. According to the commission, the three ads advocate one side of controversial issues of public importance, namely, the need for quick development of Alaska's North Slope oil fields and the alleged ecological safety of a pipeline across the state. Consequently, the three fall under the Fairness Doctrine, the FCC concluded, and NBC must present opposing viewpoints in commercials, sponsored programs, of, if necessary, free time.

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[113] Citizens Communication Center v. FCC, 447 F.2d 1201, 1213–14 n.36 (D.C. Cir. 1971).

[114] Novak, *The Inevitable Bias of Television*, in COLUMBIA SURVEY 122.

[115] *Id.*

[116] *Id.* at 126.

[117] *Id.* at 130.

[118] *See* Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

[119] Citizen's Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971).

[120] BROADCASTING, July 5, 1971, at 9.

[121] *Id.*, July 12, 1971, at 33.

[122] *Id.*, June 28, 1971, at 23.

[123] *Id.*

The Fairness Doctrine has always trod a fine line between government meddling and a reasonable degree of government control over the public airways, and the Esso case is very close to the line, involving as it does not only program content but the pocketbook. These concerned with the vigor of the media cannot help worrying, if only because the number of commercial messages which may now deserve replies seems staggering, at least at first glance. Those less concerned with the overall picture may simply wonder whether we must now endure an anti-Pucker Power march for every Pucker Power parade.

According to the FCC, the answer is No. Stations will continue to leave product claims to the Federal Trade Commission, and may ignore general institutional advertising. The FCC has rejected petitions to reply to army recruiting ads, for example, stating that the ads advocate joining the army, not the policies in which the army participates. Only spots which argue one side of controversial issues of public importance fall under the newly expanded scope of the Fairness Doctrine, and these need be countered only with a reasonable opportunity for expression of opposing views, not equal time.

Admittedly there is a line to be drawn between product and institutional goodwill advertising, on the one hand, and arguments over controversial issues, on the other. But to our eyes it's a wavy line at best. What constitutes a controversial issue of public importance, and whether a station has offered reasonable opportunity for differing viewpoints, are in themselves subjective and controversial decisions. Motives of petitioners, economic effects, and the public interest also affect FCC rulings, making decisions even more difficult and unpredictable.

And yet, despite justified practical and philosophical concerns, we believe the FCC could follow no other course with the Esso commercials. To ignore totally the force of paid advertising would be to open the way to unfairness on a major scale. We trust the FCC will continue to tiptoe in this delicate area, with a healthy respect for the independence of broadcasters to balance the goal of making limited communications channels available to many points of view.

REMARKS OF CLAY T. WHITEHEAD, DIRECTOR, OFFICE OF TELECOMMUNICATIONS POLICY EXECUTIVE OFFICE OF THE PRESIDENT

International Radio and Television Society Newsmaker Luncheon
New York, October 6, 1971

This is a major speech—I read the advance billing and felt I had to say that. I was also billed as one of the youngest and most controversial figures in government and communications. Before I've even opened my mouth, Nick Johnson hates me.

Before I read that advance billing, we had planned one of my usual speeches. You know—a state of the universe message. But after a year of stating and restating the problems, I guess I can't get away with that any more. So this won't be that kind of speech, but I've gotten attached to the format, so I'd like to spend a little time on the state of broadcasting. I don't claim to have the expertise that any of you have in broadcasting; but in the first year of OTP's life, we've been exposed to many of the relationships between government, broadcasting, and the public. Today, I want to focus on those relationships.

I'll probably sound a bit naive to you when I say that some of these relationships don't make sense and should be changed. But why can't they be changed? —especially when they are the cause of many of our problems. The Communications Act isn't sacrosanct. It's a 37-year-old law that was intended to police radio interference—and it has frozen our thinking about broadcasting ever since. But something more than that is needed in a day when the electronic mass media are becoming the mass media.

There are a number of directions to choose from, and I'm here to propose one —one that redefines the relationships in the Communications Act's triangle of government, private industry, and the public.

But before I tell you what my proposals are, let me first tell you why I think a change is needed and why you should want one too.

Look at the current state of the broadcasting business. You sell audiences to advertisers. There's nothing immoral about that, but your audience thinks your business is providing them with programs. And the FCC regulates you in much the same way the public sees you. It requires no blinding flash of originality on my part to see that this creates a very basic conflict.

CBS's Programming Vice President says: "I've got to answer to a corporation that is in this to make money, and at the same time face up to a public responsibility. . ."

His counterparts at the other networks have the same problem. They all have to program what people will watch—what gets the lowest cost-per-thousand. Sometimes that's what the people want to watch, but more often than not it's the least offensive program.

But you don't care what I think about your programs—and you shouldn't have to care what any government official thinks about your programs.

But what does the public think? The signs aren't good.

Look at the new season: Twenty-two new prime-time network law and order shows and situation comedies fill in between movies and sports. It's the same old fare. Life's Harris poll is being interpreted to show that there is wide public dissatisfaction with the entertainment you offer.

Kids and teenagers are developing an immunity to your commercials. Do you doubt that advertisers are questioning the effectiveness of TV as a sales medium?

How long will you be able to deliver our children to food and toy manufacturers? Parents are calling the Pied Piper to task—there were 80,000 letters to the FCC concerning the ACT petition alone.

Consider the anomaly of blacks as your most faithful viewers and your most active license challengers.

I suppose it looks like I'm just another critic taking cheap shots at TV. But there's another side to the broadcasting business. In my part of Washington, it's no insult to call someone a successful businessman. You have created a successful business out of the air—people *do* watch television. Sure your success is measured in billions of dollars, but it's also measured in public service and all those sets in use.

But your success is taking its toll. It's giving you viewership, but not viewer satisfaction—public visibility but not public support.

You've always had criticism from your audience but it never really mattered—you never had to satisfy them; you only had to deliver them. Then the Rev. Everett Parker read the Communications Act. You all know the outcome of the *WLBT-United Church of Christ* case. Once the public discovered its opportunity to participate in the Commission's processes, it became inevitable that the rusty tools of program content control—license renewal and the Fairness Doctrine—would be taken from the FCC's hands and used by the public and the courts to make you perform to their idea of the public interest.

Surprise! Nick Johnson is right. The '34 Act is simply being used and enforced. But where is that taking us?

Look at where we're going on license renewals. In city after city, in an atmosphere of bewilderment and apprehension, the broadcaster is being pitted against the people he's supposed to serve. The proxy for the public becomes the patsy who is held responsible for the Vietnam War, pollution, and the turmoil of changing life styles. As the East Coast renewals come up again, you're snickering about ascertainment—sure it was designed for Salina, Kansas, and not New York City—but I'll wager you'll all wrap yourself in interview sheets when your applications are filed in March. But that won't make you less vulnerable at renewal time because you can have no assurance that your efforts over the years will count for anything if a competing application is filed. "Substantial performance" becomes "superior performance" at the drop of a semantic hat and means that the government has finally adopted program percentage minimums. That's the current price of renewal protection.

So while we all talk about localism, we establish national program standards. You go through the motions of discovering local needs, knowing that the real game is to satisfy the national standards set by government bureaucrats. But it's not a game. Right now your programs are being monitored and taped and the results will be judged under the FCC's 1960 Program Statement. Can you be safe in all 14 program categories?

The Fairness Doctrine and other access mechanisms are also getting out of hand. It is a quagmire of government program control and once we get into it we can only sink deeper. If you can't see where it's leading, just read the *Red Lion* and *BEM* cases. The courts are on the way to making the broadcaster a government agent. They are taking away the licensees' First Amendment rights and they are giving the public an *abridgeable* right of access. In effect, the First Amendment is whatever the FCC decides it is.

However nice they sound in the abstract, the Fairness Doctrine and the new judicially contrived access rights are simply more government control masquerading as an expansion of the public's right of free expression. Only the literary imagination can reflect such developments adequately—Kafka sits on the Court of Appeals and Orwell works in the FCC's Office of Opinions and Review. Has anyone pointed out that the Fiftieth Anniversary of the Communications Act is 1984? "Big Brother" himself could not have conceived a more disarming "newspeak" name for a system of government program control than the Fairness Doctrine.

I'm not seriously suggesting that the FCC or the courts want to be "Big Brother" or that 1984 is here, or that we can't choose a different path from the one we now seem to be on. You are at a crossroads—now you're probably clutching your "Chicago Teddy Bears" and wondering when Whitehead is going to get to the point. The point is: We need a fundamental revision of the framework of relationships in which you, the government, and the public, interact. The underpinnings of broadcast regulation are being changed—the old status quo is gone and none of us can restore it. We can continue the chaos and see where we end up. But there has to be a better way.

I have three proposals. They are closely related and I want you to evaluate them as a package that could result in a major revision of the Communications Act. The proposals are: One, eliminate the Fairness Doctrine and replace it with a statutory right of access; two, change the license renewal process to get the government out of programming; and three, recognize commercial radio as a medium that is completely different from TV and begin to de-regulate it.

I propose that the Fairness Doctrine be abandoned. It should be replaced by an act of Congress that meets both the claim of individuals to use of the nation's most important mass media and the claim of the public at large to adequate coverage of public issues. These are two distinct claims and they cannot both be served by the same mechanism.

Access: As to the first of them—the individual's right to speak: TV time set aside for sale should be available on a first-come, first-served basis at nondiscriminatory rates—but there must be no rate regulation. The individual would have a right to speak on any matter, whether it's to sell razor blades or urge an end to the war. The licensee should not be held responsible for the content of ads, beyond the need to guard against illegal material. Deceptive product ads should be controlled at the source by the Federal Trade Commission. This private right of access should be enforced—as most private rights are enforced—through the courts and not through the FCC.

License Renewals: As to the second claim—the opportunity of the public to be informed on public issues: This is the type of "public interest" traditionally protected by regulatory agencies, but it should be done in a manner which recognizes it as an overall right, which cannot sensibly be enforced on a case-by-case basis. It can best be protected, I suggest, not in countless proceedings involving individual complaints, but in the course of the renewal process. The licensee would be obligated to make the totality of programming that is under his control (including public service announcements) responsive to the interests and concerns of the community. The criterion for renewal would be whether the broadcaster has, over the term of his license, made a good faith effort to ascertain local needs and interests and to meet them in his programming. There would be no place for government-conceived program categories, percentages and formats, or any value judgment on specific program content.

There should be a longer TV license period with the license revocable for cause and the FCC would invite or entertain competing applications *only* when a license is not renewed or is revoked.

I believe these revisions in the access and renewal processes will add stability to your industry and avoid the bitter adversary struggle between you and your community groups. They recognize the new concerns of access and fairness in a way that minimizes government content control.

I'm not saying that this will eliminate controversies. But it will defuse and change the nature of the controversies.

Radio De-Regulation: We can go further with radio. Yesterday I sent a letter to Dean Burch proposing that OTP and the FCC jointly develop an experiment to de-regulate commercial radio operations.

We proposed that one or more large cities be selected as de-regulatory test markets in which radio assignments and transfers would be pro-forma. Renewals would not be reviewed for programming and commercial practices. And the Fairness Doctrine would be suspended. The experiment should be only a first step. For most purposes, we should ultimately treat radio as we now treat magazines.

These are my proposals. The proposals are just that—I have no legislation tucked in my back pocket that we are about to introduce. But, I will work for legislation if there is support for these proposals. In short, my message on all these proposals is that we've tried government program control and bureaucratic standards of fairness and found that they don't work. In fact, they can't work. Let's give you and the public a chance to exercise more freedom in a more sensible framework and see what that can do.

There is one further aspect of freedom I would like to discuss. Some people suggest that this Administration is trying to use the great power of government licensing and regulation to intimidate the press. Some even claim to see a malicious conspiracy designed to achieve that end. They must ascribe to us a great deal of maliciousness, indeed—and a great deal of stupidity—in the attempt to reconcile their theory to the facts. It is not this Administration that is pushing legal and regulatory controls on television, in order to gain an active role in determining content. It is not this Administration that is urging an extension of the Fairness Doctrine into the details of television news—or into the print media.

There is a world of difference between the professional responsibility of a free press and the legal responsibility of a regulated press. This is the same difference between the theme of my proposals today and the current drift of broadcasting regulation. Which will you be—private business or government agent? —a responsible free press or a regulated press? You cannot have it both ways—neither can government nor your critics.

[From the Columbia Law Review, Vol. 71, June 1971]

Notes

Cable Television and The First Amendment*

Introduction

The traditional argument reconciling governmental regulation of television with the first amendment is based upon the technology of broadcasting. The reasoning is that, as the electromagnetic spectrum is finite, the number of channels available is limited. Thus, to prevent chaos, the government must allocate these channels to serve the public interest. Cable television [CATV], however, provides a new mode of television signal transmission which is not subject to the same limitations as broadcasting, and so this rationale for the limitation of first amendment rights of broadcasters seems inapplicable to cablecasters.

This Note is concerned with the application of the first amendment to CATV. The first half examines the rationales that have been suggested to justify a control over television programming stricter than that constitutionally permissible in other media and the applicability of these theories to a cable-based system. A model for governmental regulation of CATV program content within constitutional bounds is proposed in the second half.

I. THE TECHNOLOGY OF CATV [1]

CATV refers to a specific mode of transmission of television signals. Broadcast television signals are transmitted to the receiver over the air by use of a frequency of the electromagnetic spectrum. CATV signals travel to the receiver through a coaxial cable with a capacity, given present technology, of as many as eighty-two channels.[2]

CATV was first developed as a method of delivering broadcast signals to rural homes that could not receive adequate reception directly off the air.[3] In recent years, however, CATV has begun to move into urban centers at a quickening pace. By the beginning of 1970 there were an estimated 2,385 CATV systems serving 4.5 million people—or about 7.8% of all television homes.[4] Thus, although CATV was originally developed as a conduit for broadcast signals, the possibility of program origination is one of the features that makes CATV, with its plentiful channel space, a potentially revolutionary force in the communications industry. The Federal Communications Commission [FCC] has recognized this possibility and now requires that any CATV system with more than 3,500 subscribers originate on at least one channel.[5]

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[1] For a more detailed discussion of the technology and regulatory history of CATV, see Note, *Regulation of Community Antenna Television*, 70 COLUM. L. REV. 837, 837–53 (1970).

[2] Sands, *CATV and the Telephone Industry*, TEL.-ENG'R & MGMT., Feb. 1, 1968, at 25. The largest system currently being installed, at San Jose, California, provides for forty-two channels. BROADCASTING, Feb. 2, 1970, at 36.

[3] THE MAYOR'S ADVISORY TASK FORCE ON CATV AND TELE-COMMUNICATIONS, A REPORT ON CABLE TELEVISION AND CABLE TELECOMMUNICATIONS IN NEW YORK CITY 4 (1968) [hereinafter cited as MAYOR'S TASK FORCE REPORT]. *See* M. SEIDEN, AN ECONOMIC ANALYSIS OF COMMUNITY ANTENNA TELEVISION SYSTEMS AND THE TELEVISON BROADCASTING INDUSTRY (1965).

While CATV provides near perfect reception[6] and relieves crowding of the electromagnetic spectrum,[7] it is the potential for program diversity and innovative channel uses through full utilization of the many channels that is one of the most exciting aspects of the new technology.[8] The low cost of CATV origination will enable cable systems operators to exploit fully their expanded channel capacity by making television time available to potential originators who, heretofore, have been unable to afford access to the broadcast channels. The equipment needed to originate on CATV involves an investment of as little as $2,700 per year for a minimum system to $55,000 per year for a sophisticated color system.[9] Among the most significant potential uses of these CATV origination channels is "public common carrier" service,[10] which would be made available to anyone wishing to buy time. In such an arrangement, the CATV operator would provide a studio and the technical expertise, but would have no control over what is broadcast.[11] Because of the low cost of CATV origination and transmission (public common carrier time might be sold for as little as $5 per hour),[12] public common carrier channels could easily develop into true community forums to which all opinions would have equal access.

The most salient feature of CATV for the purposes of this Note is that, unlike broadcast television, there are no technical limitations on the potential number of channels available in a given locale. Should all the channels on a given cable be in use, there is no technological reason why another cable could not be laid, economic factors permitting.[13]

In discussing CATV program content control, it would be helpful to keep in mind two alternative structures for the television industry as possible developments in the forseeable future. In the more extreme (but not unrealistic) model,[14] CATV would totally displace broadcasting as the mode of television transmission. As is true of electricity wire, cable is able to reach virtually every home in the country.[15] Very probably, today's broadcasters would maintain their origination function, but they would no longer be in the transmission business; rather they would lease channel space from the local CATV operator on a full-time basis.[16]

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[4] BROADCASTING, Jan. 26, 1970, at 55.

[5] CATV—First Report and Order, 34 Fed. Reg. 1751, 17655 (1969).

[6] This accounts for some of its popularity in urban areas where "ghosting" is a constant problem due to tall buildings. MAYOR'S TASK FORCE REPORT, *supra* note 3, at 5.

[7] A steady increase in the number of those wishing to use mobile radio communications has produced a situation known as "the silent crisis." *Id.* at 6.

[8] Memorandum to CATV—Second Report and Order, 35 FED. REG. 10903 (1970). *See* Barnett & Greenberg, *A Proposal for Wired City Television*, 1968 WASH.U.L.Q. 1, 2 (1968) [hereinafter cited as Barnett & Greenberg].

[9] CATV—First Report and Order, 34 Fed. Reg. 17651, 17655 (1969).

[10] This Note uses the term "public common carrier" to refer to the operation of a station that is readily available to individual members of the public. The term "common carrier" as applied to CATV is commonly used to signify that the CATV operator will lease channel space to anyone, but, in that broader sense, it does not include the specific requirements that the CATV operator provide the studio and technical expertise in order to facilitate the general public's access to the medium of television. Without such a requirement, a common carrier channel would be available only to those groups possessing the money and expertise to establish their own origination studio. *See, e.g.*, L. JOHNSON, THE FUTURE OF CABLE TELEVISION: SOME PROBLEMS OF FEDERAL REGULATION 56–61 (1970) [hereinafter cited as L. JOHNSON]; Barnett & Greenberg, *supra* note 8, at 13; Note, *supra* note 1, at 874–75.

[11] The FCC has accepted this policy as a goal. CATV—First Report and Order, 34 Fed. Reg. 17651, 17653–54, 17656 (1969).

[12] Barnet & Greenberg, *supra* note 8, at 21.

[13] There are communications systems in various stages of development, such as laser and wave guide systems which can, through a single cable, supply tens of thousands of channels. Installation of them would even do away with these possible added economic burdens of having to lay new cable whenever channel scarcity developed. *See, e.g.*, TIME, Apr. 12, 1971, at 59.

[14] *See* Note, supra note 1, at 844–45 and authorities cited in footnotes 50 & 51. *See generally* Barnett & Greenberg, *supra* note 8.

[15] Those rural homes to which direct cable connection would be either impossible or too costly to be feasible can be included in the system by the use of a multi-channel microwave transmission system in conjunction with the cable system. *See* Note, *supra* note 1, at 843–44 and authorities cited in footnotes 46–49.

[16] *See* Barnett & Greenberg, *supra* note 8, at 13; MAYOR'S TASK FORCE REPORT, *supra* note 3, at 55–64.

But as it is not clear that the powerful and entrenched broadcasting industry will be totally eclipsed within the next twenty years, it is helpful to posit as a second model a system in which broadcast and cable television are both active. In such a system, the two modes would both operate as origination and transmission media, with CATV also supplying public access channels.[17] But because of its coexistence with broadcast television, CATV would have less of an impact on the communications media in general and this might be of significance in dealing with the systems in light of the first amendment.[18]

II. THE PRESENT SYSTEM OF TELEVISION CONTENT REGULATION

The statute creating the Federal Communications Commission states that the FCC cannot act as a censor: "And no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." [19]

Although thus limited by the statute and by the first amendment, the FCC does have broad regulatory powers to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with the law, as may be necessary to carry out . . ." the statutory commands regarding radio and television regulation.[20] The Commission is also empowered to grant licenses "if public convenience, interest, or necessity will be served thereby. . . ." [21] These statutory grants have been broadly construed [22] so as not to confine the FCC to regulation of the technical aspects of radio and television, but rather to permit the Commission to regulate all facets of radio communication in order to "encourage the larger and more effective use of radio in the public interest." [23]

The "public interest" standard has been used to justify denials of license renewals because of programming that the FCC itself finds to be against the "public interest." [24] The "public interest" criterion has also been used to justify rules [25] that relate directly to program content.[26]

Such rules and standards as are developed by the Commission are enforced primarily through the license renewal process.[27] By granting only a short-term license renewal,[28] the FCC can usually bring a recalcitrant licensee into line.[29] Of course, denial of renewal [30] or license revocation [31] are the ultimate sanctions and, as such, are rarely invoked.[32] However, the renewal process itself is an effective method of regulation because the licensee has the burden [33] of coming forth with proof of his compliance with FCC rules.[34] Furthermore, the frequency of this review (every three years) [35] ensures "that the Commission will scrutinize the actual performance of the station in relation to the performance promised." [36] Also, the licensee's stake in the process is enormous: he has a large capital investment in a highly profitable business that can continue only at the pleasure of the FCC. Therefore, the licensee will be extremely reluctant to incur the wrath of the Commission and will generally respond to subtle administration regulation.

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[17] *See* L. JOHNSON, *supra* note 10, at viii. The future of the communications industry is further complicated by the potential of satellite and laser beam communications. However, this Note keeps the models as simple as possible in order to avoid obfuscating the first amendment issues.

[18] *See* sections III-C-4, VI-A-1, and VI-B *infra*.

[19] 47 U.S.C. § 326 (1964).

[20] 47 U.S.C. § 303(r) (1964).

[21] 47 U.S.C. § 307(a) (1964). *See* Trinity Methodist Church, South v. FRC, 62 F.2d 850 (D.C. Cir.), *cert. denied*, 288 U.S. 599 (1932); KFKB Broadcasting Ass'n v. FRC, 47 F.2d 670 (D.C. Cir. 1931).

[22] *See, eg.*, NBC v. United States, 319 U.S. 190, 214–18 (1943).

[23] 47 U.S.C. § 303(g) (1964).

[24] Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 98–103 (1967) [hereinafter cited as Robinson].

[25] *See, e.g.*, 47 C.F.R. § 73.679 (1971) (a portion of the fairness doctrine). The fairness doctrine was first promulgated by the FCC. Editorializing by Broadcast Licensees, 14 Fed. Reg. 3055 (1949). Later, Congress adopted this policy by an amendment to 47 U.S.C. § 315(a). Act of Sept. 14, 1959. Pub. L. No. 86-274, 73 Stat. 557.

[26] The power to refuse a license on grounds of past or proposed programming necessarily entails some power to define the station's public interest obligations with respect to programming . . . . [E]lementary canons of administrative and constitutional law prevent the Commission from terminating a license without giving reasons or from condemning a station's overall programming as inimical to the public interest without identifying the offending material and particularizing the public interest. And if the Commission must explain its view of the public interest when it denies or revokes a license, it may surely give advance notice of its views by way of an official ruling which is subject to judicial review. Banzhaf v. FCC, 405 F.2d 1082, 1095 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

[27] 47 U.S.C. §§ 307–13. *See* Robinson, *supra* note 24, at 118–21.

[28] 47 U.S.C. § 307(d), *as implemented by* 47 C.F.R. § 73.630(a).

[29] *See, e.g.*, Loyola Univ., 24 P & F RADIO REG. 766 (1962) (one year renewal because of failure to fulfill previous promises as to programming); Allentown Broadcasting Corp., 40 F.C.C. 122 (1961) (one year renewal because of variance between programming proposals and actual performance); Robinson, *supra* note 24, at 120–21; Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701, 703 (1964).

[30] 47 U.S.C. § 307 (1964).

[31] 47 U.S.C. § 312 (1964).

[32] Robinson, *supra* note 24, at 98; Note, *supra* note 29, at 703.

[33] 47 U.S.C. § 309(e) (1964). *See, e.g.*, Office of Comm. of United Church of Christ v. FCC, 359 F.2d 994, 1007 (D.C. Cir. 1966).

> [T]he direct methods of content regulation—other than allocation and renewal of licenses—have rarely been used; indirect means, such as letters of advice and statements of policy are more common. Since renewal decisions are generally based on evaluations of overall programming, the importance the Commission will attribute to any single broadcasting factor is seldom certain. Thus, in light of the value of their franchises and the expense of renewal hearings, most broadcasters would prefer to follow FCC suggestions than to risk losing their licenses. Not only do stations tend to be attentive to FCC advice, they often seek out such advice before making broadcasting decisions. The Commission, on the other hand, has been reluctant to deprive broadcasters of their existing licenses even where it finds some aspects of their programming objectionable. Consequently, there has been a tendency to channel control through a system of "feeling out" rather that through specific rules, direct penalties, and clear holdings which are capable of being litigated.[37]

The effectiveness of such Commission control, then, coupled with the usual absence of judicial review [38] has led one commentator to characterize the license renewal process an "*in terrorem* control." [39]

FCC attempts to insure that all programming is in the public interest have led it to impose sanctions against the broadcasting of obscenity, profanity, and other similarly offensive speech,[40] defamation,[41] fraudulent contests,[42] illegal lotteries,[43] harmful medical advice,[44] and gambling information.[45] The FCC has also sought to impose affirmative obligations on the licensees to meet certain broad programming standards, such as balance,[46] diversity,[47] localism,[48] and public interest broadcasting.[49] In addition, specific affirmative obligations are imposed by the statutory requirements of equal time for political broadcasts,[50] and the FCC-promulgated fairness doctrine, which requires the licensee to present all side of issues of public importance[51] and to provide reply time to anyone personally attacked[52] over the licensee's station.

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[34] Robinson, *supra* note 24, at 119.

[35] While the statute, 47 U.S.C. § 307(d) (1964), provides for a license period of no longer than five years, administrative practice is to give three year licenses. 47 C.F.R. § 73.630(a) (1971).

[36] Robinson, *supra* note 24, at 119.

[37] Note, *supra* note 29, at 703–04.

[38] For a specific example of the way a licensee may be deprived of judicial review of a censorship decision, see Palmetto Broadcasting Co., 33 F.C.C. 250 (1962), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir.) (per curiam), *cert. denied*, 379 U.S. 843 (1964). In *Palmetto* the FCC examiner recommended denial of license renewal because of off-color jokes and other offensive material broadcast on the radio station. The Commission affirmed, setting out as an alternative rationale the proposition that because the licensee at first denied knowledge of the off-color material, he did not have the requisite "character" to be a licensee. The Court of Appeals affirmed on the narrow "character" grounds and thereby avoided any real judicial review of what was basically a censorship decision.

[39] Robinson, supra note 24, at 118. See Head v. Board of Examiners, 374 U.S. 424, 433–37 (1963) (Brennan, J., concurring).

[40] *See, e.g.*, Pacifica Foundation, 36 F.C.C. 147 (1964); Palmetto Broadcasting, 33 F.C.C. 250 (1962), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir.) (per curiam), *cert. denied*, 379 U.S. 843 (1964); Mile High Stations, Inc., 28 F.C.C. 795 (1960). Broadcast of such speech has also been declared a criminal act by Congress in 18 U.S.C. § 1464 which is based on a provision of the Radio Act of 1927. The Commission, however, has not often relied on this provision in broadcast cases. W. K. JONES, CASES AND MATERIALS ON REGULATED INDUSTRIES 1180 (1967).

[41] *See, e.g.*, Trinity Methodist Church, South v. FRC, 62 F.2d 850 (D.C. Cir.), *cert. denied*, 288 U.S. 599 (1932).

[42] *See, eg.*, KWK Radio Station, Inc., 34 F.C.C. 1039 (1963). Broadcast of fraudulent and deceptive communications has been declared illegal by 18 U.S.C. § 1343 (1964). *See also* 47 U.S.C. § 509 (aimed specifically at fraudulent contests).

[43] *See, e.g.*, WRBL Radio Station, Inc., 2 F.C.C. 687 (1936). Broadcast of information concerning lotteries is barred by 18 U.S.C. § 1304 (1964). FCC implementing regulations are 47 C.F.R. §§ 73.122, 73.292, & 73.656 (1971).

[44] *See, e.g.*, KFKB Broadcasting Ass'n v. FRC, 47 F.2d 670 (D.C. Cir. 1931).

[45] *See, e.g.*, Community Broadcasting Service, Inc., 20 F.C.C. 168 (1955). Broadcast of gambling information is outlawed in 18 U.S.C. § 1304 (1964). FCC implementing regulations are 47 C.F.R. §§ 73.122, 73.292, & 73.656 (1971).

Although the FCC is presently involved in extensive regulation of CATV,[53] it has, as yet, devoted little attention to the question of content regulation on CATV. The Commission has, however, held that the equal time,[54] fairness doctrine[55] and sponsorship identification[56] requirements are applicable to CATV.[57] The Commission assumed that these regulations furthered the public interest and that, therefore, CATV operators should not be allowed to circumvent them. The FCC did not feel that, in this regard, the "public interest" in CATV programming was any different from the "public interest" in broadcast television.[58] The Commission rejected the possibility that CATV, unlike broadcast television, may raise special constitutional problems with the observation that: "Since CATV systems use broadcast signals as the backbone of the service they provide, they come within the regulation of this agency, if reasonably related to the public interest. If the regulation is so related, it is not barred by the first amendment. [Continuing in a footnote.] It is thus immaterial that the scarcity of frequencies rationale underlying first amendment rulings in the broadcast field does not apply directly to the cable technology." [59]

Although the possibility of frustration of broadcasting policy may be a sufficient basis for ancillary FCC jurisdiction over CATV,[60] it does not seem to be a sufficient answer to a constitutional challenge. If the technological basis for finding content regulation consistent with the Constitution is, admittedly, inapplicable to CATV, it would seem wise to institute a fuller investigation of the constitutional problems of program content regulation in this new medium. It is highly unsatisfying that the FCC sought to dismiss the matter with the mere assertion that CATV program content regulation was constitutional because it was reasonably related to a constitutionally valid regulation of a related medium—broadcast television. The possible constitutional bases for the regulation of speech on CATV is the subject of the remainder of this Note.

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[46] FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 12–14 (1946) [hereinafter cited as PUBLIC SERVICE RESPONSIBILITY]. "The Commission . . . has always insisted that a "well-balanced program structure" is an essential part of the broadcasting in the public interest. . . . [S]tations have been asked, on renewal, to set forth the average amount of time . . . devoted to entertainment programs, religious programs, educational programs, fraternal programs, etc., and the Commission has relied upon the data . . . ." *Id.* at 12–13. *See* Robinson, *supra* note 24, at 113–14.

[47] PUBLIC SERVICE RESPONSIBILITY, *supra* note 24, at 15. "It has long been an established policy . . . of the Commission that the American system of broadcasting must serve significant minorities among our population, and the less dominant needs and tastes which most listeners have from time to time." *Id. See* Statement of Policy on Programming, 25 Fed. Reg. 7291 (1960).

[48] 47 U.S.C. § 307(b) (1964); PUBLIC SERVICE RESPONSIBILITY, *supra* note 46, at 36–39. The FCC has consistently recognized "the need for adequate reflection in programs of local interest, activities, and talents." *Id.* at 37. *See* L. JOHNSON, *supra* note 10, at 2.

[49] PUBLIC SERVICE RESPONSIBILITY, *supra* note 46, at 39–40. The licensee must devote an adequate amount of time to "the dissemination of news, information, and opinion, and for the discussion of public issues." *Id.* at 39.

[50] 47 U.S.C. § 315(a) (1964) provides in part: "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station."

[51] Editorializing by Broadcast Licensees, 14 Fed. Reg. 3055 (1949). The Commission stated that "broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities.' *Id.* at 3056. The fairness doctrine was subsequently given specific congressional approval by amendment to 47 U.S.C. § 315 (1964). See note 25 *supra*. *See also* Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964).

[52] 47 C.F.R. § 73.679(a) (1971) provides: "When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time . . . transmit to the person or group attacked . . . an offer of a reasonable opportunity to respond over the licensee's facilities." *See also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (holding that the Commission did not exceed its authority in adopting the personal attack rules).

[53] For an extensive discussion of the FCC's jurisdiction over and current regulation of CATV, see Note, *supra* note 1.

[54] 47 C.F.R. 74.1113 (1971). *See also* note 50 *supra*.

[55] 47 C.F.R. 74.1115 (1971). *See also* notes 51 & 52 *supra*.

[56] 47 C.F.R. 74.1119 (1971). The FCC requires that a station identify all those who, directly or indirectly, give the broadcaster valuable consideration in payment for the transmission of any matter.

[57] CATV—First Report and Order, 34 Fed. Reg. 17651, 17658–59 (1969).

[58] *Id.*

[59] *Id.* 1769 & n.28.

[60] Note, *supra* note 1, at 858–59.

III. THE APPLICATION OF THE FIRST AMENDMENT TO TELEVISION

The first amendment reads in part that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." [61] Concerning these phrases, Alexander Meiklejohn makes two important observations:

> "First, let it be noted that, by those words, Congress is not debarred from all actions upon freedom of speech. Legislation which abridges that freedom is forbidden, but not legislation to enlarge and enrich it." [62]

And again.

> "[t]hat amendment, then, we may take it for granted, *does not forbid the abridging of speech*. But, at the same time, *it does forbid the abridging of the freedom of speech*." [63]

Such theoretical concepts have been the basis of the oft-mentioned judicial maxim: "It has never been held that liberty of speech is absolute." [64]

A. Types of governmental interference with speech

Government restraints on the content of speech can be characterized by the nature of the interference—those which impose negative restraints and those which impose affirmative ones. A negative restraint is one which seeks to eliminate, censor, or control communication. An affirmative restraint, on the other hand, is one that imposes an obligation to communicate some message. It is the negative restraint that has typically been at issue in free speech controversies.[65]

In recent years, however, problems involving affirmative restraints have attracted increasing attention,[66] as a result of increased government pressure on the media to present items and views that might not otherwise be given attention. The equal time requirement [67] is one obvious example. The FCC's fairness doctrine [68] and requirement of balanced programming [69] are others. It might be argued that such affirmative restraints are prima facie valid because the first amendment forbids only such laws as *abridge* speech [70] and such requirements in no way abridge speech, but rather impose an obligation to speak. But as pointed out above, the first amendment prohibition goes to governmental action "abridging . . . the *freedom* of speech"; [71] and, arguably, that freedom is abridged when one is required to say something when one would prefer tor remain silent, or perhaps, prefer to spend one's limited time in talking of something else. Furthermore, certain affirmative restraints may have the negative effect of causing avoidance of certain speech in order to avoid incurring the affirmative obligation [72]—for example, the evasion by a broadcaster of controversial issues so as not to incur large fairness doctrine obligations, which accrue if many people seek to present conflicting opinions on the issue.

Concerning the first amendment rights of the various media then, especially those of the broadcast media, the problems inherent in affirmative restraints have come to the fore. And, in light of this, the affirmative-negative dichotomy is of considerable significance.

B. Application of the first amendment to the various media

The Supreme Court has construed the first amendment as applicable to any "significant medium for the communication of ideas." [73] However, it has consistently asserted that one media is not "necessarily subject to the precise rules governing any other method of expression. Each method tends to present its own peculiar problems." [74]

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[61] U.S. Const. amend. I.

[62] A. Meiklejohn, Free Speech and Its Relation to Self Government 16 (1948).

[63] *Id.* at 19.

[64] Times Film Corp. v. City of Chicago, 365 U.S. 43, 47 (1961). *See, e.g.*, Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697, 716 (1930); Gitlow v. New York, 268 U.S. 652, 667 (1924); Schenck v. United States, 249 U.S. 47, 52 (1918).

[65] *See, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Feiner v. New York 340 U.S. 315 (1951); Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland. 340 U.S. 268 (1951); Cantwell v. Connecticut, 310 U.S. 296 (1940); Debs v. United States, 249 U.S. 211 (1919); Schenck v. United States, 249 U.S. 47 (1919).

[66] *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

[67] *See* note 50 *supra*.

[68] *See* notes 51 & 52 *supra*.

[69] *See* note 46 *supra*.

[70] *See generally* Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967) [hereinafter cited as Barron].

[71] A. Meiklejohn, *supra* note 62, at 19 (emphasis added).

[72] RTNDA v. United States, 400 F.2d 1002 (7th Cir. 1968), *rev'd sub nom.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[73] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).

[74] *Id.* at 503 (motion pictures). *See* Kunz v. New York, 340 U.S. 290, 308 (1951) (street meeting); Kovacs v. Cooper, 336 U.S. 77, 85-88 (1948) (sound truck); Saia v. New York, 334 U.S. 558, 563 (1948) (Frankfurter, J., dissenting) (loudspeaker).

Consistent with that view, the Supreme Court, in *Times Film Corp. v. City of Chicago*,[75] upheld a city ordinance requiring all motion pictures to be licensed before they could be shown in the city. Petitioner had relied upon *Near v. Minnesota ex rel Olson*,[76] which held a newspaper licensing scheme to be invalid as a prior restraint. In *Times Film*, the Court noted with approval the language from *Joseph Burnstyn Inc. v. Wilson* [77] declaring that different media may be treated differently [78] and stated that they had previously held "that 'the phrase prior restraint is not a self-wielding sword. Nor can it serve as a talismanic test.' " [79] The Court, evidently, was comfortable with the proposition that what was unconstitutional when applied to printed matter might be permissible when applied to motion pictures.

Thus, the question of first amendment standards as applied to government restraints on the various media requires analysis of possible justifications, based upon individual media attributes. There is no reason why application of the first amendment cannot take into account the problems peculiar to each specific medium, so long as one can supply a legitimate constitutional rationale for the standard invoked in a particular context. In the following section, this Note will discuss the various rationales that have been suggested to justify a greater interference with speech on broadcast television than that allowable respecting other media and explore the legitimacy of the same in regard to a cable-based system.

C. Justifications of television content regulation

1. *Scarcity Theory.* The scarcity justification was first set forth by Justice Frankfurter in *National Broadcasting Company v. United States*: "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.[80]

The argument begins with the assumption that the technical limitations of the electromagnetic spectrum force the government to allocate the available channels. Since Government cannot avoid this allocative function, the argument continues, public policy dictates that the allocation be done on a rational basis.[81] Congress has designated the "public interest" as a standard to be used.[82] In order to insure that this standard is being met, the FCC can review the content of the licensee's programming in connection with any renewal applications or revocation proceedings.[83] But since it would be poor administrative practice (and possibly a denial of due process) for the FCC to subject a licensee to possible license revocation without the licensee having known what was expected of him, the FCC may promulgate guidelines as to what programming practices it considers to be in the public interest.[84]

The validity of this rationale has been challenged on the grounds that the effective limiting factor in the television industry, as in the newspaper industry, is economic and therefore television, like newspapers, cannot be denied full free speech protection.[85] Indeed, most metropolitan areas have more radio and television stations than newspapers and in many areas there are available frequencies that remain inoperative.[86] It was on the basis of this argument that the Seventh Circuit, in *Radio Television News Directors Association v. United States*, [*RTNDA*] declared the FCC's fairness doctrine unconstitutional.[87] However, the Supreme Court in *Red Lion Broadcasting Co. v. FCC* subsequently reversed *RTNDA*, relying on the technical limitations of the electromagnetic spectrum.[88]

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[75] 365 U.S. 43 (1961).

[76] 283 U.S. 697 (1931). *See* text accompanying notes 138 & 144 *infra*.

[77] 343 U.S. 495 (1952).

[78] 365 U.S. at 49.

[79] *Id.*

[80] 319 U.S. 190, 226 (1943). In RTNDA v. United States, 400 F.2d 1002, 1018 n.43 (7th Cir. 1968), *rev'd sub nom.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), the court indicated that: "NBC v. United States . . . does not support the Commission's position that the broadcast press is not entitled to the same order of first amendment protection as the printed press. At issue in that case was the validity of the Commission's chain broadcasting regulations. The only constitutional issue raised there was whether the denial of a station license for engaging in certain network practices was a denial of free speech." However, NBC is consistently cited as authority for the proposition that frequency scarcity justifies governmental regulations of program content. *See, e.g.*, 395 U.S. at 389, 395; CATV—First Report and Order, 34 Fed. Reg. 17651, 17659 (1969); Robinson, *supra* note 24, at 87.

[81] Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 638 (1965) [hereinafter cited as CHAFEE]; T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 663 (1970) [hereinafter cited as EMERSON].

[82] 17 U.S.C. § 307(a) (1964).

[83] KFKB Broadcasting Ass'n v. FRC, 47 F.2d 670 (D.C. Cir. 1931).

[84] Banzhaf v. FCC, 405 F.2d 1082, 1095 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

[85] RTNDA v. United States, 400 F.2d 1002, 1018–19 (7th Cir. 1968), *rev'd sub nom.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). One might, on the other hand, argue that economic factors creating a scarcity of newspapers would justify governmental interference with them. *See* Barron, *supra* note 70.

In a cable-based system, on the other hand, there is no scarcity of channels. Any local system in the current state of development may carry as many as eighty-two channels on a single cable and, economic factors permitting, more than one cable can be installed. Thus, for CATV to be subject to stricter content regulation than that applicable to newspapers, other rationales must be found; technological scarcity does not suffice as a constitutional justification.[89]

2. *Public Domain Theory.* The FCC has claimed that their right to regulate television stems from public ownership of the electromagnetic spectrum.[90] This position has found the support of Justice Douglas, who has employed it to justify the system of television licensing:

> The channels all lie in the public domain, the air space above the earth being under the exclusive control of Congress. . . . What the government owns or controls in the airway it can regulate as it sees fit.[91]

Though at first blush this argument might be thought unavailable as a justification for content regulation of a cable system, it must be remembered that a CATV operator generally needs some form of local franchise before he can lay his cable,[92] and it is not inconceivable that a local franchising agency might attempt to condition the use of the municipality's streets by the cable operator on acceptance of certain content regulation standards.[93]

This public domain approach would seem, however, in the light of accepted constitutional doctrine, to Bead to a diametrically opposite conclusion. Indeed, public ownership of the place of communication is usually considered to be a reason for applying, not suspending, first amendment protection.[94] Otherwise, if this argument were taken to its logical conclusion, it would mean the justification of regulation of all forms of communication which make any use of the streets, air space, or other elements in the public domain.[95]

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[86] RTNDA v. United States, 400 F.2d 1002, 1019 (7th Cir. 1968), *rev'd sub nom.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The conclusion that technical scarcity is not a major factor in television broadcasting has been challenged by the FCC. The Commission has stated that, as of August 1, 1968, there were no available commercial VHF channels in the top 100 markets. Further, of the 297 UHF channels allocated in those 100 markets, all but 84 had been authorized or applied for. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 398 n.25 (1969).

[87] RTNDA v. United States, 400 F.2d 1002 (7th Cir. 1968). Although the facts of the case concerned only the personal attack side of the fairness doctrine, in dictum the Court treated the doctrine as a whole.

[88] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 396–401 (1969). Unlike the court in *RTNDA*, the Court in *Red Lion* noted that technical scarcity was indeed a major factor in the television industry. *Id.* at 398. As a result, the Court did not deal with the constitutional significance of the alleged economic bar to free speech. *See generally* Barron, *supra* note 70.

[89] Apart from the scarcity question, it has been argued that public interest-oriented regulation is necessary due to the need for governmental allocation to prevent chaos on the airways which would otherwise result from frequency jumping, channel stealing, interference, etc. Such, indeed, was the situation early in the century, when broadcasting was in its formative years, and it was exactly this which led Congress to pass the Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927), *repealed* by F.C.C. Act, ch. 652, § 602, 48 Stat. 1102 (1934). *See* W. K. JONES, CASES AND MATERIALS ON REGULATED INDUSTRIES 1022–24 (1934). Since it is not possible for the government to adopt a "hands-off" attitude toward television, regulation (in all its aspects) has seemed more palatable to certain commentators. *See* EMERSON, *supra* note 81, at 661; CHAFEE, *supra* note 81, at 638. Since there is no similar need to regulate communications traffic over the cable, this rationale cannot justify CATV regulation.

[90] *See* RTNDA v. United States, 400 F.2d 1002, 1019 (7th Cir. 1968), *rev'd sub nom.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Robinson v. FCC, 334 F.2d 534, 537 (D.C. Cir. 1964) (per curiam).

[91] W. DOUGLAS, THE RIGHT OF THE PEOPLE 76 (1958). *See also* Note, *supra* note 29, at 713 and authorities cited therein at n.92.

[92] *See, e.g.*, section 362 of the CHARTER OF NEW YORK CITY which provides that the Board of Estimate shall have: "The exclusive power in behalf of the city to grant franchises . . . involving the occupation or use of any of the streets of the city, whether on under or over the surface thereof, for . . . pipes or other conduits or ways or otherwise for the . . . transmission of electricity . . . heat or power." *See also* Illinois Broadcasting Co. v. City of Decatur, 96 Ill. App. 2d 454, 455, 238 N.E.2d 261, 263 (1968); MAYOR'S TASK FORCE REPORT, *supra* note 3, at 14, 44.

[93] Illinois Broadcasting Co. v. City of Decatur, 96 Ill. App. 2d 454, 455, 238 N.E.2d 261, 263 (1968), is suggestive of the wide ranging powers some municipalities have sought to exercise over CATV franchises. The New York MAYOR'S TASK FORCE REPORT *supra* note 3, at 59, specifically rejects, though not on constitutional grounds, the proposition that the city regulate the content of CATV programming.

3. *Privilege Theory.* An offshoot of the public domain justification is the argument that use of a frequency (or use of a street under or over which the cable travels) is a privilege granted by government to which certain conditions may be attached. The Commission has maintained that: "Those who obtain licenses are granted a privilege and consequently must act as 'trustee[s] for the public'. . . . Therefore, according to the Commission, a licensee, exercising such a privilege, must abide by Commission imposed rules. . . ." [96]

Reasoning similar to that which lies behind this privilege theory has been used as a foundation for the argument that, as use of the mails is a privilege afforded by the government, regulation of the content of the mails is permissible.[97] But such a line of argument has consistently been rejected by both the Court and scholars,[98] even when use of the mails has been treated as a privilege.[99] In fact, the courts have generally been unreceptive to the claim that a government may condition the grant of a privilege on the surrender of a constitutional right.[100] Furthermore, the concept of a government-bestowed privilege as applied to broadcast television is based upon the scarcity of available frequencies and the concomitant FCC licensing. But a CATV system with sufficient numbers of channels open to the general public on some form of common carrier basis would undermine any possible grounds on which a privilege argument might be based.

4. *Impact Theory.* In his dissent in *Kunz v. New York*, Justice Jackson argued that "[t]he vulnerability of various forms of communication to community control must be proportioned to their impact upon other community interests." [101] The greater the capacity for evil inherent in a particular medium, it has been suggested, the wider the permissible scope of community control.[102]

Such a "capacity for evil" approach to the control of communication content seems, however, constitutionally unsound, as it assumes that a government official can validly make judgments on behalf of the public as to the value of ideas sought to be communicated. But it is precisely this type of judgment which the first amendment seeks to preserve for the individual citizen. Even in its best light, this "capacity to influence" argument runs counter to the spirit of the amendment. As Alexander Meiklejohn has forcefully argued: "[t]he principle of the freedom of speech springs from the necessities of the program of self-government." [103]

One of the major aims of the first amendment is to allow disgruntled citizens to persuade their fellow countrymen in the hope of affecting the public decision-making process.[104] To assert, then, that if a particular medium has a high capacity to influence, it may be all the more strictlly regulated as to its content and presentation is to argue that when the first amendment is on the verge of fulfilling its promise, it should be suspended.

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[94] *E.g.*, Hague v. CIO, 307 U.S. 496, 515–16 (1938) (ordinance prohibiting meetings or distribution of printed matter in public places without a permit held void). "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. . . . The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated . . . but it must not, in the guise of regulaion, be abridged or denied." *See* Kunz v. New York, 340 U.S. 290, 293–94 (1951) (reversal of conviction for holding meeting on city street without a permit); CHAFEE, *supra* note 81, at 280; Robinson, *supra* note 24, at 151–53.

[95] RTNDA v. United States, 400 F.2d 1002, 1019 (7th Cir. 1968), *rev'd sub rom.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[96] *Id. See* Television Corp. of Michigan v. FCC, 294 F.2d 730, 733–34 (D.C. Cir. 1961).

[97] *See* Hannegan v. Esquire, 327 U.S. 146, 156 (1945).

[98] *See, e.g.*, Lamont v. Postmaster General, 381 U.S. 301, 305 (1965), quoting with approval (and with a few grammatical changes) the language of Justice Holmes's dissent in Milwaukee Pub. Co. v. Burleson, 255 U.S. 407, 437 (1921): "The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues. . . ." *See also* CHAFE, *supra* note 81, at 276–80.

[99] *E.g.*, Hannegan v. Esquire, 327 U.S. 146, 156 (1945).

[100] *See, e.g.*, Frost & Frost Trucking Co. v. R.R. Comm'n of California, 271 U.S. 583 (1926); Lawson v. Housing Authority of Milwaukee, 270 Wis. 269, 70 N.W.2d 605, *cert. denied*, 350 U.S. 882 (1955).

[101] 340 U.S. 290, 308 (1951). *See* Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961).

[102] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (movie censorship via licensing).

[103] A. MEIKLEJOHN, *supra* note 62, at 26. The Supreme Court has, itself, forcefully asserted "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open. . . ." New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

While the above would indicate that an impact theory can in no way justify negative restraints, affirmative restraints may be justified in certain circumstances. The first amendment is based on "the classical argument of Milton and John Stuart Mill, that only through open discussion is truth discovered and spread." [105] The technology of modern communications, however, is such that this theory of truth ascertainment through competition of ideas may be unattainable without governmental interference.[106] A legal right to speak is fruitless if one is denied access to the avenues of communication.[107] If one medium has an unusually potent impact on community thought, free competition of ideas may be impossible if that medium is able successfully to exclude certain ideas. Thus any such distortion of public debate through the manipulation of an enormously influential and relatively inaccessible mass medium is inimical to the goals of the first amendment [108] and arguably presents legitimate constitutional justification for the imposition of certain affirmative restraints on broadcast television.

But the structure of a fully developed cable system would radically alter the status quo. With channel space much more accessible to members of the public desiring to present their ideas, and with a vastly greater number of channels on the air at any one time—no one, two, or three channels having quite the captive audience they have in today's world of limited spectrum space—justification for even such affirmative restraints, at least on the cable channels, would be greatly weakened.

5. *Imposition Theory.* It has been argued that when a speaker attempts to reach unwilling listeners, the right of privacy supplies a limiting factor to the first amendment.[109] In *Kovacs v. Cooper*,[110] the Supreme Court upheld a municipal ordinance designed to regulate loudspeakers: "To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself." [111] The Court has also been solicitous of the privacy of individuals in regard to an unwilling exposure to pornographic materials.[112]

The right of privacy cannot, however, be used to confer broad censorship powers on the government. In *Kovacs*, the Court noted that any regulation to protect unwilling members of the general public from having offensive communication thrust upon them must be narrowly drawn so as to preserve the opportunity of the speaker to gain the attention of potentially willing receivers of the communication in question.[113]

The "imposition theory" was applied to television in *Banzhaf v. Federal Communications Commission* [114] where the theory was used by the D.C. Circuit in upholding the constitutionality of the FCC's requirement that television licensees provide free time to public health groups to counteract the effects of cigarette advertising. The court reasoned that, although such affirmative restraints would assumedly be unconstitutional if applied to the printed media, the differences between television and newspapers justified differing first amendment treatment: "Written messages are not communicated unless they are read, and reading requires an affirmative act. . . . Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other affirmative act." [115]
This rationale, however, is valid only when confined to the realm of short advertising interspersed among the material the viewer wishes to see, for turning on

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[104] *See* United States v. Carolene Prods. Co., 304 U.S. 144 n.4 (1938).

[105] CHAFEE, *supra* note 81, at 471.

[106] Barron, *supra* note 70, at 1641. *See* EMERSON, *supra* note 81, at 4.

[107] Barron, *supra* note 70, at 1643.

[108] *See* Banzhaf v. FCC, 405 F.2d 1082, 1102 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969); EMERSON, *supra* note 81, at 4; Editorializing by Broadcast Licensees, 14 Fed. Reg. 3055, 3056 (1949).

[109] *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949); Saia v. New York, 334 U.S. 558, 563 (1948) (Frankfurter, J., dissenting: "Surely there is not a constitutional right to force unwilling people to listen."); Breard v. Alexandria, 341 U.S. 622 (1951).

[110] 336 U.S. 77 (1949).

[111] *Id.* at 88.

[112] *See* Redrup v. New York, 386 U.S. 767 (1967) (per curiam).

[113] Kovacs v. Cooper, 336 U.S. 77, 87 (1949).

[114] 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1970).

[115] *Id.* at 1100.

a television or watching a particular program is certainly as much an affirmative act as the reading of a newspaper or a particular article therein. We must remember the obvious: one may turn off a television set on encountering objectionable communication as freely as one can stop reading printed material. The *Banzhaf* distinction, then, is valid to the extent that we can identify what the viewer was willingly watching and can isolate messages and material that are thrust upon him in such a way that he cannot reasonably be expected to avoid them if he wishes to see the remainder of the program that interests him.

6. *Accessibility Theory.* Television, broadcast and cablecast, is unquestionably distinguishable from printed material in that it is, at the flick of a switch, readily accessible to all members of the family and the community, including young children.[116]

The Supreme Court has declared its willingness to uphold a statutory prohibition of *distribution to minors* of material which, if judged by adult standards, would not be held obscene. In *Ginsberg v. New York*,[117] the Court maintained that: "Constitutional interpretation has consistently recognized that parents' claims to authority in their own households to direct the rearing of their children is basic in the structure of our society. . . . The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's wellbeing are entitled to the support of laws designed to aid discharge of that responsibility." [118]

The Court was careful to note that the statute in question did not forbid the distribution of such material to adults, nor did it absolutely prevent a minor from receiving the material if his parent or guardian thought no harm would result.[119] Thus the Court seems to have endorsed the theory that a state should confine itself to aiding parents in their efforts to shelter children and should not itself attempt to impose a moral code on minors.[120]

The *Ginsberg* decision may, therefore, given the nature of distribution in the television industry, support the proposition that certain negative restraints on television program content, unconstitutional if applied to other media, would be acceptable here. But, at the same time, any restrictions based on this argument would have to be narrowly drawn so as to comply with the teaching of *Butler v. Michigan*.[121] In that case a Michigan statute prohibiting the sale of such books as would have a harmful effect on children was held unconstitutional because it would interfere with the first amendment rights of adults. The Court said that the legislation here at issue was: "Not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children." [122]

7. *Justification Based on the Economic Structure of the Industry.* Assuming that the goal of the owners of both television and periodicals is to maximize profits, realization of this goal, given the present technological situation and market structure, requires significant differences in their content. For both, advertising is the economic base and, for both, audience maximization is the means for achievement of maximum advertising revenue. The newspaper, however, is an expandable medium. There is no fixed limit on its size, and it can include stories of limited appeal to attract minority audiences without any reduction in stories of wide appeal. Also, the industry as a whole is expandable —new magazines and newspapers can be started without a concomitant necessity of eliminating any existing publications. Thus normal economic forces will lead to diversification of content in periodicals. A television channel, on the other hand, is limited by the number of hours in a day or, more especially, in "prime time"; [123] and this means that the television operator can maximize audiences only by broadcasting, at all times, programs with the widest possible

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[116] *See* W. K. Jones, Cases on Regulated Industries 1190 (1967).

[117] 390 U.S. 629 (1968).

[118] *Id.* at 639.

[119] *Id.*

[120] *See* Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L. Rev. 391, 413 n.68 (1963).

[121] 352 U.S. 380 (1957).

[122] Butler v. Michigan, 352 U.S. at 383.

[123] The hours between 7 and 11 are usually considered "prime time."

attraction.[124] This attempt to appeal to the "lowest common denominator" in the audience tends to create a certain exaggerated similarity of program content at the expense of any substantial diversity.[125]

It has been suggested that this situation justifies the FCC's imposition of affirmative restraints such as balance,[126] localism,[127] and diversity: [128]

> [M]inority interests and the general public interests in the free exchange of information and ideas—protection of which underlie the first amendment—are fostered by FCC regulation. To invalidate this scheme of regulation in the name of the Constitution would undercut the very protection the Constitution seeks to afford.[129]

This argument, however, avoids the issue of the constitutionality of such restraints by assuming that the Constitution seeks to insure diversity of medial content for the sake of diversity alone. In the discussion of the impact theory above, it was suggested that the first amendment seeks to insure adequate debate on matters of public importance. The present argument, though, does not focus on the presentation of balanced *opinions*, but rather of balanced *programming*, or diversity of subjects covered.[130] And apart from preventing media distortions in public debate, it is not at all clear that the first amendment implies affirmative duties of a medium to cover a variety of subjects.[131]

Even if this argument for diversity rules is accepted, the development and expansion of CATV will radically alter the economic structure of the industry, thus rendering highly doubtful the continued legitimacy of the theory. With almost unlimited channel potential, CATV—from the standpoint of the industry though perhaps not from that of individual channel lessee [132]—is an expandable medium. And it is to the capacity of the medium as a whole that one must look for first amendment purposes as it was with the premise that the first amendment requires only that minority tastes be served and not that they be served on every channel that the economic justification theory was posited.

As to the financial viability of such a system, it need only be pointed out that, as the general television audience becomes increasingly splintered by the multiplication of cable channels, appeals to significant minority tastes may draw, by CATV standards, audiences sizeable enough to warrant advertiser interest.[133] Also, new financial bases for programming for the various CATV channels, such as "pay TV" [134] and public common carrier service,[135] will promote a further diversification of offerings. Pay TV will justify programming of limited but intense appeal, as viewers must pay a special fee to see the individual show, and the content of public common carrier programming will be dictated by the desires of the communicator rather than of the average viewer.

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[124] This analysis is somewhat oversimplified and breaks down, in part, when many channels are operating in a given area, as, for example, in such major metropolitan areas as New York, Los Angeles, and Chicago. As the audience fractionalizes, a program catering to the tastes of a significant minority might draw a larger audience share than a program appealing to the already divided majority tastes. Since few markets are served by more than three or four stations, this fractionalization of audience is not significant.

This entire economic analysis, of course, does not apply to organizations, such as the Educational Television Network, in which profit maximization is not a goal.

[125] Note, *supra* note 29, at 714; Note, *The Listener's Right to Hear in Broadcasting*, 22 STAN. L. REV. 863, 864–65 (1970).

[126] *See* note 46 *supra*.

[127] *See* note 48 *supra*.

[128] *See* note 47 *supra*.

[129] Note, *supra* note 29, at 714.

[130] The impact argument, however, does not meet the problem of dealing with a programmer who decides not to broadcast any matters dealing with issues of public importance. However, the FCC requires the licensee to engage in public interest broadcasting, *see* note 49 *supra*, and to encourage the use of their station for discussion of controversial public issues, *see* note 51 *supra*. These policies cannot be justified as a matter of eliminating distortions in the impact of public debate, and can only be reconciled with the Constitution by reference to the scarcity argument, *i.e.*, when the medium involved is limited, the government may allocate it in the public interest. *See* section III-C-1 *supra*.

[131] *But see* Note, *supra* note 125, at 869.

[132] The lessee of one channel would, of course, be limited to 24 hours a day. But given a system of unlimited channel availability, one organization could simultaneously originate over many channels and therefore may be considered to be communicating in an expandable medium.

[133] Since CATV transmission costs are low, *see* text accompanying note 12 *supra*, advertising may be sold for much less than on broadcast television. Also, specialized programming will enjoy specialized audiences that may attract certain advertisers whose product would only appeal to such selective groups. *See, e.g.*, BROADCASTING, June 23, 1969, at 62.

[134] *See* 47 C.F.R. § 73.641.

[135] *See* note 10 *supra*.

IV. LICENSING AND CATV

The above discussion was concerned with the areas of permissible content regulation of broadcast and cable television and with the justifications advanced for such regulation. Before suggesting a proper role for the FCC in the regulation of CATV, one must examine the validity of licensing as a *means* of control over content, especially in light of the rationale for the licensing of broadcast television.

The FCC is statutorily authorized[136] to grant licenses to radio and television broadcasters. The constitutionality of this practice has been upheld because the scarcity of frequency space makes broadcasting a unique mode of communication.[137] However, as channel space on CATV is not limited, the doctrine of prior restraint as applied to the licensing of communication media must be carefully reconsidered.

A. *Doctrine of prior restraint*

The first amendment significance of prior restraints was made explicit in the landmark decision of *Near v. Minnesota ex rel Olsen.*[138] The Minnesota statute[139] in question provided:

> "Any person who . . . shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away: (a) An obscene, lewd, and lascivious newspaper, magazine, or other periodical, or (b) a malicious, scandalous and defamatory newspaper, magazine, or other periodical, is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined. . . ."

Petitioner Near was adjudged to have violated the statute by publication of a "malicious, scandalous, and defamatory" newspaper.[140] A permanent injunction was issued.[141] The Supreme Court reversed, declaring the relevant statute unconstitutional because it involved "censorship"[142] and therefore was not within "the permissible scope of subsequent punishment."[143]

Although the *Near* Court was not explicit in developing a reasoned basis for the prior restraint doctrine,[144] Thomas Emerson has suggested the following justifications: "A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: it is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows."[145]

Nonetheless, in subsequent cases the Supreme Court has not always strictly enforced this prohibition against prior restraints[146] and the extent of applicability of the doctrine is not entirely clear. Yet, while one cannot extrapolate from the cases the constitutional limits of regulatory procedures in the cable television field, certain generalizations are possible. Thus, one can reasonably say that a prior restraint will be disfavored if alternative means are available, will be upheld only if procedural protection is supplied, and must be narrowly drawn so as not to amount to censorship of all communication or to a system in which all communication must be licensed.[147]

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[136] 47 U.S.C. § 307 (1964).

[137] NBC v. United States, 319 U.S. 190, 226 (1942).

[138] 283 U.S. 697 (1931).

[139] *Id.* at 702, *quoting* ch. 285, [1925] Minn. Sess. Laws.

[140] *Id.* at 705.

[141] *Id.*

[142] *Id.* at 713.

[143] *Id.* at 715.

[144] *Id.* at 713–14, *quoting* 4 W. BLACKSTONE, COMMENTARIES *151–52.

[145] EMERSON, *supra* note 81, at 506. For a fuller discussion, see Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMPT. PROB. 648 (1955).

[146] *E.g.*, Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957). The authority of *Times Film* was severely limited by Freedman v. Maryland, 380 U.S. 51 (1965), in which the Court invalidated a movie licensing system because of the lack of procedural safeguards against the dangers of censorship. The procedures required by the Court include the requirements that the government bear the burden of proof, that a judicial rather than administrative ruling be obtained before imposition of a final valid restraint, and that any temporary administrative restraint be of short duration 380 U.S. at 58–59.

[147] *See* EMERSON, *see* note 81, at 511.

B. Application of prior restraint doctrine to broadcasting

In *KFKB Broadcasting Association v. Federal Radio Commission*,[148] the appellant claimed that the FRC's[149] denial of a license renewal because of the broadcasting of "quack" medical advice by the station amounted to censorship. Finding for the FRC, the court held: "This contention is without merit. There has been no attempt on the part of the commission to subject any part of appellant's broadcasting matter to scrutiny prior to its release. . . . [T]he commission has merely exercised its undoubted right to take note of appellant's past conduct, which is not censorship."[150]

But in arriving at this conclusion, the court ignored the nature of the sanction to be imposed—license revocation. Such a sanction results in the denial of a licensee's first amendment protection as to future communication because of past infractions. And this would seem to yield a situation precisely analogous to that condemned as an unconstitutional prior restraint in *Near*.

"Public interest" licensing, then, such as provided for in the Communications Act and as subsequently interpreted and effectuated by the courts and the Commission in the renewal and revocation procedures clearly can result in prior restraints. Yet there is a need for the licensing of broadcast television as it operates on a limited resource, the electromagnetic spectrum, which must be allocated among potential users. In addition, some centralized technical supervision of the airwaves is required. Because of these factors, it would appear that the government cannot avoid all licensing of the medium. Since, however, scarcity is not a factor in CATV, this rationale for licensing broadcast television is inapplicable to the cable system. Without such a justification, licensing by the FCC of cable television as a means of content control must be closely questioned, especially in view of the more limited controls available to achieve necessary regulation.[151]

C. Application of the prior restraint doctrine to CATV

The most glaring problem with the licensing system as it exists today is the almost complete lack of procedural safeguards.[152] Because of the informality of the proceedings, there are few specific rulings subject to judicial review.[153] And a licensee, having a great financial interest in maintaining his license, is unlikely to risk it by challenging an FCC ruling and broadcasting questionable material. At the same time, maintainance of good relations with the regulatory agency might in numerous ways prove helpful to the licensee.[154] Consequently, he is likely to be especially timid and stay well within the bounds of what the FCC considers to be acceptable speech. Furthermore, as the present system operates largely through what amounts to informally induced self-restraint, the public is likely to remain largely unaware of the extent of government control and, as a result, unconcerned with its implications. Clearly then, the present system of licensing television channels results in what amounts to a prior restraint which should be mitigated to the extent possible, if not eliminated completely.

There is a unique feature of television that remains to be considered. Television communication can instantaneously reach millions of people. One can move against a publisher after publication, but before the questioned material has reached a very wide audience.[155] On the other hand, with television, unless a show is to be repeated, any subsequent proceedings would have no suppressive effect on the questioned communication. This is, however, beside the point. The prior restraint rule is supposed to operate in such a way as to insure communication to the public at large of any and all ideas so long as the speaker is willing to assume the risk of subsequent punishment.[156] Some governmental authorities have undoubtedly used subsequent proceedings to avoid wide dissemination of the troublesome communication.[157] But such misuse of subsequent action must not prevent a proper application of the prior restraint doctrine so as more fully to protect first amendment rights.

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[148] 47 F.2d 670 (D.C. Cir. 1931).

[149] The Federal Radio Commission was the predecessor of the FCC. It was established by the Radio Act of 1927, ch. 169, 44 Stat. 1162, *repealed by* F.C.C. Act, ch. 652, § 602, 48 Stat. 1102.

[150] 47 F.2d at 672. *See also* Trinity Methodist Church, South v. FRC, 62 F.2d 850 (D.C. Cir.), *cert. denied*, 288 U.S. 599 (1932).

[151] *See* section V *infra*.

[152] *See* text accompanying note 22 *supra*.

[153] *See* text accompanying note 23 *supra*.

[154] *See* Robinson, *supra* note 24, at 119–20.

[155] *Cf.* NEW YORK CODE OF CRIMINAL PROC. § 22-a(1). (As of Sept. 1, 1971, this provision will be in the NEW YORK CPLR).

[156] *See* Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMPT. PROB. 648, 659 (1955).

Since the present FCC licensing procedures for broadcasting, constituting as they effectively do a prior restraint on content, can be justified only on the basis of scarcity of access, the same system applied to CATV would be of doubtful validity. If content is not to be regulated by licensing because of the absence of spectrum limitations, the Commission must be confined in its licensing to purely technical considerations, such as the prevention of signal intereference. Hence it could require the licensing only of the cable transmission systems, not of the individual cablecasters on the various CATV channels.[158]

V. A PROPOSED ROLE FOR THE FCC IN CATV REGULATION

A. *A model system*

In considering the role of the FCC in CATV regulation, it will be helpful to posit a model of the type of system that may be created in the not too distant future, especially if the FCC encourages development in this direction. A substantial proportion of the nation's homes would be reached by the cable, and national interconnection [159] of the various local systems would allow the development of major cable networks. The local system operator [160] would have at least 20 channels [161] available. Some of these would be used to carry local broadcast signals;[162] others might be utilized by national cable neworks; some channels would be for origination by local cablecasters;[163] some might carry a "subscription television service";[164] certain others could be reserved for the use of the local government in carrying out municipal functions;[165] still others might be reserved for private educational and cultural institutions or other non-profit organizations;[166] and, finally, some channels would serve as public common carriers. For the public common carrier service, the CATV operator would provide the studio, equipment, and technical expertise for a fee to members of the public seeking to originate non-commercial programs.[167] The time would be made available for leasing in a variety of time lengths, probably on a first-come, first-served basis.[168] The CATV operator would have no control over the content of what is broadcast, and would have no discretion in the selection of originators or their assignment to various time slots.

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[157] *See, e.g.*, Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).

[158] It may be suggested, based on the reasoning of Freedman v. Maryland, 380 U.S. 51 (1965), that licensing of cablecasters could be saved if procedures were modified to minimize the inherent dangers of prior restraint. Such an approach misconceives the problem. If an administrative procedure impinges on first amendment rights, its retention should be tolerated only if there is an affirmative justification for it. If less offensive means of regulation are available, then licensing, shorn of its primary *raison d'etre,* should not be saved.

[159] *See, e.g.*, Community Antenna Television Service, Technical Standards, 35 Fed. Reg. 11036, 11037 (1970); CATV—First Report and Order, 34 Fed. Reg. 17651, 17655 (1969).

[160] The term "system operator", as used in this Note, indicates the owner of the cable operation itself, *i.e.*, franchise, wires, and technical equipment. He is to be distinguished from the "channel lessee" or "cablecaster" who originates over a given cable channel, but who is not in any way an owner of the system itself. It is, of course, possible for the system owner also to operate as a cablecaster. In fact, such origination is presently required by the FCC. CATV—First Report and Order, 34 Fed. Reg. 17651, 17655 (1969).

[161] The current FCC proposed rules, 35 Fed. Reg. 11036, 11037 (1970), indicate that the Commission is considering requiring a minimum channel capacity of 20 or 40 channels. *See also* text accompanying note 2 *supra*.

[162] 47 C.F.R. § 74.1033 (1971); Proposed Rule Making—Community Antenna Television Systems, 35 Fed. Reg. 11045, 11048 (1970). *See* MAYOR'S TASK FORCE REPORT, *supra* note 3, at 55.

[163] To insulate program content from indirect FCC control, it may be advisable to bar the system operator, who would be licensed, from acting as a cablecaster. Such a rule might also lead to fuller utilization of the cable system as well as greater diversity since the CATV operator would not be in competition with other potential and actual users of his system. *See* L. JOHNSON, *supra* note 10, at 54; Barnett & Greenberg, *supra* order requiring all CATV operators with more than 3500 subscribers to begin origination by January 1, 1971. CATV—First Report and Order, 34 Fed. Reg. 17651, 17655 (1969). *See* Barnett, *Cable Television and Media Concentration*, 22 STAN. L. REV. 221, 247–48 (1970).

[164] *See* 47 C.F.R. § 73.641 (1971).

[165] *See* CATV—First Report and Order, 34 Fed. Reg. 17651, 17653 (1969); Proposed Rule Making—Community Antenna Television Systems, 35 Fed. Reg. 11045, 11048 (1970); MAYOR'S TASK FORCE REPORT, *supra* note 3, at 57.

[166] *See* CATV—First Report and Order, 34 Fed. Reg. 17651, 17653 (1969); Proposed Rule Making—Community Antenna Television Systems, 35 Fed. Reg. 11045, 11048 (1970); MAYOR'S TASK FORCE REPORT, *supra* note 3, at 57.

[167] *See* CATV—First Report and Order, 34 Fed. Reg. 17651, 17653 (1969); Proposed Rule Making—Community Antenna Television Systems, 35 Fed. Reg. 11045, 11048 (1970); MAYOR'S TASK FORCE REPORT, *supra* note 3, at 58.

In such a system, the FCC should have an active role in regulation of CATV at the system level. This would include the setting of certain technical requirements, as well as requirements as to the proportional allotment of channels for the various uses suggested above, and also rate regulation for some of these services. Furthermore, as developed below,[169] the Commission should probably have some limited powers over the channel lessees.

The FCC is already exercising some jurisdiction over CATV, and, arguably,[170] much of what is suggested here, such as allocation and rate regulation, can be done by considering CATV as within the common carrier jurisdiction of the FCC.[171] However, the FCC may not have the power to reach the individual channel lessees without a further congressional grant of jurisdiction. The approaches that follow assume statutory jurisdiction and are attempts to confront the problems only from a constitutional standpoint.

B. Regulation of the CATV systems and their operations

Under the system posited, a CATV system operator would be licensed by the FCC. Of course, he might also be subject to state regulation and local franchising,[172] provided there is no federal preemption and the constitutional limits set forth in this Note are complied with. Indeed, given local government's greater familiarity with special local communication needs, the choice of which potential operator should be granted a license might best be left to the franchising procedures of the municipality involved.[173] The FCC could, of course, make itself available to the local agencies as a reservoir of expertise and experience.[174] Pursuant to the local grant or franchise, then, the FCC would license the operator chosen on the condition that he agree, on penalty of license forfeiture,[175] to adhere to any FCC rules relating to cable transmission.

In the proposed system, it seems appropriate that the FCC have power to promulgate rules governing three general areas of concern.

1. *Technical Standards Regulations.* In order to secure the best possible media system for the public,[176] the Commission would be empowered to require that the cable systems meet certain technical standards. The FCC has already begun to move in this direction by proposing a series of rules that would require a minimum channel capacity,[177] adaptability of the cable for a two-way transmission system,[178] and "that each community within the franchise area of the system be equipped with production capability for the programming of its community channel." [179]

2. *Cable and Broadcast Television Coexistence Regulations.* Until the time, if ever, that the cable reaches 100% of the homes in a given area, there is a public interest in maintaining broadcast television. Left unregulated, though, CATV might drive out broadcast television at a time when a substantial portion of the public would still not have cable available to them.[180] Thus, whether its long range goal is to preserve a peaceful coexistence between the competing media or merely to provide a decent burial for broadcast television, the FCC must take an active role in the cable-broadcast confrontation so as to protect the public interest.

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[168] MAYOR'S TASK FORCE REPORT, *supra* note 3, at 58. *See generally* VERA INSTITUTE OF JUSTICE, A REPORT ON NEW YORK CITY'S OPTIONS FOR CABLE TELEVISION FRANCHISES 7–10 (1970).

[169] *See* sections VI–A–2 & B *infra*.

[170] *See, e.g.*, Note, *supra* note 1, at 864–75.

[171] 47 U.S.C. §§ 201–23 (1964).

[172] *See, e.g.*, Illinois Broadcasting Co. v. City of Decatur, 96 Ill. App. 2d 454, 238 N.E.2d 261 (1968).

[173] Community Antenna Television Systems, Federal-State or Local Relationships, 35 Fed. Reg. 11044, 11045 (1970).

[174] *Id.*

[175] *Cf.* 47 U.S.C. §§ 307–12.

[176] *See* 47 U.S.C. § 151 (1964).

[177] Community Antenna Television Systems, Technical Standards, 35 Fed. Reg. 11036, 11037 (1970). The FCC proposes adopting a requirement of either 20 or 40 channels.

[178] *Id.*

[179] *Id.*

[180] L. JOHNSON, *supra* note 10, at 63–65.

The Commission has long focused its attention upon this area and has taken steps to cope with the problems involved.[181] Among the options open to it to meet future needs arising from cable-broadcast competition, the FCC might choose, for example, under its authority to provide for the public interest in the best possible media system, and with a view toward eventual elemination of broadcast television, to condition a grant of a cable license on an understanding that the cable operator go into markets that, for demographic reasons, might otherwise be unprofitable, such as rural or ghetto areas.[182]

3. *Policy-Oriented Regulations.* Finally, the FCC can use its power of economic regulation over the CATV operator to insure that the CATV industry effectively serves the public interest. The Commission has already accepted in principle the idea that cable systems should allocate their channels so as to provide without charge a local government channel, a public access channel, and instruction channels.[183] Naturally, the Commission would retain power in the proposed system to pursue these general public interest goals through its regulation of the cable systems.[184]

C. Regulation of the CATV program originators

In addition to its licensing function, the FCC under the proposed system would have the authority to promulgate certain rules governing the operation of the channel lessees. Such rules would, of course, have to be narrowly drawn to avoid any first amendment challenge to their scope or enforcement procedure.[185]

In view of the need for procedural safeguards, it would be appropriate to limit the options of the Commission, in the event of alleged violations of its regulations, to either the issuance of a cease and desist order,[186] enforceable only by judicial action, or the recommendation of criminal proceedings[187] where appropriate. The salient feature of this system is that the FCC would be compelled to use the judicial process to enforce its content-regulating rules.

Furthermore, since the channel user would not, under the new system, be licensed by the FCC, he would have less to lose by incurring the wrath of the Commission. Thus, rather than being constrained by excessive timidity in the exercise of first amendment rights, the originator would be able to test any FCC rules he felt to be restrictive of his rights by pushing at the boundaries of protected speech. In doing this, the user would risk only enjoinment from continuance of the *specific* practice (not deprivation of the use of the medium) or subjection to criminal sanctions, as is the case with other media. He could no more be deprived of any right to future lease of channel space than could someone convicted under a pornography statute be enjoined from further access to a printing press.

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[181] *E.g.*, Experimental Auxiliary, and Special Broadcast and Other Distributional Systems, 35 Fed. Reg. 10903 (1970) (rules relating to cross ownership of broadcast stations and CATV systems). *See generally* Proposed Rulemaking and Notice of Inquiry; CATV Systems, 33 Fed. Reg. 19028 (1968): CATV—Second Report and Order, (Jurisdiction over CATV), 31 Fed. Reg. 4540 (1966).

[182] *See generally* Posner, *Natural Monopoly and its Regulation*, 21 STAN. L. REV. 548 (1969).

[183] Proposed Rule Making—Community Antenna Television Systems, 30 Fed. Reg. 11045, 11048 (1970). See, for example, the system proposed in the MAYOR'S TASK FORCE REPORT, where the task force, dealing with a proposed 18 channel system, suggests:

"(a) Eleven should be used to carry the signals of the city's eleven television channels.

"(b) Three should be reserved for the exclusive use of the city government, at no cast to the city government.

"(c) The remaining four channels should be used for program origination. Each authorized cable television company should be permitted to hold two channels as a general broadcaster—one for the presentation of public service programs, the other for the presentation of whatever programming it may wish to offer. To ensure that a cable television company does not control access to all channels, however, it would hold the other two channels only as a carrier. These channels would be available for lease by outside users who wish to present original programs." Letter accompanying the MAYOR'S TASK FORCE REPORT, *supra* note 3, at 4.

[184] There is a danger that the FCC might use its channel allocation power to prevent expression of unpopular views. This could be done by expanding the requirements for government channels, with the result that space for public common carrier channels would be eliminated. This would, in effect, create a system of prior restraints, as the government would then be in a position to allocate the available air time to those programmers of whom it approved. To avoid this possibility, it may be advisable to establish a statutory requirement of a minimum number of public common carrier channels for the benefit and use of all private parties willing to pay a reasonable fee.

[185] Specific rules are developed below. *See* section VI *infra.*

[186] *Cf.* 47 U.S.C. § 312(b) (1964).

[187] *Cf.* 18 U.S.C. §§ 1304 & 1464 (1964).

VI. CONSTITUTIONALLY PERMISSIBLE CONTENT REGULATION RULES FOR CATV

The FCC's power to make rules directly regulating CATV program content will, of course, be limited by first amendment guarantees. For a particular rule to be acceptable, it would have to be based on one of the three constitutional justifications thought to be applicable to CTAV: either on the accessability[188] or imposition[189] arguments, which justify certain limited negative restraints, or on the impact[190] theory which, arguably, justifies some affirmative restraints. To the extent that the specific problems posed by these theories cannot adequately be satisfied by other measures, direct restraints on CATV programming would be justifiable.

A. Negative restraints

These restraints are, by definition, restraints on freedom of speech and can be used only if narrowly drawn to cure specific evils that are considered greater than the loss of free speech involved.[191] There are, of course, recognized limitations on first amendment rights that apply to all media. For example, negative restraints have been approved in circumstances involving a clear and present danger of dangerous conduct,[192] obscenity,[193] or "fighting words."[194] These exceptions will, of course, apply to speech on CATV. But it is not with these that we are presently concerned. Rather, it is with any other more restrictive restraints that may constitutionally be applied to CATV. As suggested in section III above, there are only two justifications for applying stricter negative restraints upon cablecast television than may be imposed on other non-broadcast media: the accessability and the imposition rationales.

1. *Possible Accessability-Based Restraints.* Television, cable as well as broadcast, is readily accessible to children; and it is usually conceded that the state has a legitimate interest in protecting children from nonparentally approved exposure to non-obscene, yet highly salacious materials.[195] At the same time, though it is clear that the state must be careful not to restrict unduly the adult population's rights to see such marginally non-obscene matter.[196] Accommodation of both these conflicting interests might best be served, given the nature of cable television, by an FCC requirement that all cable attachments to individual television receivers be equipped with a simple mechanical device that will enable a parent to "lock-off" certain channels.

During the period of broadcast-cable coexistence, the parent could, if he so chose, shelter his child by "locking-off" all channels except those relaying broadcast signals directly subject to FCC content regulation. If broadcast television were to become extinct, it is reasonable to assume that many, if not most, permanent lessees would, as a matter both of goodwill and of audience interest, not transmit material that would be offensive to minors, especially at hours during which children are likely to be in the audience. Undoubtedly, certain channels might become "electronic smut shops,"[197] but guaranteeing the parent's ability to "lock-off" such channels seems quite adequate for the protection of the child.

It might be argued that such a system would work only if the parent exercises good judgment and that there is a state obligation to protect the child even though the parent is unconcerned. The best view, however, seems to be that the state can legitimately seek only to aid those parents who wish to provide an environment for their children in which there is no exposure or only limited exposure to certain types of materials. In other words, the state is limited to ensuring that the child may be denied access to such material when the parent is not present.[198]

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[188] *See* text accompanying notes 116–122 *supra.*

[189] *See* text accompanying notes 109–115 *supra.*

[190] *See* text accompanying notes 101–108 *supra.*

[191] *Cf.* Freedman v. Maryland, 380 U.S. 51 (1965).

[192] Schenck v. United States, 249 U.S. 47 (1919).

[193] Roth v. United States, 354 U.S. 476 (1957).

[194] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[195] *E.g.*, Ginsberg v. New York, 390 U.S. 629 (1968).

[196] *See* text accompanying notes 116–122 *supra.*

[197] *Cf.* the fears of the National Association of Broadcasters that CATV can also transmit borderline pornography, deceptive and irresponsible advertising, subversive propaganda, the outpourings of the lunatic fringe, and the appeals of countless others whose appearances have thus far been minimized by the broadcasters' responsibility to program within the public interest standards of the Communications Act and the NAB's Code of Good Practices. NATIONAL ASSOCIATION OF BROADCASTERS, REPLY COMMENTS ON PART V, GENERAL AREAS OF INQUIRY, *quoted in* L. JOHNSON, *supra* note 10, at 57.

In any case, it is clear that, in protecting children, the state cannot "reduce the adult population . . . to [watching] only what is fit for children." [199] And this "lock-off" device would seem to be a constitutional as well as a practical method for control of near-obscene programming, which does not restrict the viewing options of the adult. In addition, this method seems especially desirable as it eliminates the need for the FCC to exercise any supervision or control over the communicators themselves.

2. *Imposition Based Restraints.* To a certain extent the television viewer is a more passive receiver of communications than the newspaper reader in that once the television is turned on, the viewer may unavoidably be exposed to material he would have preferred not to see. As pointed out above, the individual's right to privacy is not to be completely sacrificed to the first amendment rights of a "speaker"; indeed, the Supreme Court has indicated its willingness to protect the public from having offensive material thrust upon them.[200]

Since turning on the television is as much an affirmative act as is picking up a newspaper, rules based on this theory should be confined to situations in which the element of surprise is clearly present. Thus, for example, the FCC might legitimately require that warnings be given before programs of possibly objectionable material are broadcast. Similarly, the Commission might develop rules regarding extraneous material, such as advertising, that comes within the confines of one program and which might be highly offensive to the audience, which has no choice but to listen, leave the room, or turn off the television for the length of the commercial.[201] The degree of content control such regulations may vest in the FCC would seem justified by the fact that the viewer must perform an affirmative act to avoid offensive material.[202] Furthermore, commercial advertising may not have the benefit of first amendment protection.[203]

B. Possible affirmative restraints

Preventing the viewer's subjection to unwanted material satisfies only a portion of the FCC's commitment to encourage the development of an adequate television system. In the context of a cable system, however, most of the FCC's affirmative goals, notably diversity, localism, and balance, can best be achieved by regulation at the system's operational level, rather than at its program level, as presently done.[204]

Thus, diversity of content might be achieved by an FCC requirement that the system operator make available a certain number of channels for use by programmers with different financial bases, for example, several channels set aside for advertiser based programming (producing mostly general appeal programming); a number open for public common carrier service (producing programming based on the originator's rather than the viewer's desires); and a number for a pay-per-program format (producing programs with a limited but intense appeal).[205]

As for the requirement that the media not unduly distort public debate,[206] this too can best be met, in large measure, by regulation at the system level. The first amendment is based upon the view that the truth will emerge through free discussion of all ideas. To that end the amendment permits, arguably requires,[207] that this discussion not be unduly distorted by the "unnatural" influence of a particular medium of communication.[208] Otherwise, if a few communicators who dominate the enormously powerful television medium because the limitations of the electromagnetic spectrum restrict access vigorously promote one point of view, their position is likely to gain wide acceptance, not because of its merit, but because of its "unnaturally" prominent position in the public forum. This possibility is the reason for the fairness doctrine.[209]

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[198] Henkin, *supra* note 120, at 413 n.68. *See* Ginsberg v. New York, 390 U.S. 629, 639 (1968).

[199] Butler v. Michigan, 352 U.S. 380, 383 (1957).

[200] *See* Redrup v. New York, 386 U.S. 767 (1967) (per curiam). *See generally* text accompanying notes 109–21 *supra*.

[201] Advertising was the context of the *Banzhaf* decision. 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969).

[202] *See* text accompanying notes 109–21 *supra*.

[203] *See* Valentin v. Chrestensen, 316 U.S. 52 (1942) (Municipal ordinance forbidding the distribution in the streets of commercial handbills was upheld). Because some advertising, *e.g.*, that which would be better characterized as political or social propaganda is constitutionally protected, the possibility that commercial advertising is not protected does not moot the question of the permissibility of this regulation. *See Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1027–36 (1967).

[204] *See* note 183 *supra* and accompanying text.

[205] Barnett & Greenberg, *supra* note 8, at 13–15.

[206] *See* text accompanying notes 101–08 *supra*.

[207] *See generally* Barron, *supra* note 70.

In the case of a CATV channel, however, there is no "unnatural" reason that would give it undue influence in public debate. CATV is not a limited access medium as is broadcast television. If each community is serviced by a great number of cable channels, no single CATV originator will have a captive audience. That is, he would not be able to thrust his ideas upon viewers who had no choice but to watch his channel or one or two others with very similar interests. Every cable originator would be free to espouse any position he wished, and advocates with different opinions would be able to present their arguments on other channels. Indeed, such a system would seem to serve the first amendment with even greater effectiveness than could any direct regulation, such as we have at present, for it bases itself on the rather sound proposition that vigorous debate is most likely to develop when each participant is free to advocate what he wishes without being concerned about attempting to present a balanced viewpoint. Thus, there seems to be no reason to treat CATV channels any differently from newspapers. Just as many newspapers adopt political biases with each reader free to choose among them, the television viewer would be free to choose among the various CATV channels and originators.

Of course, such a system would not serve the public debate function of the first amendment if any ideas were denied all access to television, a medium of great potential influence. For, without question, in order that a debate be truly free, all points of view must have access to the avenues of communication.[210]

Here again, however, this goal would seem to be best assured by regulation at the cable systems level requiring the designation of certain channels as "public common carriers." With the CATV systems operator providing the studios and expertise and time on these channels sold in small segments and at regulated rates to anyone wishing to be heard, public debate would be fostered naturally by the conviction of the advocates, rather than by an artificial criterion of "balanced presentation."

As a final point, it should be noted that during the period in which broadcast television coexists with CATV, the broadcaster would, of course, still be subject to all the rules, including those presently governing FCC licensees. However, a problem might be presented if broadcasting became an extinct mode of transmission with the present broadcasters becoming major channel lessees. Because of their present dominance of the industry, it is not unreasonable to assume that even when the networks switch their mode of transmission to cable, they will continue to attract a major portion of the television audience. To some extent this holdover phenomenon might be attributed to the "unnatural" effect of frequency scarcity that has kept the networks free from major competition for many years. During the period of broadcast television, they were able to develop their huge attraction not because of program content alone, but because of the lack of competition. In such circumstances, then, it would seem that the fairness doctrine might legitimately be applied to these ex-broadcasters for some certain, though limited, period of time after their conversion to the cable so as to prevent them from exploiting the enormous influence that was created by the "unnatural" factors inherent in broadcast television.

Conclusion

The fact that there is no limit to the number of cable television channels potentially available in any one area indicates that channel scarcity is no longer available as a constitutional justification for television content regulation. Most other possible theories for affording CATV less first amendment protection than other media were examined and rejected as either spurious or inapplicable. However, the easy accessability of television to children and the possibility of an unwilling viewer encountering objectionable material do justify some narrowly drawn negative restraints to remedy these specific problems. In addition, television's tremendous capacity to influence arguably justifies certain affirmative restraints to eliminate distortions in public debate caused by "unnatural" factors. But except perhaps during a brief transition period, CATV channels do not pose the threat of "unnatural" distortion in the way that broadcast channels do; it seems that adequate public debate can best be guaranteed by requiring the setting aside of "public common carrier" channels at the systems level, and not by regulating the programming directly.

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[208] *See generally* text accompanying notes 101–08 *supra*. As used here, the term "unnatural" refers to an unusually large influence that an idea gains, not through any inherent attraction of the idea itself, but rather as a result of some extraneous factor that should not be controlling in the public forum.

[209] *See* Editorializing by Broadcast Licensees, 14 Fed. Reg. 3055, 3059 (1949). For the sake of brevity, this Note refers only to the fairness doctrine, but the same arguments are, of course, valid when applied to the equal time requirement.

[210] Editorializing by Broadcast Licensees, 14 Fed. Reg. 3055, 3056 (1949). Barron, *supra* note 70, applies this argument to newspapers as well as television. Barron is rebutted in EMERSON, *supra* note 81, at 666–71.

Adequate first amendment protection can be realized for CATV only through a major overhaul of the regulatory process consistent with the prior restraint doctrine. "Ideally the transmission function should be separated from program origination with the FCC having licensing power only over the transmitter, or the cable systems operator. For only if the originator is totally free from administrative licensing will he be able to enjoy the uninhibited freedom of speech guaranteed by the first amendment." And only if the first amendment is given its full application in the television industry will CATV, released from regulatory restraints, be free to realize its potentially revolutionary impact on modern telecommunications.

/From 5 Harv. Civ. R.-Civ. L. Rev. 89 (1970)/

FROM THE FCC'S FAIRNESS DOCTRINE TO RED LION'S FIDUCIARY PRINCIPLE

Probably no issue in the history of American broadcasting has evoked as much public discussion, criticism and agony as who should exercise effective control over the quality and content of television and radio programming. Central to the problem is concern about the influence enjoyed by private broadcasters over the political intelligence of the country; not only news broadcasts, but all programs in some way affect the public's perceptions, impressions, opinions and understandings of contemporary life.[1] Thus, as many commentators have noted with increasing emphasis,[2] what is at stake in this debate is not only the future of broadcasting's multibillion dollar private investment,[3] but also the generations of minds that the media will influence.

Traditionally, the FCC has eschewed direct regulation of programming in favor of controls over station location, ownership limitations and employment requirements that have only an indirect and problematical influence over programming content.[4] Straightforward regulation has been avoided for three primary reasons. First, in terms of resource capacity, the Commission has been understaffed from its inception and restricted in its ability to supervise programming practices by individual licensees.[5] Second, it has failed to develop meaningful and workable standards of programming service.[6] But most importantly, the Commission has evinced a high degree of concern over whether direct regulation of programming oversteps the constitutional bounds of the First Amendment. Embodied in the Communications Act of 1934 is the specific admonition that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the rights of free speech by means of radio communication."[7] However compelling the Commission's purpose might be in improving the quality of programming, that purpose cannot be served by unnecessarily broad or burdensome restrictions on the freedom of FCC licensees.[8] It seems that, as a result, a majority of the seven FCC Commissioners "do not regard it as the Commission's proper role to give serious scrutiny to the performance of applicants before granting their requests for renewal."[9]

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[1] This point was vividly illustrated with respect to one major contemporary problem, race relations, by the Kerner Commission:

> The absence of Negro faces and activities from the media has an effect on white audiences as well as black. If what the white American reads in his newspapers or sees on television conditions his expectation of what is ordinary and normal in the larger society, he will neither understand nor accept the black American. By failing to portray the Negro as a matter of routine and in the context of the total society, the news media have, we believe, contributed to the black-white schism in this country.

REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 383 (Bantam Book ed. 1968).

[2] *E.g.*, S. Donner, THE FUTURE OF COMMERCIAL TELEVISION, Report of the Stanford University Seminar on Television (1965); EQUAL TIME, THE PRIVATE BROADCASTER AND THE PUBLIC INTEREST (L. Laurent ed. 1964); R. MacNeil, THE PEOPLE MACHINE (1968); B. Rubin, POLITICAL TELEVISION (1967); Address by Vice-President Spiro T. Agnew, in Des Moines, Iowa, *reported in* N.Y.Times, Nov. 14, 1969, at 24, col. 1-8.

[3] *See*, TELEVISION FACTBOOK *passim* (1966).

[4] The example of employment illustrates the Commission's approach. In a pending rule making proceeding "to require broadcast licensees to show non-discrimination in their employment practices," 33 Fed. Reg. 9960 (1968), it was observed by the American Civil Liberties Union that the hiring of racial minority group members such as Negroes and American Indians "could very well help to balance the present preponderance of white interests and white points of view on the air." Letter from the American Civil Liberties Union to the F.C.C., Oct. 4, 1968, at 2, on file with F.C.C., Docket No. 18244. The proposed rule making proceeding was announced shortly after the Commission renewed the license of a southern station accused of presenting racially biased programming. The renewal was reversed in *United Church of Christ v. FCC*, 38 U.S.L.W. 2002 (D.C. Cir. June 20, 1969).

A dramatic turning point may have been signaled, however, by the Supreme Court's decision in two cases consolidated for hearing in the last term of court. In *Red Lion Broadcasting Co. v. F.C.C.* and *United States v. Radio Television News Directors Association,*[10] the court faced squarely and for the first time the question whether the FCC, relying on its "fairness doctrine," could constitutionally compel a licensee to adhere to certain minimal programming requisites. In holding, 7 to 0, "that the specific application of the fairness doctrine in *Red Lion,* and . . . in *RTNDA,* are both authorized by Congress and enhance rather than abridge the freedoms of speech and press,"[11] the Court may have significantly mitigated the constitutional obstacle to more effective and direct program regulation.[12]

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[5] The FCC staff numbers approximately 1500 employees and operates on an annual budget of about $20 million. Interview with Mr. Robert Thorpe, Assistant to FCC Commissioner Nicholas Johnson, November 13, 1969; *see also,* MacNeil, *supra* note 2, at 259. The volume of correspondence regarding broadcasting programming may be illustrated by an inter-office memorandum circulated to the Commissioners in July, 1968. The memo reported that in the previous month 4,807 letters had been received of which 1,948 were treated as complaints about some aspect of programming. Of this number, 258 related to the problem of violence on television, presumably in reaction to the death of Senator Robert Kennedy. MEMORANDUM OF THE BROADCAST BUREAU, Item No. 3, July 23, 1968.

[6] Jaffe, *WHDH: The FCC and Broadcasting License Renewals,* 82 HARV. L. REV. 1693, 1694-1697 (1969).

[7] 47 U.S.C. § 326 (1964). *See generally Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 Fed. Reg. 10415 (1964) [hereafter cited as *Fairness Primer*]. For a lively discussion among the Commissioners during the hearing into renewal of a station license where the licensee allowed, *inter alia,* a lengthy panel discussion of homosexuality and the reading of literature thought to be offensive, see *Pacifica Foundation,* 36 F.C.C. 147 (1964).

[8] United States v. Robel, 389 U.S. 258 (1967); Cox v. Louisiana, 379 U.S. 536 (1965). *See also* Note, *Less Drastic Means and the First Amendment,* 78 YALE L.J. 464 (1969).

[9] *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study,* 14 FCC 2d 1, 12 (1969) (separate statement of Commissioners Cox and Johnson) [hereinafter cited as *Oklahoma Case Study*].

[10] 395 U.S. 367 (1969).

I

As it has evolved through FCC administrative decisions, policy reports and, since 1965, codified regulations,[13] the fairness doctrine imposes on all broadcast licensees the obligation "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[14] *Red Lion* and *RTNDA* involved two particular aspects of the doctrine: the rules governing licensee editorializing and "personal attacks" during the discussion of public issues.[15] In both instances, licensees who have broadcast expressions of the kind embraced by the rules are required to preserve evidence of the nature of the remarks and to offer free reply time to groups or individuals with contrasting viewpoints.[16]

The fairness obligation was thought by many to have been compelled by the language of the Federal Radio Act of 1927.[17] Although primarily concerned with the novel engineering problems involved in finding an optimum employment of the spectrum space, Congress also focused its attention on the difficult question of who should have access to the air waves.[18] Reflecting the anxiety of some that "big city" interests would monopolize radio,[19] the Act instructed the Federal Radio Commission to regulate its use "as public convenience, interest, or necessity requires. . . ."[20] From the outset, the Commission interpreted this statutory command to compel a critical view of stations which presented only one side of controversial questions.[21] It has been widely supposed that when Congress incorporated substantially the same "public interest" standard in the successor Act of 1934,[22] "the basic policy of the 'standard of fairness' which is imposed on broadcasters . . ." was reaffirmed.[23] In 1959, moreover, after several decades of Commission experience with the fairness principle, Congress ratified it in major part by amending the Act to exempt certain kinds of broadcasts from its coverage.[24]

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[11] *Id.* at 375.

[12] The Court may also have indicated how staff inadequacies and the dilemma of an absence of standards may be mitigated. *See* p. 101 *infra.*

[13] John J. Dempsey, 6 P & F Radio Reg. 615 (1950); United Broadcasting Co., 10 F.C.C. 515 (1945); Mayflower Broadcasting Corp., 8 F.C.C. 333 (1941); Young People's Association for the Propagation of the Gospel, 6 F.C.C. 178 (1938). *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. 1246 (1949), *see also Fairness Primer, supra* note 7. 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1969) (all identical).

[14] 47 U.S.C.§ 315 (1964).

[15] The personal attack rule provides that an attack "made upon the honesty, character integrity or like personal qualities of an identified person or group" during the discussion of a controversial issue obligates a licensee to notify the subject of the attack within a week after it is made. 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1969) (all identical). The editorializing rules establish a similar obligation on licensees who endorse or oppose candidates for public office, except that the notification periods are shorter. *Id.*

[16] These codified rules are not exhaustive of the fairness doctrine. Thus, a licensee editorial not related to a candidate for public office but clearly adopting a controversial viewpoint raises similar obligations to offer responsive reply time. *See generally Fairness Primer, supra* note 7.

[17] Ch. 169, § 4, 44 Stat. 1162.

[18] Prior to 1927, the frequencies for radio were generally left on a first come, first serve basis. E. Barnouw, A TOWER IN BABEL, 211 *et seq.* (1966).

[19] Then as now, New York City appears to have represented evil incarnate. *Compare* Address by Vice-President Spiro Agnew, *supra* note 2 (New York is "the most unrepresentative community in the entire United States") *with* the remarks of one Southwestern Congressman debating with Rep. Cellers of New York in 1928: "I am

The history of enforcement by the FCC has not quieted disagreement over the scope of the fairness obligation and the extent to which the Commission may constitutionally go in enforcing it. It was this disagreement, in fact, which the Court sought to resolve in the *Red Lion-RTNDA* litigation.

Red Lion arose late in 1964 when a Pennsylvania radio station broadcast a 15-minute "Christian Crusade" program featuring Reverend Billy James Hargis. In the course of the program, Hargis discussed a book written by Fred J. Cook, entitled, "Goldwater Extremist on the Right" and made several allegations about the author's ethics as a journalist and his previous political affiliations. The Commission, citing *Times-Mirror Broadcasting Co.*,[25] concluded that Hargis's remarks constituted a personal attack and ordered the station to provide Cook with an opportunity to respond free of charge.[26] The *RTNDA* litigation was commenced by a petition seeking to set aside the FCC's newly adopted codification of its

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not satisfied to sit there and listen to your city without you listening to mine." 69 Cong. Rec. 4489 (remarks of Rep. McKeown). Initially, Congress attempted to create a buffer against domination of the nation by any single geographical area by creating five zones which were to have had roughly comparable transmission and reception services. Act of March 28, 1928, ch. 263 § 5, 45 Stat. 373, *repealed*, ch. 511, 49 Stat. 1475 (1936).

[20] § 4, 44 Stat. 1162 (1927).

[21] When the Federal Radio Commission was established, many active radio stations previously licensed under the 1912 legislation were found to be owned and operated in the interests of specific groups, such as labor unions, churches, newspapers, etc. Barnouw, *supra* note 18. The FRC refused to license such stations almost immediately. *See* Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on the other grounds*, 59 App. D.C. 197, 37 F.2d 993, *cert. denied*, 281 U.S. 706 (1930); Chicago Federation of Labor v. FRC, 3 F.R.C. Ann. Rep. 36 (1929), *aff'd*, 41 F.2d 422 (D.C. Cir. 1930).

[22] 47 U.S.C. § 303 (1964).

[23] H.R. Rep. No. 1069, 86th Cong., 1st Sess. 5 (1958).

[24] Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 380-2 (1969), *construing* 47 U.S.C. § 315 (1964).

[25] 24 P & F Radio Reg. 404 (1962).

[26] The Red Lion Broadcasting Co. at first refused on the ground that Cook had not shown to the station that he was unable to pay for his reply time or that a commercial sponsor for it could not be found. Red Lion Broadcasting Co. v. F.C.C., 381 F.2d 908, 911 (D.C. Cir. 1967).

licensee editorializing rules. In a lengthy opinion issued in September, 1968, the Seventh Circuit Court of Appeals granted the petition on the grounds that the Commission's enforcement procedure compelling broadcasters to provide free reply time "will impose unconstitutional burdens on the freedom of the press protected by the First Amendment."[27]

The broadcasters attacked the doctrine on two broad grounds. (1) First, it was suggested that the doctrine works an unconstitutional restraint on the broadcasters' freedoms of speech and press. (2) Second, it was argued that the Commission's chosen means for enforcement of the doctrine would encourage station owners to censor their own programming, thus abridging the public's right to an uninhibited forum for ideas.[28]

(1) *The doctrine as an abridgment of the broadcasters' rights.* The broadcasters in *Red Lion-RTNDA* saw their own freedom of expression threatened by the severity of the sanctions for noncompliance, the vagueness of the fairness obligation and the potential the doctrine creates for administrative abuse of discretion. Because licenses to broadcast conceivably can be revoked or not renewed by the FCC on the basis of a single fairness violation, it was argued, the doctrine reposes in the government the ultimate censorial power to silence permanently a broadcaster for a solitary pecadillo.[29] The chilling effect of this prospect is compounded by the lack of clear standards by which station owners may gauge whether the FCC will consider a given expression "controversial" or of "public importance."[30] Confronted with close questions, for example while preparing documentaries or station editorials, broadcasters will feel constrained to avoid the heavy penalty of license denial by favoring the least controversial expression. Finally, it was argued, the potential for governmental abuse is clear. By selective enforcement of the doctrine, the FCC can protect certain expressions from the balancing requirement while burdening others. Thus, licensees with a proclivity to express views at odds with the prevailing governmental opinion run a substantially higher risk of suffering the Commission's sanctions than licensees who program controversial utterances that coincide with the Commission's own judgment.[31]

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[27] Radio-Television News Directors Association v. United States, 400 F.2d 1002, 1010 (7th Cir. 1968).

[28] The Seventh Circuit adopted the ingenious position that while the fairness doctrine could be part of the reasons for a denial of a license renewal, the rules requiring responsive reply time imposed burdens too onerous and immediate to withstand constitutional attack. *Id.* at 1013.

[29] Revocation of licenses is provided for in 47 U.S.C. § 312(a) (1964).

[30] It is not clear, for example, whether the doctrine requires responsive reply time for personal attacks uttered apart from a discussion respecting a controversial issue. *See* Note, *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 144 (1969). The editorializing rules, however, are less susceptible to this objection since they tend to operate somewhat more mechanically. *But see McCarthy v. F.C.C.* 390 F.2d 471 (D.C. Cir. 1968) (whether equal opportunity should be afforded Senator McCarthy following address by Pres. Lyndon Johnson in December, 1967).

[31] *Cf.* Pacifica Foundation, 36 F.C.C. 147 (1964).

The Court quickly disposed of these objections. First, it pointed out, the Commission has available a range of sanctions less drastic than license denial. The responsive reply time rules, in themselves, represent a sanction developed by the FCC to mitigate the effects of biased programming without permanently excluding a broadcaster from the air waves. Other sanctions may range from a mild rebuke to a monetary forfeiture.[32] Second, the Court dismissed the vagueness argument as spurious, pointing out that the Commission has developed a line of administrative precedents which establish clear and reasonable bounds for the doctrine.[33] For example, the FCC has repeatedly expressed its intention to deal reasonably with inadvertant violations;[34] and recently, the Commission affirmed that nothing in the fairness rules requires broadcasters to alert either the Commission or the public in advance of a controversial broadcast or a personal attack.[35]

Turning to the third objection, the Court did not deny that the doctrine imposes burdens on licensees who otherwise would be free to broadcast only the views they found desirable.[36] But this limitation, the Court indicated, does not necessarily implicate the government in censorial activity. A broadcaster may still exercise absolute freedom to air his own views; the rules limit only his monopolization of the air waves to exclude contrary expressions. In justifying the burdens attached to the exercise of free expression, the Court relied heavily on the special nature of the broadcasting medium. Since the spectrum space available for private use is limited, it reasoned, the Government has a special warrant to regulate access in order to insure that optimum use of the frequency is achieved.[37] In pursuit of that objective, it has conferred on some a monopoly power over the resource. But there is no absolute right to enjoyment of this power over the channels of communication. Because it springs from the governmental licensing process, it must be conditioned upon what the Court termed a "proxy or fiduciary" duty to give adequate coverage to all competing views without distinction as to content or ideology.[38]

Yet frequency limitations of the spectrum, which the Court described at considerable length, are only some among the many impediments to greater public access to the broadcasting media. In fact, given the present availability of frequency space in many radio and television markets, they are not the major obstacles.[39] Two others loom large as well: the high cost of access to ownership[40] and the FCC's own licensing policies, which have not consistently encouraged diversity of ownership.[41] But there can be little doubt that broadcasting is a severely restricted medium, whatever the causes. The award of a license by the government to a private broadcaster elevates him to a potentially preferred position in the public forum. Conditioning retention of that position upon observance of a fiduciary duty to program responsive replies to editorials or personal attacks does not seem unreasonable when the interest served is an increase in the volume of ideas and controversial expressions available to the public.[42]

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[32] 47 U.S.C. § 503 (1964).

[33] 395 U.S. at 395.

[34] *E.g.*, *Report on Editorializing by Broadcast Licensees*, *supra* note 13, at par. 10. 10.

[35] Anti-Defamation League of B'nai B'rith, Pacific Southwest Regional Office v. FCC, 403 F.2d 169 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969).

[36] 395 U.S. at 386.

[37] "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Id.* at 388.

[38] *Id.* at 389.

In redressing the imbalance between licensees and those excluded from ownership, the Court in *Red Lion–RTNDA* adopted what one commentator has termed a "positive" dimension to First Amendment theory.[43] This approach emphasizes not the individual right of the speaker but the more fundamental interest in "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences. . . ."[44] As a result, it restores to prominence the cardinal purpose of the First Amendment: the assurance of a multiplicity of ideas and experiences.

(2) *The doctrine as an abridgment of the rights of the public.* The broadcasters further asserted that the rules would actually work to inhibit public discourse. Invoking a variation of Gresham's Law, they argued that licensees anxious to avoid the burdens of compliance or the penalties of noncompliance will meticulously purge their programs of any matter likely to provoke a demand for free reply time. At the same time, conscientious

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[39] 47 C.F.R. § 73.606 (1968) contains a table of assignments of television channels. Despite the apparent availability of VHF and UHF frequencies, however, the Court correctly noted that there is no assurance that all demands on the spectrum space can be served. Demand for frequencies grows apace with the population and increasingly sophisticated land-mobile, industrial and medical uses. 395 U.S. at 396.

[40] *See, e.g., Television Factbook* 10C-21C (1966).

[41] *Cf.*, Jaffe, *supra* note 6, at 1697-98; Johnson, *The Media Barons and the Public Interest*, ATLANTIC, June, 1968, at 43. In 1968, less than ten percent of VHF television stations were owned by entities that did not have interests in other media. *Id.* at 48. Such concentration poses a danger that viewers in the local community will be deprived of the opportunity to hear conflicting views on important issues. Existing regulations on multiple ownership are lenient, but several recent cases suggest a shift in FCC attitude. *E.g.*, Chronicle Broadcasting Co., 17 F.C.C.2d 245, 15 P & F Radio Reg. 2d 993 (1969); WHDH, Inc., 16 F.C.C.2d 1, 15 P & F Radio Reg.2d 411 (1969).

One proposed rule would limit further applicants to one AM, FM or television station per market. 33 Fed. Reg. 5315, April 3, 1968. Applied prospectively, such a rule would take many years to achieve a significant reduction in concentration of ownership of the media. Johnson, *supra* at 51. The Justice Department Antitrust Division has suggested the FCC consider divestiture of existing concentrations and extension of the rule to include newspapers. N.Y. Times, Aug. 2, 1968, at 67, col. 3.

[42] *See* Note, *The Supreme Court, 1968 Term*, *supra* note 30, at 143-47.

[43] Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487, 498 (1969).

[44] 395 U.S. at 390.

station owners will be put to the Sisyphean task of counterbalancing every expression even remotely controversial. The resultant programming blandness of the former and economic and artistic burdens suffered by the latter will achieve a result directly the reverse of the Court's intention.[45]

The Supreme Court found this argument "speculative":

> [I]f experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. The fairness doctrine in the past has had no such overall effect.[46]

The Court's summary treatment of this argument seems unconvincing. Occasions when individual stations as well as networks have chosen to be silent rather than speak out on controversial issues are not unknown. In some instances, the decision to say nothing has clearly been based on the impracticality of affording responsive reply time.[47] In others, however, ideological aversion to seeing a viewpoint given access to the air waves has played a major role in the decision.[48] But the Court may be correct in suggesting that generally the doctrine is not the principle cause for licensee timorousness. Data drawn from two recent studies indicate that on the contrary, broadcasters often fail to air controversial issues for reasons unrelated to the effect of the balancing requirement. A Senate subcommittee polling over 5,000 licensees found that approximately 9 per cent felt the doctrine inhibited them from engaging in public interest programming.[49] Another survey conducted by the National Association of Broadcasters in 1967 revealed that nearly 30 per cent of all licensees sampled had experienced at least one threat from an advertiser after broadcasting a political editorial.[50] The two surveys strongly suggest that commercial considerations rather than the fairness obligation account for much of the dearth of tendentious programming among commercial broadcasters.[51]

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[45] The Seventh Circuit was impressed with this argument taking note of the "substantial economic and practical burdens which attend the mandatory requirements of notification, the provision of a tape, and the arrangement for a reply." 400 F.2d at 1012.

[46] 395 U.S. at 393.

[47] The dilemma may be particularly acute where there is a proliferation of minor candidates for public office. *See, Use of Broadcast Facilities by Candidates for Public Office*, 31 Fed. Reg. 6660, 6667-69 (1966); Barrow, *The Equal Opportunities and the Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. CINCINNATI L. REV. 447, 480-81 (1968). Further complications can arise in a different context when a candidate for office is in addition an on-the-air personality. Recently, the FCC awarded 22 hours of free time on a Panama City, Florida station to a candidate for tax collector because his opponent had been a local newscaster and variety show emcee. The windfall was used, in part, to air amateur music shows and other entertainment, featuring the non-station employee as "host." Apparently, however, the "Public response was so bad he . . . dropped the entertainment." The candidate was quoted by the Associated Press as remarking optimistically, "As we get nearer election date, I'll use the 50 minutes a day I'm entitled to. If I've got a good band we'll have the band on." *See generally* New York Times, Oct. 2, 1968, at 78.

[48] A striking illustration is reported in A. Kendrick, *Prime Time*, 49-60 (1969): During the production of Edward R. Murrow's notable *See It Now* attack on Senator Joseph McCarthy, several network newsmen expressed the fear that programming the attack would only increase McCarthy's popularity in the end, due both to his exposure on *See It Now* and his subsequent reply program. However, Murrow eventually decided to go ahead with the program, heeding the advice of Chairman Frank Stanton to offer McCarthy equal time. Murrow, in fact, opened the broadcast with that offer. Interestingly, McCarthy attempted to have his equal appearance filled by columnist William F. Buckley, but the network insisted that McCarthy make his reply personally.

But the Supreme Court went beyond finding that the broadcasters' gloomy predictions of blandness were speculative. In a single passage likely to have a nearly revolutionary impact on the industry, it stated:

> [I]f present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues. . . . To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press.[52]

The Commission power which the Court apparently had in mind is the FCC's general requirement "that every licensee devote a reasonable portion of broadcast time to the discussion and consideration of controversial issues of public importance."[53] Clearly, this affirmative duty goes beyond the obligation to present a contrasting viewpoint once a controversial expression has been broadcast. In effect, it would seem to require all licensees to engage purposely in programming likely to trigger the reply time rules. Such an extension of the fiduciary principle would probably mitigate the discriminatory effects the fairness rules otherwise would have on conscientious licensees. But it remains to be seen whether this obligation is pragmatically or constitutionally enforceable.

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[49] Staff of Senate Comm. on Interstate Commerce, 90th Cong. 2d Sess., *Report on Communications* 81 (Comm. Print 1968).

[50] *Broadcasters and Editorializing*, A Study of Management Attitudes and Stations Practices by the Research Department of the National Association of Broadcasters (1967), quoted in MacNeil, *supra* note 2, at 236.

[51] The generally higher standard of public service broadcasting among educational outlets would seem to support this conclusion. However, recently 25 primarily southern educational outlets refused to clear the first program of NET's Public Broadcast Laboratory apparently because of its controversial nature. The program included a short drama of a small racist town acted entirely by a Negro company in "white face." Kendrick, *supra* note 48, at 18.

[52] 395 U.S. at 393-94 (dictum).

[53] 47 U.S.C. § 315 (1964).

II

The obligation to devote a reasonable amount of programming to public interest questions has languished throughout most of the Commission's history, although the FCC has frequently referred to it as a necessary concomitant of the reply time rules or as a component of the fairness doctrine itself.[54] Apart from the constitutional entanglements, the Commission has been unsuccessful in arriving at an enforcement procedure that would be both meaningful and even-handed.

Two polar approaches have received the Commission's most serious attention. One approach would require all licensees to commit a minimum percentage of their air time to certain programming types, such as local news shows, documentaries, panel discussions, station editorials and public service announcements.[55] Congressman Reuss introduced a bill to this effect in 1960, which would have required broadcasters to devote at least twenty percent of their programming, including one hour a night of prime time, to public service programs.[56] Such a proposal could create a vast increase in the diversity of programming, since it would alleviate commercial pressures on broadcasters to limit their efforts to bland, inoffensive programming with mass appeal.[57] Imposing a minimum public affairs programming standard on broadcasters seems appropriate, too, since they may be insulated from competitive challenges to their licenses, as proposed by the "Pastore bill."[58] The proposal has the advantage of being relatively easy to administer, since any station falling below the required minimum levels could be readily detected at renewal time. Licensees are already familiar with programming breakdowns similar to the kind that would accompany industry-wide minimums.[59] Furthermore, concrete standards for a station's obligations afford licensees a high degree of security for their investments.[60]

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[54] *Report on Editorializing by Broadcast Licensees, supra* note 13, at par. 6.

On the average, less than ten percent of programming is devoted to news and public affairs. Stavins, *Public Interest Old and New,* in Institute of Policy Studies, TELEVISION TODAY: THE END OF COMMUNICATION AND THE DEATH OF COMMUNITY 72-73 (1969); *see Oklahoma Case Study, supra* note 9, at 12-13, 18.

[55] Jaffe, *supra* note 6, at 1701.

[56] H.R. 9549, 86th Cong., 2d Sess. (1960). "Public service programming" would be defined by a special committee in the Office of Education.

[57] "The serious side of life, controversial issues, racial problems, the information necessary to cope with the exigencies of the period are deemed too 'downbeat' (sad and gloomy) to attract viewers and leave them with a happy, bright image of the sponsor and his product." Barrow, *Private Interest,* in FREEDOM AND RESPONSIBILITY IN BROADCASTING 54 (J. Coons ed. 1961). One advertiser turned down a talented writer's script on the grounds he wanted "happy shows for happy people with happy problems." In the Matter of the Study of Radio and Television Broadcasting, FCC Docket No. 12782, Hearings, at 5558.

[58] S. 2004, 91st Cong., 1st Sess. (1969).

[59] Similar categories of "program types" are included in license renewal application forms. FCC Form 303, Section IV-A, p. 2.

But the industry-wide approach is not entirely rational or fair. Although a station may meet the minimum time standards, short of an exhaustive investigation into daily programming practices, there is no way for determining whether a broadcaster's treatment of public issues is robust or what the late A. J. Leibling disdained as "on-the-one-hand-this-on-the-other-hand-that" journalism.[61] Moreover, industry-wide time minima may fall most heavily on stations in rural areas, since often it is these licensees who have neither the artistic nor the pecuniary resources to support a high level of public service programming.[62]

An alternative approach would have the Commission consider in detail the programming practices of each licensee before granting renewal of his license.[63] Although this approach might avoid the problems of discrimination against poorer stations and self-serving but bland coverage of important issues, it suffers from the defects suggested earlier; *viz*, the lack of standards, staffing inadequacies and the censorial dangers inherent in full-blown government inspection of the content of speech by broadcasting.[64]

More by default than design, a third alternative to these polar approaches has recently been advanced. In *United Church of Christ v.*

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[60] The economic dislocations resulting from unpredictable "lurches" in FCC decision-making are explored in Jaffe, *supra* note 6 *passim*.

[61] Leibling, THE PRESS (paper edition) at 226-39 (1961). Another solution that has been suggested to solve this problem is that members of the public have direct access to the media. Barron, *Access to the Press–A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1969). This view may be based on the doubt whether, even under the fidicuiary doctrine of *Red Lion*, the public should be entirely dependent on the judgment of broadcasters to determine whose voices are representative of the community. The fundamental right to speak to the public on matters of public concern should not be restricted to those advocates wealthy enough to purchase broadcasting time. Broadcasters could be required to offer a few hours a week free to members of the public, with speakers chosen by some nondiscretionary method such as a lottery.

[62] The problem has been thought to be particularly acute for marginally operated UHF stations. However, L. William White, general manager of a Boston station, observed that the burdens for reply time in both radio and television are nominal. According to White, a single part-time employee is placed in charge of handling the notification requirements on the frequent occasions when his stations editorialize. One letter is sent immediately after the broadcast, and another follow-up letter one week later. White also observed that public service programming apart from editorializing is expensive, however, involving as it does the expense of obtaining qualified news and program personnel and various technical equipment such as mobile cameras, etc. Interview with L. William White, November 20, 1969.

[63] The suggestion is advanced in *Oklahoma Case Study*, *supra* note 9, at 13-25.

[64] *See* pp. 89-90 *supra*.

F.C.C.,[65] the District of Columbia Circuit Court held that the Commission is compelled by its statutory authorization to require renewal candidates to shoulder the burden of proving that a renewal license is in the public interest. The decision reverses the traditionally insecure position of public interest representatives who oppose the interests of broadcasters. Noting that such representatives should not be treated as "interlopers" in a private sanctum, the Court declared:

> Rather, if analogues can be useful, a "Public Intervenor" who is seeking no license or private right is, in this context, more nearly like a complaining witness who presents evidence to police or a prosecutor whose duty it is to conduct an affirmative and objective investigation of all the facts and to pursue his prosecutorial or regulatory function if there is probable cause to believe a violation has occurred.[66]

Reliance on the complaints of the public may well provide a solution to the problem of how to detect a failure in affirmative performance of the fiduciary duty: the Commission may simply wait for alleged transgressions to be called to its attention. But this path also has its difficulties. However conscientious, no licensee is capable of satisfying every conceivable programming interest in his audience.[67] Some interests may be entirely idiosyncratic or insubstantial. In larger and more diverse metropolitan areas, licensees may as a practical matter be forced to choose among a variety of equally substantial programming interests. To revoke a license or deny renewal because a licensee wrongly guessed which interests he should consider paramount might lead to an undesirable instability of investment.

However, the *Red Lion-RTNDA* Court's promotion of the community proxy concept may offer an escape from this dilemma. The Court's declaration that broadcasters have a fiduciary duty "to present those views and voices which are representative" of their communities[68] is reminiscent of one of the most fundamental policies of the FCC: the encouragement of local program service. It was anticipated that by favoring a nation-wide system of low powered stations as opposed to a few super power facilities the industry would be made more responsive to the desires of each station's respective audience.[69] Localized minority viewpoints which might be overlooked in a regional audience would be more apparent to a broadcaster covering a smaller geographic area. The vision failed for a number of reasons, including the growth of national networks and the ascendance of advertisers as a major influence on programming decisions.[70] At bottom, however, the local service concept was allowed to falter on confusion over the identity or definition of the audience to be served by a given licensee. Thus, as Alexander Kendrick has recently observed, many stations have become beholden to commercial and political forces which bear no relationship to the station audience and which "may not be representative of the community as a whole, or consonant with its best interests."[71]

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[65] 38 U.S.L.W. 2002 (D.C. Cir. June 20, 1969) (Burger, J.).

[66] *Id.*

[67] The *United Church of Christ* case involved easily identifiable racial and political programming interests. But other interests, especially those with limited influence, may be more difficult to identify. *Cf.* "The Limits of Technology," Address by former FCC Commissioner Lee Loevinger before the New Jersey Broadcasters Association Convention, Atlantic City, N.J., October 10, 1966 (it is unrealistic to expect technological advances to serve every programming desire.)

[68] 395 U.S. at 389.

[69] *See, e.g.*, Courier-Post Publishing Co. v. F.C.C., 104 F.2d 213 (D.C. Cir. 1939).

The fiduciary principle of *Red Lion–RTNDA* suggests that the task before the FCC is not to divine what kinds of programming *are* consonant with those interests, but to develop administrative procedures which will allow those interests to assert themselves without at the same time threatening the stability of the industry.

III

The Commission already possesses what may prove to be the foundation for such a procedure. Applicants for a construction permit to commence broadcasting are now required to submit to the FCC evidence that they have undertaken to survey the needs of their local communities.[72] It is a rudimentary system at best, however, compromised principally by the haphazard nature of most surveys.[73]

But the scheme does suggest an appropriate line for further development. It might be refined to require from every applicant for a license: (1) a catalogue of the component programming interests he perceives in his community; (2) a declaration outlining which of these he proposes to serve as his programming "constituency"; (3) a reasonably specific description of what steps he will take to serve this constituency; and (4) an explanation why other interests were excluded. In this manner, the definitional problem involved in reducing multifarious communities to their component parts is left in the first instance to the broadcasters. If the definition is accepted by the FCC, the licensee can rely on the subsequent renewal of his license so long as the interests he has identified are adequately served.

Of course, inequities may arise from imperfectly conceived community surveys. The Commission recognizes this problem now, and has on occasion expressed a preference for one survey technique over another.[74] One important deterrent to poor surveys springs from the fact that many communities are served by more than one licensee. In these areas, marked differences in survey descriptions of community interests may warrant further inquiries. An additional check is available through the liberalized standing rules for public interest representatives.[75] Citizens who believe their interests are improperly excluded from a licensee constituency could seek inclusion through the hearing procedure. The effects of a decision that the constituency should be amended to include a new interest, moreover, presumably would be less shattering to a licensee than the loss of his license for failure to serve those interests in the past.

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[70] *See Advertising on Standard, FM, and Television Broadcast Stations*, 36 F.C.C. 45 (1964); *Television Factbook* 55A (1966).

[71] *Supra* note 48, at 16.

[72] *Policy Statement on Comparative Broadcast Hearings* 1 F.C.C. 2d 393, 397 (1965).

[73] One station manager has reported that he "surveys" his community by "talking to" approximately 15 people a month to "see what they think." Interview with L. William White, *supra* note 59. *See also* City of Camden, 16 P & F Radio Reg. 2d 555 (1969).

The advantages of a system such as this one are several. It resolves the troublesome question of the "community" to which a broadcaster stands as a proxy;[76] it provides a measure of stability to ownership while at the same time increasing public influence over program content; it relieves much of the bureaucratic burden of the Commission by providing it with measureable standards for judging past performance records; and it maintains a desireable flexibility "geared to the situation in each community."[77]

Perhaps most important, the procedure would seem to mitigate the threat of government censorship. Rather than having to define the bounds of "good" programming in each given instance, the Commission is confronted only with the primary task of identifying the community interests to be served, a judgment more amenable to cognizable standards of proof and procedure.[78]

It should be noted, finally, that a practice similar to the one envisioned has been informally executed by the Commission in two recent renewal proceedings. In Texarkana, Texas, and Rochester, New York, television stations applying for renewal have appeared before the Commission with formal agreements hammered out between the station owners and members of their audiences. The policy agreements cover a surprisingly wide range of matters including, *inter alia*, the number of color cameras located in adjunctive studios, the use of the station to publicize the legal rights of the poor, the provision of toll-free telephones in some nearby cities to facilitate audience inquiries, the pledge to program regular local "live" programs involving participants from the service area and monthly meetings between the station management and representatives of the several constituent groups.[79] It remains to be seen whether these modest beginnings will lead to an institutionalized procedure for assuring that broadcasters discharge their fiduciary duties.[80] It remains to be seen whether the FCC will correct the present inequities in media access. But it is clear from the *Red Lion* decision that should the Commission neglect its duty, the courts will enforce it themselves, and in perhaps a more vigorous manner than the broadcasting industry would like.

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[74] City of Camden, 16 P & F Radio Reg.2d 555 (1969); Viking Television 15 P & F Radio Reg.2d 954 (1969).

[75] Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), *after remand*, United Church of Christ v. FCC, 38 U.S.L.W. 2002 (D.C. Cir. June 20, 1969).

[76] *See*, BROADCASTING, May 5, 1969, at 42 *et seq.*

[77] Jaffe, *supra* note 6 at 1701.

[78] Moreover, it might be noted that the Courts would thus be provided with a more rational basis for review. Inevitably, surveys seeking to ferret out all community programming interests will at least in part tend toward empirical research. Broadcast advertisers have already developed sophisticated means for plumbing the interests of television viewers in every market in the country, and it might be anticipated that the learning gained from these techniques could be applied to program, as opposed to product, interests with a minimum of difficulties. *See, e.g.*, The American Research Bureau "Explanation of Survey Method and Sources" on the back page of any *ARB Market Report*.

—John C. Barrett

—Mary Louise Frampton

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[79] Statement of Policy of Station KTAL-TV, Texarkana, Texas, Adopted as an Agreement with 12 Community Organizations of Texarkana and Filed at the FCC on June 9, 1969.

[80] We may be on the verge of a technological solution to the constitutional problem of television regulation. It is possible that such developments as community antenna television, satellite-to-home broadcasting, or "wired-city" TV will eliminate the scarce-frequency problem and so reduce the cost of transmission that the public can be assured of a wide variety of programming and of reasonable access by the citizen. *See generally* Note, *The Federal Communications Commission and the Regulation of CATV*, 43 N.Y.U. L. REV. 117 (1968); For a discussion of satellite technology generally see Johnson, *New Technology and Its Effect on Use and Management of the Radio Spectrum*, 1967 WASH. U.L.Q. 521 (1967); Barnett and Greenberg, *A Proposal for Wired City Television*, 1968 WASH. U.L.Q. 1 (1968). Analysis of these alternatives is beyond the scope of this comment. But there is disagreement over the number of channels such innovations might provide and the degree to which they can reduce costs. Some commentators suggest that even with a large number of channels there will continue to be a need for the "fairness doctrine" in its various aspects. *E.g.*, Barrow, *The Equal Opportunities and Fairness Doctrines of Broadcasting: Pillars in the Forum of Democracy*, 37 U. CINCINNATI L. REV. 447, 490-93 (1968).

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Is television news biased?

PAUL H. WEAVER

Is television news biased? That anyone alive today should debate this question, or even ask it, is at least paradoxical. The spirit of our age is the spirit of relativism—of the belief in the subjectivity of human consciousness, the parochialism of cultures and values, "doing your own thing," etc. In such an age, the proposition that TV news is biased should be about as controversial as the law of gravity. Yet the situation is otherwise, to put it mildly. The question is not only asked and debated; it has generated an intense controversy that now includes, in addition to the extremes of left and right, a small army of journalists and network executives, politicians across the spectrum, ethnic and interest groups, presidential commissions, and just about everyone else with political interest or ambition.

But in fact there is no contradiction in this. The very scale of the controversy, taken together with the triviality of the question, indicates that the issue has surely been misdefined. The real question is not: Are the media biased? They are, by definition and of necessity. The question is rather: *How* are the media biased, and what is the consequent effect on our interests and values? Of course, the matter is never put in these terms; the genius of American politics seems determined that we should frame it the other way, as if a perfectly unbiased or neutral mode of discourse were within the realm of human possibility. The result has been a hopeless muddling of the intellectual issue, and a needless intensification of the authentic political conflict which lies beneath it.

The question of legitimacy

It is not just an American innocence which has transformed a serious debate into the quixotic pursuit of a phantom called "unbiased news." There has been another, more specific cause. For the debate is not only a discussion of whether the media have power and how they use it; it is equally a dispute over the *legitimacy* of that power. Americans have no trouble believing that an individual may and should do everything within his power (and the law) to affect public discussion and shape public policy; that is his right as a citizen, as a participant in sovereignty, and thus as a source of legitimacy. But the mass media are not citizens or sovereigns. They are corporate entities, creatures of the state; they are elected by no one and are answerable only to themselves. Yet they possess far more power over our public life than does any individual. Then by what right do they exercise this power?

For the media, the question has long been a troubling one; in the context of the current controversy, which they see as a concerted partisan attack, it is downright embarrassing. Their temptation, in the circumstances, is to claim that they exercise no political power and therefore have no need to justify such power. But this line of argument is not very satisfactory, and they rarely use it—at least not for long. For one thing, to deny that they have power over public opinion is to deny that advertisers have any good reason to buy time or space from them. Moreover, as long as American journalists' self-proclaimed mission is to improve public opinion, they cannot very well claim that they have and seek no influence. Besides, any such claim would be met with utter disbelief. Hard as it has been for social science to measure the full range of media effects, the fact remains that the media, at least as selectors of information, possess a subtle but massive power to define the terms, issues, and especially the priorities of public discussion. Indeed, it is their possession and unavoidable use of this power, in the context of our growing national disagreement over the goals and priorities of public policy, which is the underlying reason for the existence of the entire controversy in the first place.

Sensibly enough, most journalists acknowledge the existence of their power and seek instead to defend its legitimacy on the ground of their "professional" and above all "fair" use of it to tell the news. By this they mean that their intention—and, in general, their achievement—is to give equal time, equal space, and equally considerate attention to all popular candidates and all popular views on all popular issues. The media recognize that this strategy will not protect them from the wrath of the political extremes, whose views and candidates they systematically ignore. But they do hope it will prevent them from offending the great majority, who presumably will see in the formula of "fairness" at least a rough approximation to "objectivity."

Yet the fact remains that even if the media were always "fair" by their own definition, they would not necessarily be unbiased in the larger sense. "Fairness" involves adhering to an accepted, professional mode of behavior; bias is a way of describing the effect of any activity ("fair" or not) on some value. The distinction is familiar enough in other connections. Judges and district attorneys may be "fair" in scrupulously following traditional rules; but the cumulative impact of their activities may be biased—against poor people, for instance. The media are capable of making this distinction about other institutions; but they do not acknowledge that this distinction applies to themselves. *They defend their legitimacy by using "fairness" as a synonym for lack of bias.* In consequence they perpetuate and—let us be candid about this—profit from a serious confusion of the real issue. Meanwhile, wrapped in the mantle of "fairness," the media indignantly rebuke their critics as "biased," "extremist," "self-seeking," "manipulative," or possessed of an irrational desire to punish the innocent messenger who bears a distasteful truth.

For the most part, the critics have been quick to accept this stealthy equation of "fairness" with lack of bias. For without the premise that an unbiased account is both possible and desirable, they have no very persuasive ground for complaint. To object to news coverage by thundering that it is "biased"—that is, clearly and intentionally misleading—is to use a powerful rhetoric; to say that it proceeds in such a way as to produce a misleading impression is rather less compelling. So the critics have been no less delighted than the media to confuse the issue. Neither have they been notably shy about finding dishonorable motives at work in any example of objectionable reportage or making broad charges on the basis of anecdotal or fragmentary evidence. Needless to say, the entire controversy has not been the most enlightening or admirable episode in the history of American public discussion, and the subject by now is long overdue for some serious study.

"TNT"

One could have hoped, therefore, that Edith Efron's *The News Twisters* (Nash, $7.95), published this fall, would have been recognized for what it is—a serious independent effort to measure what she takes to be the "fairness" of network television news, and thereby to shed the light of quantitative evidence on one important aspect of the debate. Alas, it generally has been recognized as no such thing, and both its supporters and detractors have quickly assimilated it to their own polemical purposes. This is a pity, for the book deserves more thoughtful attention than it has generally received so far—not so much because it is brilliant, or scholarly, or especially penetrating (it is none of these), but rather because it presents for the first time an extensive and tolerably reliable body of evidence on the content of television coverage of the presidential campaign in 1968. Properly interpreted, this evidence reveals a great deal about *how* television news is biased and thus about the direction of its influence on public opinion. Any book that illumines such matters deserves better than *TNT* (to use the publisher's provocative acronym) has received.

Miss Efron's procedure was indeed brilliant in its simplicity. She made a transcript of the three national networks' evening news programs during the final seven weeks of the 1968 campaign. She then went through these transcripts identifying and recording every sentence containing positive or negative opinion concerning the three presidential candidates and a list of issues she selected. (Within the news stories on the campaign, most sentences contained no such opinion and therefore were not recorded.) When this procedure was finished—the actual identification and classification of opinion required the formulation and systematic application of specific rules to cover problematic cases—she simply totalled the number of words of positive and negative opinion concerning each candidate and issue and entered these totals on graphs.

Concerning the candidates, the results were as follows: Humphrey received essentially "fair" coverage by all three networks (ABC had 4,200 words for him, 3,600 against; CBS, 2,400 for and 2,100 against; NBC, 1,900 for and 2,700 against). Wallace received tolerably "fair" coverage from two of the networks (CBS, 1,100 words for and 1,300 against; NBC, 1,000 for and 1,800 against) and pretty clearly "unfair" coverage from one network (ABC: 1,400 words for, 3,400 against). But the coverage of Nixon was something else altogether; on all three networks the pattern was one of extreme "unfairness," so much so that *negative opinion on Nixon exceeded positive opinion by a factor of 10.* (ABC, 900 words for and 7,500 words against; CBS, 300 words for, 5,300 words against; NBC, 400 words for, 4,200 against.) Miss Efron's study produced other findings—on coverage of the selected issues[1] and on the structure and rhetoric of "biased" news stories—but only those on the coverage of candidates merit the reader's close attention.

If it is true that the networks' coverage of Nixon was extraordinarily "unfair," and especially if this "unfairness" was deliberate or politically motivated, then Miss Efron has documented an authentic national scandal. Television, after all, is the primary source of news for a majority of Americans; the three network programs are almost the only source of national and international news on American television; and the networks possess their tight oligopoly over such news as a direct result of federal policy, federal regulation, and federal protection. If the networks are indeed seriously abusing their special powers—and Miss Efron's findings, if true, suggest an abuse of some magnitude—then there would seem to be a strong case for using the same public authority that now sustains the networks' oligopoly either to regulate their news programs more stringently, or else to destroy their oligopoly over national news altogether. One can imagine still other courses of action—but that is beside the point. What is to the point is that, by measuring the extent to which the networks, *by their own standards,* are performing "unfairly," and therefore illegitimately, Miss Efron's statistics inevitably raise a serious question of public policy, and with it the specter of government intervention.

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[1] Although Miss Efron holds that her analysis of issue coverage reveals a pattern of leftward "bias," her findings are in fact inconclusive. With only one clear exception, the "issues" she chose to study are not issues in any ordinary sense of the term. Some were not discussed at all during the campaign; others were discussed, but all candidates took essentially the same position on them. In any case, most of her "issues" are not issues but political groups—liberals, conservatives, the white middle class, black militants, the left, demonstrators, and violent radicals. One problem here is that the groups as defined are not mutually exclusive. A more serious problem is that insofar as these groups were topics of discussion, they were not issues but *symbols.* People either find a symbol persuasive and take it seriously, or else they ignore it out of a preference for some different symbol. To measure the fairness of coverage of symbols, one would have to identify the different symbols of left, center, right, etc., and then measure their relative incidence. Miss Efron's procedure does not do this.

Method and magnitude

So it is hardly a surprise to discover that the book has aroused intense reactions along political lines, with conservatives strongly approving and liberals harshly negative. Aside from the fact that CBS, prior to the official publication date, issued a long memorandum "refuting" Miss Efron's content analysis, using two dozen examples (which are too few to be statistically capable of confirming or falsifying the study), what is interesting about this critical reception is not its direction or intensity but rather its focus. For it is the validity or invalidity of Miss Efron's *numbers* which has preoccupied the reviewers, both favorable and hostile. Nearly everyone has been prepared to believe that if the numbers are correct, then her conclusion—"that network coverage tends to be strongly biased in favor of the Democratic-liberal-left axis of opinion, and strongly biased against the Republican-conservative-right axis of opinion"—follows automatically. In fact, the only conclusion that follows automatically from her statistics (we are excluding the "non-findings" on issues) is that, whereas the amounts of negative and positive opinion on Humphrey and Wallace were roughly equal, negative opinion on Nixon vastly exceeded positive opinion. Now it is true that one way to describe and explain this pattern is to say that it reveals "bias for" Democrats and liberals and "bias against" Republicans and conservatives. But there are other—and, as we shall see, better—ways to account for the pattern. The point is that what statistics show and mean—even the relatively simple statistics in *TNT*—is always a complicated and elusive question of interpretation. Miss Efron's hostile reviewers have resolutely ignored this fact. Captivated by the notion that "fairness" is the same thing as lack of bias, and that any bias must automatically flow from "unfairness" on the part of individual journalists, they have busied themselves almost exclusively with her data and methods, as if it were on their validity alone that her conclusions stand or fall.

Of course, her method does deserve careful scrutiny—the data are no more reliable than the way they were gathered. What it has received so far is only inconclusive calumny. Some critics have objected to Miss Efron's decision to exclude from her analysis all pictures, most speeches by candidates, all stories about the results of public opinion polls and the question of whether there would be a Humphrey-Wallace-Nixon debate, and all non-narrative audio material (applause, shouts, random words or phrases from crowds, etc.). Now, although there are good reasons for excluding such material (it is, in various technical ways, especially hard to measure or categorize as pro or con), it is true that the exclusion *may* have affected the relative amounts of pro and con opinion on each candidate; but until it is shown that the exclusion *did* have such effects, there can be no decisive objection to this aspect of Miss Efron's procedure—especially since it seems more reasonable to suppose, in the absence of evidence to the contrary, that the excluded content (especially pictures) was pro and con in something like the same proportion as the analyzed content.

A more serious objection has been raised against Miss Efron's notion of what constitutes negative and positive opinion, especially concerning Nixon. (Most examples of questionable categorization adduced by critics concern the "issues"—but again, that part of her study is ill-conceived and should simply be ignored.) And here, it is true, Miss Efron appears to have some farfetched ideas. But there are three points to be made about this problem. First, my own inspection of two different samples of Miss Efron's file of anti-Nixon opinion convinces me that, by any reasonable standard, the large majority of such items are in fact quite clearly anti-Nixon opinion; no more than 20 or 30 per cent of the anti-Nixon items might be questioned. Nobody has shown that the proportion of questionable items is larger; indeed, so far critics have merely adduced a few extreme examples, as if these were enough to invalidate the entire study. And this brings me to the second point. What is significant about Miss Efron's findings is not the absolute numbers of words pro and con; it is the *relative size* of the two bodies of opinion. In order to invalidate the finding of a huge disparity between pro-Nixon and anti-Nixon opinion, it is not enough to show that *some* anti-Nixon opinion has been incorrectly classified—one must show that *most* of it has been incorrectly classified. Even if one were to find that she had overestimated the amount of anti-Nixon opinion by 100 per cent and underestimated the amount of pro-Nixon opinion by 50 per cent, there would still be 2.5 times more anti-Nixon opinion than pro-Nixon opinion, a clearly "unfair" pattern. Needless to say, nobody has yet established errors of this magnitude, and it seems unlikely that anyone will.

And this brings us to a final point. By ignoring the whole question of the magnitude of Miss Efron's errors, the critics seem to be arguing that any method which is in part uncertain is wholly invalid. This objection applies not only to Miss Efron's study but to every similar content analysis. For content analysis of this sort—consisting as it does in identifying opinion and classifying it as positive or negative—is inherently problematic because any definition of opin ion is problematic. Such content analysis is not invalidated when one discovers that some material that one personally considers neutral has been classified as pro or con opinion, or vice versa. It is invalidated only when procedures for identifying and classifying opinion are not followed systematically or when the procedures embody a wildly and uniformly unreasonable notion of opinion. Neither appears to be the case with Miss Efron's study. Of course, one is perfectly free to decide that any method that is so inherently arbitrary and uncertain should be abandoned altogether and its findings simply disregarded; some academic content analysts have done as much. But anyone who takes this view is also rejecting the entire notion of "fairness" in journalism. "Fairness" presupposes that opinion can be identified and categorized with reasonable accuracy and consistency; after all, what is a reporter who adheres to the formulae of "fairness" in writing a story doing but making an on-the-spot content analysis? Some critics' arguments have come dangerously close to denying not only the validity of Miss Efron's study but also the possibility of a "fair" (and therefore, by its own standards, legitimate) journalism. This latter, one feels sure, is not exactly what they have in mind.

Ultimately, the validity of the Efron study will not be definitively confirmed or falsified until someone undertakes a complete reanalysis of her transcripts. One can be fairly certain that when that happens, all her specific numbers will be revised, some of them substantially, but that the general pattern—at least concerning Nixon—will be confirmed. For quite apart from Miss Efron's book, there is ample evidence for believing that the networks' coverage of Nixon during the 1968 campaign was indeed substantially "unfair" in the sense that it presented much more negative than positive material about him, and that their coverage of Humphrey (and possibly also Wallace) was significantly less so. The question to be asked, then, is not whether this happened—very probably it did. The really interesting question is how and why it happened, and what it means.

Is a campaign an issue?

The intuitive reaction to Miss Efron's work is to conclude, as Miss Efron herself does, that the networks' coverage was clearly, even overwhelmingly, biased against Nixon. From there it seems but a short and logical step to the further conclusion that the cause of this slanted coverage must have been the personal political opinions of the network newsmen. As a group, after all, they are mostly liberals, and as liberals they have not only an innate dislike for Republicans and conservatives in general, but also the American liberal's special historical animus against Nixon in particular. So, on the face of the matter, it seems plausible to conclude that what Miss Efron has found is biased reporting by biased reporters animated solely by their bias—not a pretty picture in a democracy, implying as it does the systematic manipulation of public opinion by a powerful few for their own favored political ends.

But in this case, as in so many others, what seems intuitively obvious turns out, on closer inspection, to rest on assumptions that are not obviously true at all. For in describing the coverage of Nixon as "unfair"—and therefore "biased"—merely on the evidence of the relative amount of pro and con opinion, Miss Efron tacitly assumes that a national election is essentially an "issue" and that each candidate and his campaign represent a "side" of that issue. If this were the case, then "fair" campaign reporting would indeed consist, as Miss Efron supposes, in an equally lengthy and forceful description of each side's position in a way that advantages no side. But the principle of fairness she uses here is only one of *two different "fairness" principles* that journalists apply.

When they perceive the subject of one of their stories as an "issue"—something on which one "takes sides"—journalists do indeed apply this "equal treatment" test: They try to guarantee equality of textual *results*, so that their reportage confers no differential advantage or disadvantage upon any party to the dispute. On the other hand, the subject of a story may not be perceived as an issue or dispute at all. For instance, if a public official is caught with his hand in the till and subsequently is convicted for it, this event is not an "issue," even though the official may insist on his innocence. The journalistic report will necessarily contain a preponderance of negative opinion concerning the official. In this context, journalistic "fairness" would *not* demand that a reporter balance his story with some favorable item about the official, so that a reader's total impression would be of equal amounts of good and bad. The story would be unfair only if disadvantage were conferred through an arbitrary or deliberately inconsistent application of the established rules and routines of news reporting or through some falsification of the facts.

In short, where the story's subject is perceived not as an *issue* but as an *event* or *action*, the "equal treatment" criterion simply does not apply; under these circumstances, one is not justified in inferring "unfairness" from the presence of a preponderance of disadvantaging or advantaging content. "Unfairness" in these circumstances exists only where too much or too little disadvantage (or advantage) is conferred as a result of unsystematic or partial use of the conventional concepts and rules of news. Needless to say, it is next to impossible to demonstrate "unfairness" of this kind.

So the critical question for Miss Efron's conclusions is this: Did the television networks perceive the 1968 campaign as an issue? If they did, then both Miss Efron's data and her interpretation are conclusive; the networks stand condemned by their own standard of fairness, and one can only assume that the unfairness of their coverage reflects the newsmen's personal animus against Nixon. But if in fact the networks saw the campaign as something other than an issue, her findings are not so conclusive after all—at least not by the established traditions of American journalism and the FCC's Fairness Doctrine. Of course, one may still conclude from her data that Nixon (or for that matter Humphrey or Wallace) was treated unjustly or inadequately. But in this case the standard of justice or adequacy will be one's own, not the official or traditional journalistic one; the standard will have to be defended; and the explanation of the injustice or inadequacy of coverage will probably be found not in the reporters' personal opinions (which is how any deviation from professional news standards usually is explained), but rather in the established routines and concepts of gathering, selecting, and writing news (since it is almost certain that one's own standards will be different from those of the craft of journalism).

For several reasons, Miss Efron's interpretation—that the campaign was an issue, that the networks saw it as such, and that their actual coverage therefore was deliberately biased—seems unsatisfactory. First, anyone who watched the networks' coverage in 1968 could not help but notice their massive and almost single-minded concentration on those aspects of the campaign with only a most distant relation to the "issue" of who ought to be president—the physical events, human dramas, crowds, happenings, rallies, speeches, motorcades, balloons, etc., etc. Insofar as they saw the campaign in these terms, the "equal treatment" standard did not apply. In the second place, the networks were meticulously fair about giving the two major candidates almost exactly equal *amounts* of coverage. Thus, insofar as they did perceive the campaign as an issue—as a choice between two men—they did indeed adhere to an "equal treatment" standard of fairness. And this suggests in turn that where the networks' coverage did not meet the equal treatment test, the reason was simply that *they saw the campaign not as an* *issue but as a series of events, actions, people, etc.;* that they reported those events in accordance with the established definitions and formulae of "news"; and that any advantage or disadvantage thereby conferred on the candidates was the direct result of those definitions and formulae themselves. If so, then what Miss Efron's numbers measure is not bias against Nixon himself because of his personality, party, or opinions, *but rather bias against someone like Nixon for reasons of his journalistically-defined situation and identity;* and the cause of this bias is not the personal political sentiments of reporters—not their will to unfairness—but rather the nature of the television news form itself. In other words, what Nixon encountered in 1968 was not an essentially *political* bias, it was an essentially *journalistic* bias.

The television news form

To see how this is so, one must begin by appreciating the television news story as a form, which is most readily grasped by contrasting it to the form of the newspaper news story. In newspapers, the subject and focus of every story is an *event,* which is described in the headline and lead paragraph. The rest of the story, which elaborates upon the event according to an established routine of description (who, what, where, when, how, and why), is discursive almost to the point of formlessness; it ends simply by trailing off or, more often, by being arbitrarily cut off by an editor. The story is narrated in a highly impersonal manner; the reporter never directly reveals himself; and all statements are presented as impersonal statements of fact.

By contrast, a television news story cannot assume this discursive structure. Its principal need is for a clear, continuous narrative line sustained throughout the story—something with a beginning, a middle, and an end that will create, maintain, and if possible increase the viewer's interest (otherwise, he might switch to another channel). Because of this need, a television story cannot focus simply on an event and go on to describe serially its component parts; it needs instead a *theme* which can be sustained throughout the story. This focus on theme rather than event is symbolized by the role which the reporter assumes in television—no longer a self-effacing and impersonal figure, as in newspapers, but a highly visible and distinctive one whose personality and sustained presence are an additional device lending unity and intelligibility to the story. The focus on theme also determines the role of facts and simple events in the story: They no longer constitute the story's major interest, as in newspapers; they become instead the materials with which the chosen theme is illustrated.

These three elements and needs of the form—a suitable theme, a short and simple but continuous narrative, and the use of events as illustrative materials—powerfully affect the content of television news in various ways. For one thing, they endow television news with a strong preference for personifying and dramatizing, for representing institutions, situations, general developments, and the like, by means of the actions, predicaments, moods, or statements of individual people. And more generally, the form guarantees that *the typical television news story will be far more interpretive than a newspaper news story*. In a campaign, for example, whereas a newspaper will focus primarily on the events of a campaign—a rally here, a major address there—television coverage focuses not on events but on the general trends, situations, and dynamics of the campaign, which it illustrates with materials gathered at the events. Thus, the tendency of TV campaign reporting is to disregard the surface of events in preference for explaining what's really going on underneath. And this leads to a further consequence of the form: It tends to make TV campaign reporting much more repetitious and uniform, substantively, than newspaper reporting. For newspapers, a campaign story is different every day because it focuses on a different particular event, but television news stories change only as fast as the underlying campaign situation changes—if it changes at all. In 1968 it changed very little, as a result of which the themes of television news coverage were almost changeless and thus almost timeless. Only the illustrative materials changed, and on any given day not even these could be relied on to be uniformly up-to-the-minute.

So the content, and therefore the bias of television campaign coverage depend crucially on the nature of the recurrent story themes, and these in turn depend on how the network newsmen interpret what's "really" going on beneath the surface of events. Obviously, a very important factor in the newsman's interpretation is the actual situation and dynamics of the campaign itself and the personalities, histories, idiosyncrasies, etc., of the candidates. Yet there is in principle no end to the number of different ways one could define the situation, personalities, and so on, which means that newsmen must have some basis for selecting among the possibilities. They find that basis in the intellectual traditions and operational standards of the craft of journalism; these include as one of their central elements a *narrow and distinctively journalistic model or theory of politics*, one which defines not only politics in general but also the spirit and terms in which to describe political situations. This model is the second crucial factor shaping the themes of campaign stories, and its pervasive influence largely accounts for the networks' different treatment of the three candidates in 1968.

According to this model, which has been at the heart of American journalism for something approaching a century and a half, politics is essentially a game played by individual politicians for personal advancement, gain, or power. The game is a competitive one, and the players' principal activities are those of calculating and pursuing strategies designed to defeat competitors and to achieve their goals (usually election to public office). Of course, the game takes place against a backdrop of governmental institutions, public problems, policy debates, and the like, but these are noteworthy only insofar as they affect, or are used by, players in pursuit of the game's rewards. The game is played before an audience—the electorate—which controls most of the prizes, and players therefore constantly attempt to make a favorable impression. In consequence, there is an endemic tendency for players to exaggerate their good qualities and to minimize their bad ones, to be deceitful, to engage in hypocrisies, to manipulate appearances; though inevitable, these tendencies are bad tendencies according to the model and should be exposed. They reduce the electorate's ability to make its own discriminating choices, and they may hide players' infractions of the game's rules, such as those against corruption and lying.

Seen in terms of this model, then, every campaign has two faces. In one sense, it is a lively competition for public favor and office, and to this extent it is an exciting drama of men in pursuit of their goals—a spectacle that engages the empathy and emotions of the onlooker. But in a second sense, a campaign also is a drama of men trying to deceive and manipulate their audience and thus arouses in the onlooker feelings of contempt, indignation, or fear.

This traditional and distinctively journalistic model determined in almost every respect the way newsmen defined the situations and dynamics of the 1968 campaign, the way they defined the few simple recurrent themes which gave structure and focus to most campaign news stories, and therefore also the types and amounts of opinion contained in their reportage.

Themes of campaign coverage

The networks defined Humphrey's situation in the campaign as that of the underdog, and virtually all their news stories about him centered around the theme of "underdog." On this theme there were a number of variations. Particularly in the early weeks of the campaign, the theme was defined in terms of the sources of his underdog status—the disarray of the party after the Chicago convention, the disorganization and poverty of Humphrey's campaign, the candidate's close association with the person and policies of Lyndon Johnson, the candidate's garrulous and unconvincing effort to appear optimistic in the face of almost certain defeat, and, in general, the confusion and inefficacy of his entire campaign effort. A second variation, which began to develop toward the mid-point of the campaign, was that of the underdog confronting and beginning to overcome the causes of his underdog status. Here the focus was particularly on Humphrey's own efforts and achievements: the apparent break with Johnson symbolized by the Salt Lake City speech, the foray into the South ("Wallace country"), the frontal attack on both Wallace and Nixon ("Richard the Chicken-Hearted"), and the dramatic renewal of the candidate's confidence, enthusiasm, and charm. The third variation was that of the underdog gaining momentum and making dramatic progress toward a possible upset victory, as reflected in the reversal of the Wallace tide, the unification of the Democratic party around its candidate (yielding many endorsements, which of course counted as "pro" opinion in Miss Efron's study), the increase in campaign contributions, the candidate's steady progress in the public opinion polls, and, finally, the candidate's growing conviction that he would win.

This theme in its three variations was the cognitive underpinning of most network news stories on Humphrey and determined the selection and presentation of events, facts, etc. Especially because of the early opposition to Humphrey from the left, campaign reportage contained roughly equal amounts of favorable and unfavorable opinion; but the overall image of the underdog enthusiastically battling to overcome his predicament against great odds and coming within an inch of triumph was the central story—and an immensely appealing personal drama of rags-to-near-riches it was.

The networks defined Nixon's situation as that of the front runner—a big lead in the polls, an experienced campaigner with a well-organized campaign effort, large amounts of money, a unified party, in short, a player who needed only to hold onto his lead in order to win the game. On this theme there were three major variations. One emphasized the consequences of the candidate's position as front runner—the reasonable and statesmanlike role he could take, his ability to avoid political gut-fighting, his opportunity to make thoughtful speeches on subjects like the American spirit, East-West trade, and other such recondite matters, his reluctance to attack Humphrey and Wallace directly or at length, and the like. But if this variation of the front runner theme often proved favorable to Nixon, the other two variations did not. One of these, which found its way into a great many stories on Nixon, fixed attention on the characteristic problems of the front runner: how to maintain his lead and how to do it most effectively. This variation on the front runner theme, of course, focuses directly on the campaign as an exercise in the calculated, organized, well-funded manipulation of appearances and public opinion; and stories built around this theme emphasized the deliberateness, the lack of spontaneity, and the deceptiveness of all campaign events—the fact that behind every enthusiastic rally there are advance men at work creating and directing an audience; that in every public statement on some issue there lurks a tactical intelligence calculating what position will gain the most votes or lose the fewest, and so on. This theme accounted for much of the negative opinion on Nixon identified by Miss Efron's study.

Nixon was disproportionately the subject of this theme not only because of his front runner status but also because of the personal drama surrounding him in the last several weeks of the campaign. This constituted the third variation on the front runner theme: the psychological drama of the front runner facing the spectacle of his commanding lead dwindling day by day as Humphrey's fortunes rose. The stories built around this variation pictured Nixon, in contrast to the outgoing and enthusiastic "happy warrior" Humphrey, as an introspective man, calculating whether victory was again going to slip through his fingers and trying to avoid doing anything hasty or impetuous to invite that fate.[2] Here, too, the effect was to present an unfavorable image of the candidate.

In sum, while it is true that some of the anti-Nixon opinion in network coverage derived from Humphrey's and other Democrats' attacks on Nixon, a very large amount of it derived from the front runner theme, especially in its second and third variations. At least in the American democracy, to describe a man and his campaign in a way that calls attention to their manipulative intention is not exactly to flatter him.

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[2] ABC provided the most extreme example of this kind of story while reporting a Nixon rally in Syracuse, New York. After an introduction, the reporter said: "You can almost feel him struggling with himself. 'Hold on, Richard. You've come so far and you're almost there. Don't blow it now.' . . . Well, that's difficult, especially when his natural instinct is to smash the enemy with a club or go after it with a meat axe. . . . Richard Nixon's most interesting and vital struggle is not with Hubert Humphrey or with George Wallace, but with himself." (ABC, 10/30/68)

The theme of most Wallace stories was that he not only reflected but also created division and violence wherever he went. As a result of the emphasis on division and conflict, these stories contained roughly equal amounts of pro-Wallace and anti-Wallace opinion; but the overall theme, it need hardly be pointed out, was scarcely neutral as to the essence of the Wallace phenomenon. Here too the theme was supplied by the journalistic model of politics, which discounts ideology and issues and prefers to focus attention on (among other things) a player's impact on the electorate—especially when that impact leads to incidents (e.g., a riot) that are eminently "televisable."

Humphrey the underdog, Nixon the front runner, and Wallace the sower of discord and violence—these were the central themes which the networks repeated day after day as they looked beneath the surface of events to plumb what really was happening in the campaign. The themes derive directly from an established and distinctively journalistic way of understanding politics, and the extraordinary power they exercised over the content of network coverage was a direct consequence of the peculiarities of the form of the television news story. The resulting pattern of coverage was far from neutral in its depiction of the various candidates; but although the effect of this non-neutrality was, or may have been, political, its cause appears to have been almost completely journalistic in nature. And so, at least in a narrow sense, the networks' indignant rejection of those who have charged them with "political bias" in reporting the 1968 campaign has some justification. It would appear that they were indeed merely reporting what they saw as the news fairly and impartially, and that if the news conferred advantage or disadvantage on any candidate, it did so primarily because of the inherent biases of television news as a distinctive form of discourse.

On the margins, it is true, the personal political opinions of the newsmen almost certainly influenced the content of television campaign coverage. The extremely favorable reporting on Muskie seems perhaps the clearest example of such influence, and the extraordinary frequency with which the manipulative aspect of the Nixon campaign was mentioned may well be another. Even beyond these examples, it is doubtless true that network newsmen could often take pleasure in their news stories' depiction of the various candidates, for the effects of these depictions were often in harmony with their liberal political sympathies. But influence on the margins is by no means the same thing as the power to control and shape. Granting this marginal influence to the reporters' sympathies takes nothing away from the overwhelming importance of the news form itself in determining the content—and biases—of the news.

The problem of news itself

To say that in the main the networks were indeed doing a professional and "fair" job of reporting the news of the 1968 campaign may lay to rest the charge of "political bias" as it has generally been formulated, but it does not at all resolve the larger issue of the news media: not *whether* they are biased, but rather *how* they are biased. Indeed, it only sharpens that issue. If a professional job of reporting often reinforced the entire thrust of the Humphrey campaign, often presented the Nixon effort in an extremely unflattering light, and saw in the Wallace phenomenon nothing but the seeds of violence, perhaps we should begin to worry about the adequacy of the professionals' notion of news itself. Obviously news itself, as conventionally defined by the journalistic profession, has its own structural biases. This means that insofar as we rely on news in forming our mental picture of what is going on in the world, what we are receiving is not a neutral body of information, but rather information gathered and presented to illustrate certain ways of seeing the world, based on certain values and favorable to certain courses of action. If so, one issue which arises immediately is that of legitimacy: By what right do the news media propagate their own distinctive vision, which is not entirely neutral as between different sorts of candidates, or different sorts of opinions? But that, I fear, is an insoluble question. *Any* body of knowledge possesses its biases. The only way to insure that every citizen truly is the master of his own opinions is to ban *all* media (not to speak of other opinion-forming institutions). But such an imposition of ignorance would exercise its own tyranny.

A more useful question to pose is: *Which* biases are we content to let journalism possess, and which do we insist that it avoid? This is a formulation which gives us some real choice. For it is by no means clear that television news in its current form represents an optimal combination of all the available and feasible biases. As an example, consider the model of politics as a game played for personal advantage, which informs and shapes nearly every story about political campaigning. To be sure, there is much to be said for reporting this facet of electioneering. It does exist, there is deceit and worse, and people should be aware of its excesses. But it is wildly misleading to look at a campaign and see *nothing but* this. A campaign to some extent always *is* an issue, and candidates usually do present some authentic choices about the style and direction of public policy and national leadership. To ignore or minimize the serious issues implicit (and sometimes explicit) in a campaign is to deny citizens the information and analysis they need in order to make a rational decision about how to exercise their suffrage in the manner most likely to promote their own vision of how our public life should be ordered.

Nor is that the only cost of the news form as it exists today. For in its denial of the "issue" aspect of campaigning and in its cynical preoccupation with the deceptive and manipulative aspects of politics, it subtly but powerfully suggests to citizens a posture of detachment (at best) or cynical rejection (at worst) toward the political institutions of the nation. In the long run this can only weaken their capacity to perform the services which that very detachment or rejection posits as desirable.

However reassuring it may be to know that the biases of television news more often than not have their origin in the news form rather than in reporters' personal opinions, it is disconcerting in the extreme to discover, when one examines that form, how frivolous, mean-spirited, and intellectually impoverished a form it is. It clearly would be desirable for reporters to see *more* themes, developments, and phenomena in the campaigns and other events they cover. Thus, what is needed is a pluralizing of the themes of "stories," and an expansion and improvement of the "vocabulary" of the television reporter and editor. Perhaps the current controversy will convince the networks of the utility, and possibly even the merit, of this kind of self-reform. In any case, this is not the sort of reform which Congress or the FCC can undertake, or even stimulate; government intervention would be almost certain to make things worse. For what is required is not some new law; it is instead an enlargement of the journalistic imagination and an expansion of the journalists' vision. This is not to say that newsmen should try to become social scientists or political theorists—if they tried they would probably fail, and besides, there is much of value to be learned from a uniquely journalistic view of the world. Only journalists can decide what this view is to be; but to do so intelligently they must face up to the fact that no form is without bias, and that the biases of the current news form clearly are less than optimal.

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SELECTED BIBLIOGRAPHY OF WORKS RELEVANT TO A CONSIDERATION OF FIRST AMENDMENT ISSUES RAISED BY GOVERNMENT REGULATION OF COMMUNICATIONS MEDIA CONTENT WITH SPECIAL EMPHASIS ON THE BROADCAST MEDIA

Note: Because of the changing judicial interpretation of First Amendment requirements in the area under consideration, the material is arranged chronologically by year so that the works referred to can be considered in the context of the changing judicial climate. Also, the emphasis is on works published in the last decade although some references to earlier works are included for background information.

There are some subtopics to which few references, if any, are made although they may be relevant to a discussion of the effect of the First Amendment on the communications media. Examples of subtopics not included are works which discuss the conflict between the government seeking to force a reporter to reveal the source of his information and the reporter attempting to keep the sources secret and, to give another example, the conflict which may arise in attempts by the press to keep the public informed about a court trial and the efforts of the government to insure that the trial will not be unfairly prejudiced by publicity.

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ELIZABETH YADLOSKY
Legislative Attorney.

The Investigation of Newsman Daniel Schorr

November 12, 1971.

Hon. Richard M. Nixon
The President,
The White House.

Dear Mr. President: As you know, the Senate Subcommittee on Constitutional Rights has been conducting hearings on the state of freedom of the press in our country. We are giving special attention to the relationship between government and the press and the impact of this relationship upon First Amendment freedoms.

In personal letters inviting several high-level officials of your Administration to present testimony to the Subcommittee, I have expressed my concern over the increasing suspicion of many Americans that government appears anxious to use its power to control the press for its own purposes. Recent newspaper reports of an alleged investigation of Mr. Daniel Schorr, correspondent for Columbia Broadcasting System, by the Federal Bureau of Investigation, have clearly exacerbated this suspicion. One report suggests that this investigation was undertaken under the guise of considering Mr. Schorr for a top position in the Federal government. Apparently neither Mr. Schorr nor various White House officials with general responsibility in the area of recruiting were aware of any such appointment under consideration.

I am deeply concerned over the fears, even unwarranted fears, which may arise from the public reports concerning the alleged investigation of Mr. Schorr. First Amendment freedoms can be stilled by intimidation and suggestion from those who have official power just as surely as they can by direct curtailment.

I should like to urge that you make inquiry into this matter and that you provide me with any information developed therefrom. I also intend to invite Mr. Schorr, Mr. Malek, Mr. Colson and other persons involved in this incident to appear before the Subcommittee when it resumes hearings on freedom of the press early in January. In addition, may I express again the desire of the Subcommittee on Constitutional Rights to have Mr. Klein or some other official of comparable responsibility from the White House also testify.

With kindest wishes,

Sincerely yours,

Sam J. Ervin, Jr.,
Chairman.

The White House,
Washington, D.C.

Hon. Sam J. Ervin, Jr.,
U.S. Senate, Washington, D.C.

Dear Senator Ervin: This is in response to your letters of December 3, 1971 to the President, Mr. Frederick V. Malek and Mr. Charles W. Colson concerning the investigation of Mr. Daniel Schorr.

You have indicated in your letter to the President that your inquiry is prompted by concerns and suspicions which have risen in connection with this matter and the need to put them to rest. We fully agree that any concerns and suspicions which have arisen must be eliminated and we have moved to do just that by publicly stating the precise reason the investigation of Mr. Schorr was conducted. Also, upon reviewing this matter, the President has made it the policy of this Administration that such preliminary job clearance investigations will not be initiated without prior notification to the person being investigated.

Despite some inaccurate conjecture to the contrary, the facts in this situation are quite simple. Mr. Schorr was being considered for a post that is presently filled and a routine job investigation was commenced without notifying Mr. Schorr. Mr. Malek's office was performing in its general area of talent searching in this matter. Mr. Colson's office was not involved in the matter at all. Given these facts, there is nothing more we believe can be added to clarify the situation.

With respect to your request for the appearance of Mr. Malek and Mr. Colson before your Subcommittee, it has been a matter of long-established principle and precedent that members of the President's immediate staff do not appear before Congressional committees to testify in regard to the performance of their duties as members of the President's staff. This practice is, indeed, fundamental to the operation of our system of government.

Therefore, I wish to advise you that Mr. Malek and Mr. Colson respectfully decline the invitation to testify.

Sincerely,

JOHN W. DEAN, III.
Counsel to the President.

JANUARY 24, 1972.

HON. J. EDGAR HOOVER,
Director, Federal Bureau of Investigation, Department of Justice, Washington, D.C.

DEAR MR. HOOVER: As you may know the Senate Subcommittee on Constitutional Rights is studying the state of freedom of the press in America. In this connection the Subcommittee conducted a series of hearings in the fall of 1971 and will resume them on February 1, 1972.

One of the primary concerns of the Subcommittee's study is the relationship between government and the press. Many Americans, rightly or wrongly, have become suspicious about government's commitment to First Amendment principles. Several developments of the past few years have exacerbated these suspicions. One recent incident, involving Mr. Daniel Schorr of the Columbia Broadcasting System, has raised expecially widespread and serious concern.

Mr. Schorr publicly reported that the Federal Bureau of Investigation conducted an investigation of him last year at a time when Mr. Schorr was reporting on the Administration's economic policies. Administration spokesmen subsequently stated that this investigation of Mr. Schorr was authorized and conducted pursuant to the Administration's consideration of Mr. Schorr for a government appointment. Mr. Schorr, in turn, responded that he had had no knowledge of such consideration. Although President Nixon has said that in the future no such investigation will be initiated without informing the person involved, there are serious questions concerning this matter which remained unanswered.

The Subcommittee has invited Mr. Schorr and certain White House officials reportedly involved with this incident to appear before the Subcommittee. Mr. Schorr has agreed to testify, but we have as yet not heard from the White House officials.

The Subcommittee would appreciate any information which the FBI has concerning this incident. Specifically, we would like to know under what and whose authority the FBI conducted its investigation. We would like to know when the investigation was begun, who in the White House ordered it, and when the investigation was terminated. We would like to know approximately how many persons were questioned about Mr. Schorr, the kind of information the FBI was asked to gather, and the general nature of the investigation. Finally, we are interested in knowing what has happened to any records, files, or other materials collected in the course of the investigation.

The Subcommittee will be grateful to this and other information the FBI can supply concerning this matter. I am sure that you know of my continuing high regard for the outstanding work of the FBI and of my personal admiration for your leadership over the years.

With kindest wishes,

Sincerely yours,

SAM J. ERVIN, JR.,
Chairman.

JANUARY 27, 1972.

HON. SAM J. ERVIN, JR.,
Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

MY DEAR MR. CHAIRMAN: Reference is made to your letter dated January 24, 1972, regarding the investigation of Mr. Daniel Louis Schorr.

Investigation of Mr. Schorr was requested on August 19, 1971, by a member of the White House staff, authorized to request federal personnel background investigations. The investigation was referred to our field offices, but no inquiries were conducted until the morning of August 20, 1971. Mr. Schorr was contacted at approximately 8:30 a.m. on August 20, 1971, to obtain appropriate background data. He was informed of the investigation and later that morning made background data available to us. At approximately 3:00 p.m. on the same day, we learned from officials of the Columbia Broadcasting System that Mr. Schorr desired the investigation to be discontinued. The investigation was discontinued at approximately that hour pursuant to instructions from the White House. Prior to the discontinuance of our investigation, twenty-five persons were interviewed concerning Mr. Schorr.

This Bureau was not specifically requested by the White House to obtain any particular type of information during the investigation. The investigation was requested as a routine background investigation for possible federal appointment in which we make inquiries regarding a person's character, loyalty, general standing, and ability.

The incomplete investigation of Mr. Schorr was entirely favorable concerning him and the results were furnished to the White House.

Sincerely yours,

J. EDGAR HOOVER,
Director, Federal Bureau of Investigation.

UNITED STATES SENATE,
Washington, D.C., February 3, 1972.

HON. J. EDGAR HOOVER,
Director, Federal Bureau of Investigation, Department of Justice, Washington, D.C.

DEAR MR. HOOVER: On yesterday, I was astounded at what was reported to be a news article in the Washington Post which stated that on the previous day I stated during the course of an investigation into the Daniel Schorr matter that I intended to propose some legislation to limit the activities of the FBI. On yesterday morning, the Subcommittee resumed the hearings, and I made a statement on this subject, a copy of which I enclose.

The entire article seemed to be based on inferences drawn from a mere remark on my part that I did not think that any person in the Executive Branch of the service should ask the FBI to make an investigation of the qualifications of any man for appointment to a public office unless such official first ascertained from such individual that he would accept such office if offered, and advise the official that an investigation was being made in connection with the prospective appointment.

The FBI certainly did not do anything except its legal duty in initiating the investigation of Mr. Schorr at the instance of some official in the White House.

With all kind wishes, I am

Sincerely yours,

SAM J. ERVIN, JR.

OPENING REMARKS BY SENATOR SAM J. ERVIN, JR.

Yesterday during the hearings I made certain oral statements. There is always a hazard in making oral statements which is two-fold. The person who makes an oral statement may not express himself correctly or he may not be correctly understood by some of his audience.

I refer to certain statements attributed to me, and if I made any remarks justifying these statements, they certainly were inadvertently made. I did not blame the FBI in any way for its investigation of CBS commentator Daniel Schorr. I don't think Mr. Schorr criticized the FBI in any way in respect to that investigation.

Under the laws and the Executive Office, the FBI is an agency of the executive branch of the Federal Government and it is required to make an investigation whenever ordered to do so either by the President as the head of the executive branch of the Government or any person whom it believes is authorized to speak for the President, and likewise when requested by the Department of Justice.

The FBI merely performed its duty in this case. I accept at face value the statement of Mr. J. Edgar Hoover that the FBI was requested by a properly authorized person in the White House to make the investigation of Mr. Schorr with a view to determining his fitness from the standpoint of character and loyalty to fill some Federal office which was not designated to the FBI or to anybody else.

I do agree with Mr. Schorr's observations that before any official, who is authorized by the executive department to request the FBI to make an investigation to determine fitness for the appointment to Federal office, acts, that official should inform the person being investigated of the investigation, of the objective of the investigation, and the office for which he is being considered.

With due respect to everybody concerned, I think there is a certain amount of stupidity demonstrated by investigating a man's fitness for appointment to Federal office without first consulting that individual and ascertaining whether he would accept the office if it is offered to him, but the FBI was not responsible in any way for that stupidity.

The FBI performs a most important function in our country. In the first place, it is necessary for those having appointive powers in the Federal Government to ascertain the loyalty and fitness of an American being considered for an appointment to a public office. Therefore, the FBI has that duty when requested to do so by a proper official.

Furthermore, the FBI is authorized to make investigations at the request of the Department of Justice. The Department of Justice is justified in making those requests whenever they have information which seems to indicate to them that some individual or some group has violated the law or is about to violate the law.

Now, if you had a law that said that the FBI or any other law enforcement agency of the government, Federal or State, couldn't investigate a person or group to ascertain whether circumstances reasonably indicated they were about to violate the law or had violated the law, unless that violation was first established, then in effect, you couldn't have any investigations at all. If the FBI, or any other agency of government that has law enforcement powers, undertakes to investigate a charge that perhaps I have violated the law or am about to violate the law, they may wind up with a finding after an investigation that I hadn't violated the law and wasn't about to violate the law.

So I just wanted to make these remarks to clarify this situation and to defuse any emotions which might have resulted from anything I inadvertently said or inadvertently was suspected of having said.

ENVIRONMENTAL PROTECTION AGENCY,
Washington, D.C., March 1, 1972.

HON. SAM J. ERVIN, JR.,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: This is in reply to your letter of January 25, 1972, regarding the hearings on the state of freedom of the press in America and the controversy surrounding Mr. Daniel Schorr, news correspondent for the Columbia Broadcasting System.

To my knowledge Mr. Schorr has not been considered for any position in the Environmental Protection Agency, nor is he under consideration for any position in the Agency at this time. The list of top-level positions which the Agency filled around August 1, 1971, or was actively recruiting for through executive assignment procedures is enclosed as requested.

Sincerely yours,

WILLIAM D. RUCKELSHAUS,
Administrator.

TOP LEVEL POSITIONS IN EPA AVAILABLE ON OR ABOUT AUGUST 1, 1971

Deputy Assistant Administrator for Solid Waste Management	GS-17
Deputy Director, Office of Public Affairs	GS-16
Regional Administrator—Region I	GS-17
Regional Administrator—Region III	GS-17
Regional Administrator—Region IV	GS-17
Regional Administrator—Region VI	GS-17
Regional Administrator—Region VIII	GS-17
Regional Administrator—Region X	GS-17
Deputy Regional Administrator—Region III	GS-16
Deputy Regional Administrator—Region IV	GS-16
Deputy Regional Administrator—Region V	GS-16
Deputy Regional Administrator—Region VIII	GS-16

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., Feb 4, 1972.

HON. SAM J. ERVIN, JR.,
Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: As background for my responses to the questions in your letter of January 24, 1972, I am attaching a copy of Federal Personnel Manual Chapter 736, Investigations. Your Subcommittee staff may find it helpful to review this material, which contains detailed information on investigative policies, practices and procedures.

While it is not within our purview to issue instructions concerning investigations requested at the White House level, the requests generally are channeled as follows:

Cases on Presidential appointments requiring consent of the Senate go to the Federal Bureau of Investigation.

Cases on Presidential appointments not requiring Senate consent go to the Federal Bureau of Investigation if the request for investigation comes from the White House.

If the request for investigation emanates from the employing agency, the submission requirements outlined in the attachment are followed. These cases come to the Civil Service Commission for investigation unless the employing agency has been authorized to conduct its own investigations by agreement with the Commission. We have such agreements with the Department of Army, Navy, Air Force, State, Treasury, and FBI for Justice. The Central Intelligence Agency also conducts its own investigations.

The Civil Service Commission has not conducted any investigation of Mr. Daniel Schorr. We did receive a notice for our files that on August 19, 1971, the Federal Bureau of Investigation had initiated a personnel investigation on Mr. Schorr at the request of the White House.

The following comments in response to your questions relate to personnel investigations that are within the Commission's purview below the White House level.

When a full field "background" investigation is required because of the nature and sensitivity of the position, the prospective appointee is asked to fill out a Security Investigations Data Form giving information on a variety of essential items including employments, residence, education. Standard Form 86, used by the Commission for this purpose, clearly indicates by its title and content that it is for use in conducting the investigation. Anyone completing the form cannot help but be fully aware that he is to be investigated.

Upon receipt of the data form and a fingerprint chart, the Commission schedules the full field investigation, including a national agency check, as defined on pages 736-3 and 736-4 of the attachment. The investigations are conducted by experienced investigators, trained in the techniques of fair, objective, impartial investigating and reporting. They are under strict instructions to scrupulously safeguard the rights of individuals and to avoid unwarranted invasions of privacy while maintaining a prudent regard for the national interest.

When the investigation is completed, the reports are furnished to the employing agency. This is done because of the provisions of Executive Order 10450 which vest the responsibility for security determinations in the head of the employing agency. Transmittal of the full field reports of investigation from the Commission to the agency is strictly controlled. They are delivered only to officials properly designated and approved to receive them.

The instructions on page 736-13 of the attachment concerning custody of reports of investigation are based on the provisions of Executive Order 10450. The reports remain the property of the investigative agency that made the investigation but generally are retained by the employing agency while the employee is still on its rolls. The reports are required to be maintained in confidence and must be returned to the investigative agency when they have served their purpose—e.g., when a decision is made not to appoint or when the employee is separated for any reason. The files thus returned are maintained in secure areas and thereafter may be released only upon a showing of legitimate need for employment or security purposes. Their availability for these strictly controlled bona fide purposes avoids the considerable investigative cost that otherwise would be incurred if the same person is later considered for employment. This often occurs and the resulting savings are very substantial.

The Commission is not in a position to provide a list of the senior positions open or contemplated in the field of environmental protection as of last fall. We suggest that officials of the Environmental Protection Agency or the White House may be better able to supply such a list.

Sincerely yours,

ROBERT E. HAMPTON,
Chairman.

[From The Washington Post, November 11, 1971]

FBI PROBES NEWSMAN CRITICAL OF PRESIDENT

(BY KEN W. CLAWSON)

Acting on orders from the White House, the FBI has been investigating veteran CBS correspondent Daniel Schorr.

The investigation started Aug. 20 in the midst of one of Schorr's frequent clashes with White House aides over the quality and accuracy of his reporting.

FBI agents called on Richard Salant, president of CBS; Bill Small, CBS Washington bureau chief; Fred Friendly, former president of CBS, and even neighbors of Schorr, who lives in Georgetown, and those of his brother, Alvin, who lives in New York.

In each instance, agents said that Schorr was being considered for a "position of trust and confidence" in the government. An agent told Salant, who was suspicious of the reason for the probe, that Schorr had been proposed for a "very important job" and the White House had asked the FBI to expedite the investigation.

Most of the interviews took place during the weekend of Aug. 20.

No job offer was ever made to Schorr, but a White House official said last night that Schorr "was under consideration, among others, for a high position in the environmental area. The consideration was terminated, not for any reason that turned up in the FBI investigation, but for other reasons with respect to him and the position for which he was being considered."

The official refused to identify the environmental post.

"I now believe there was never a job to be offered," Schorr said yesterday. "Out of curiosity mostly, I have checked every source who might know without the slightest indication that I was ever considered for any post."

It was learned that the White House indeed sought from the FBI a field investigation on Schorr and, as is usual in these cases, indicated it was because Schorr was under consideration for employment in a substantial government post.

The investigation started three days after President Nixon made a speech to the Knights of Columbus in New York in which he indicated he strongly supported financial aid to parochial schools despite political and constitutional barriers. On the night of the speech, Schorr reported the President caught Catholic educators and even some HEW officials by surprise because they didn't know of any programs or initiatives in progress that could accomplish the President's apparent goal.

The following day, Aug. 18, Schorr was called by Al Snyder, an aide to White House communications director Herbert G. Klein, and asked to a meeting "to get all the facts" on White House initiatives on parochial schools.

Present were presidential speechwriter Pat Buchanan, Terry Bell, then an assistant commissioner of education, and Henry Cashen, an aide to Charles Colson, special counsel to the President.

Schorr said the quartet reeled off information so rapidly that he could not absorb it. He asked them for a simple statement of the facts, and promised he would try to air their position after checking it with his original sources.

Although his sources dismissed much of the subsequent statement as "pie in the sky," Schorr said he went on the CBS Evening News with Walter Cronkite Friday, Aug. 20, with a story giving the White House position as well as a partial knockdown by his own sources.

The FBI investigation was started earlier the same day. Schorr's bureau chief, Bill Small, refused to turn over the correspondent's personnel file to the FBI agent in view of the fact that he could not learn what job might be in the offing.

But Schorr himself answered several routine questions about his background and then ended the interview. He said he told the agent: "This is funny. If a job is going to be offered, shouldn't I know bout it?"

In addition to a background check by the FBI, standard procedure prior to a high government appointment is an investigation of the prospect's back tax records. It was learned that no such check was made on Schorr.

Schorr became more and more curious as the days went by, as friends and associates called him to report contacts with the FBI. Marjorie Hunter, a New York Times reporter and Schorr's neighbor, was queried.

Irving R. Levine, an NBC correspondent, was asked by agents about Schorr's behavior when he was CBS' Moscow correspondent from 1955 through 1957. Schorr's nephew, Ken, 18, said neighbors in New York were being asked about Schorr.

The White House official said last night that the FBI probe was initiated routinely by the office of Frederic V. Malek, chief White House recruiter.

Coincidentally, Malek and Schorr attended a dinner party together after the FBI investigation was begun. The correspondent asked Malek at the dinner if he really was under consideration for a job. Malek's reaction, Schorr said yesterday, was one of surprise. Malek told Schorr he would look into the matter and call him. Malek didn't call.

Schorr and the White House, and especially Colson, the President's special counsel, have been on the outs over Schorr's coverage of the wage-price freeze and Phase II of the government's economic plans.

Last Wednesday, after Schorr reported that the Pay Board was about to explode because of labor members' reaction to proposed guidelines, Colson called Frank Stanton, vice chairman of CBS, and complained that the report was inaccurate.

One version of the call is that Colson charged that Schorr had personally fed the story to The Washington Post and the New York Times, thereby compounding the inaccuracy. This version further alleges that when AFL-CIO President George Meany heard the Schorr television report he became so angry that he boycotted the Thursday session of the Pay Board.

Labor sources said yesterday Meany did miss the morning session, but it was because he had a doctor's appointment. The Washington Post story, written by Frank C. Porter, did not come from Schorr, according to Porter.

Stanton himself said he didn't recall enough of the conversation with Colson to be precise about it. But he said that he didn't think it would be fair to say that Colson complained vigorously about Schorr's report.

Following the coverage of the acceptance of mainland China into the United Nations, however, Colson complained to a Washington CBS official that the network had failed to show the jubilation of pro-Chinese nations after the crucial vote.

Sargent Carlton, director of governmental relations for CBS, said Colson's complaint was relayed to Salant in New York. Earlier that day, the White House had denounced as "shocking" the "demonstration of undisguised glee shown by some" U.N. delegates.

All that was clear last night was that Schorr was secure in his job at CBS, and that his chances, if he ever had any, for a high position of "trust and confidence" in the government, were dead.

[From the Washington Post, November 12, 1971]

WHITE HOUSE DEFENDS PROBE OF TV NEWSMAN

(By Ken W. Clawson)

The White House said yesterday the FBI investigation ordered on CBS correspondent Daniel Schorr was not intended to intimidate the newsman, who has often clashed with the administration over the fairness and accuracy of his reports.

Presidential press secretary Ronald L. Ziegler said Schorr was being considered for a position in the administration, which he described vaguely as in the "environmental area."

This is why, Ziegler said, White House talent scout Frederic V. Malek or one of his subordinates ordered an FBI investigation into Schorr's background last August.

Ziegler stressed that during the three years of the Nixon administration there has not been a single example of government intimidation of a newsman.

On the House floor, however, Rep. James H. Scheuer (D-N.Y.) called for a congressional investigation of what he called the "administration's attempt to control the news." Sen. John Tunney (D-Calif.) made a similar plea for an investigation, alleging that Schorr appeared to be the victim of "harassment and intimidation."

Chairman Emmanuel Celler (D-N.Y.) of the House Judiciary Committee was reported to have asked Attorney General John N. Mitchell for an explanation of the FBI investigation.

Ziegler's extended defense of the propriety of investigating Schorr before he was notified he was a candidate for a government post, appeared to harden Schorr's conviction that he was the victim of "something."

"I remain more convinced than ever that there never was a job" for which he was being considered, Schorr said.

But he said CBS policy prevented him from discussing the issue on television. He added that he was not going to allow himself "to be pushed into a crusade to make it possible for the administration to establish the bias they already accuse me of anyway."

Although Ziegler said the FBI probe came through Malek's office, he refused to disclose the number of White House aides who have the authority to ask for an FBI investigation of individuals.

He did say that neither he nor Charles Colson, special counsel to the President who has complained to CBS about some of Schorr's reports, has the authority to request such a probe.

[From the Washington Post, January 31, 1972]

WHITE HOUSE WEIGHED JOB FOR SCHORR

(By Carroll Kilpatrick)

A White House official said yesterday that CBS correspondent Daniel Schorr was under consideration last year to be assistant to the chairman of the Council on Environmental Quality.

The official told The Washington Post that Schorr's name was considered for the position by Frederic V. Malek, chief White House recruiter, and that his discussion of Schorr's name with aides triggered the FBI investigation of the correspondent.

Schorr is scheduled to testify today at the opening of hearings called by Sen. Sam J. Ervin (D-N.C.) on press freedoms. Ervin is chairman of a Senate constitutional rights subcommittee.

Ervin charged last night that the White House has refused to permit any of its officials to testify at the hearings.

He said he had requested Malek, Special Counsel Charles Colson and Communications Director Herbert G. Klein to testify to set the record straight, but all declined.

Ervin said the only response was a letter from John W. Dean III, counsel to the President, who wrote, "This matter has been fully and carefully reviewed. There are no indications of any intent on the part of anyone in the White House to harass or intimidate Mr. Schorr by initiating an investigation into his background."

Ervin also released a letter from FBI Director J. Edgar Hoover supporting the White House explanation that Schorr was considered for an administration job.

"My mind is open on whether there was a job," Schorr said yesterday when informed of the White House official's comment.

"That is not the issue. The issue is whether the administration should have the FBI investigate anyone not accused of a crime without his consent."

Schorr said he had heard nothing about a job offer or the nature of the job from the time the FBI first began investigating him last August to the present.

After the news broke that the correspondent was under investigation his name was dropped from consideration. Since then other well known TV newsmen have been interviewed in connection with the job, the official said. He declined to give their names, but he said the job had not been filled.

There are plans to undertake the project, whether under the direction of someone brought in from the outside or by someone already in the government, the official said.

The FBI investigation of Schorr brought accusations that the administration was seeking to intimidate Schorr, who had been critical of administration policy on a number of occasions.

Schorr had never been told he was under consideration for a job and had not sought one. He said in November, when news of the investigation broke, that he did not believe there was a job to be offered.

"Out of curiosity, mostly, I have checked every source who might know without the slightest indication that I was ever considered for any post," he said in November.

White House press secretary Ronald L. Ziegler said at the time that the administration definitely had a job in mind for Schorr, but he declined to say what it was on the grounds it would make it more difficult to fill the post.

Ziegler did say that it was in the environmental area, and he promised to disclose the nature of the job later.

The official who gave The Post the information yesterday said Schorr had been considered because of his prominence and experience as a TV newsman and because he had done important work in the environmental area. Schorr's broadcasts have included reports on environment issues.

Malek knew that Schorr had been critical of the administration on occasion, the official said. But Malek was under instructions from President Nixon to find ways to encourage individuals to do more to help clean up the environment.

Malek and Russell E. Train, director of the Council on Environmental Quality, agreed that the best way to enlist public support for individual initiative in the environmental field was with a series of television programs, the official explained.

The President was not told that Schorr was being considered. When criticism developed over the FBI investigation, the President, according to Ziegler, directed that in the future no FBI investigations be started on a person being considered for a job without his knowledge.

[From The Washington Post, Friday, November 12, 1971]

THE "ROUTINE" INVESTIGATION OF DANIEL SCHORR

(An Editorial)

"I now believe there was never a job to be offered"—the remark was made by CBS correspondent Daniel Schorr apropos of the strange goings on between the White House, the FBI and Mr. Schorr's friends, neighbors, relatives and employers who were interrogated about him recently by federal agents claiming he was under consideration for a high level government job. In response to Ken Clawson's story about all this in The Washington Post yesterday, the President's spokesman, Mr. Ziegler, has asserted (1) that Mr. Schorr was being investigated as a candidate for a position in government, (2) that the administration is not at liberty to say what that position was and (3) that no attempt at intimidation of Mr. Schorr—whose television reportage and commentary have been a source of some displeasure in the White House—was even remotely contemplated.

The known facts of the matter, the bare bones of what has been ascertained could sustain either version of the story. They are simply that Mr. Schorr has incurred the wrath and occasional complaints of Nixon administration officials—most recently of Charles Colson in the White House; that more or less simultaneously with one of these episodes in August an FBI investigation of Mr. Schorr was undertaken at the initiative of Frederic Malek's office in the White House; that the investigators were informed that Mr. Schorr was being checked out by way of clearance for a high level job; that neither Mr. Schorr nor his employers could ever find out what that job might be or whether it even existed.

We are perfectly prepared to believe—or at least to have it demonstrated—that Mr. Schorr was in fact being considered for a post in the Nixon administration. For all we know, Tom Wicker may be in line to replace Attorney General Mitchell and Sander Vanocur may be headed for our embassy in Saigon—after all, everything is *possible*. The point is that the administration would not have to be cutting through such a heavy fog of suspicion on what it insists was a "routine" check, if some of the White House staff principals involved were rather more famous for their scruples and if administration behavior in general did not make it so easy to believe that government might well be abusing its powers in this fashion. Consider Messrs. Colson and Malek, who are best known in certain political and administrative circles around town for the skill of their blunt instrument work. The scurrilous, last minute ads of the 1970 congressional campaign, the summary kicking out of Secretary Hickel's staff, the dangerous and backfiring attack on George Meany at the time of the President's announcement of his new economic policy—these are among the juicier espisodes with which these aides have been associated. We say "associated" because such things have a way of never becoming entirely open or clear. Mr. Colson in particular seems to have come to public attention chiefly through an unending series of denials and clarifications of episodes the administration would rather not discuss.

More important than the fact that these two men were said to have been involved—one with the initiation of the investigation, the other in pressing complaints with CBS—is the fact that the administration has given vent at such high levels to the idea that the media, or certain parts of it, are peopled by men and women who have neither the country's nor the government's best interests at heart. The campaign to discredit both the motives and the product of much of the press, taken together with the administration's propensity for confusing criticism with conspiracy and worse, is essential background to understanding the fuss. In past administrations, investigations have been undertaken of press leaks, as they have been in this one. The present affair is something quite different. As a measure of how far this administration has let its bad temper with the media take it, you could try a simple question on yourself: Which would surprise you more: to learn that the administration had named a well-known and highly respected critic, such as Daniel Schorr, to one of its top jobs or to learn that it had been hounding and harassing such a critic?

PROPOSED CONGRESSIONAL LEGISLATION

[S. 1311, 92d Cong., First Sess.]

Mr. PEARSON introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL To provide certain privileges against disclosure of confidential information and the sources of information obtained by newsmen

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Newsmen's Privilege Act".

NONDISCLOSURE OF CONFIDENTIAL INFORMATION

SEC. 2. Except as provided in section 4, no person shall be required by any court, grand jury, agency, department, or commission of the United States or by either House of or any committee of Congress to disclose any confidential information received or obtained by him in his capacity as a reporter, editor, commentator, journalist, writer, correspondent, announcer, or other person directly engaged in the gathering or presentation of news for any newspaper, periodical, press association, newspaper syndicate, wire service, or radio or television station.

NONDISCLOSURE OF SOURCE

SEC. 3. Except as provided in section 4, no person shall be required by any court, grand jury, agency, department, or commission of the United States or by either House of or any committee of Congress to disclose the source of any information received or obtained by him in his capacity as a reporter, editor, commentator, journalist, writer, correspondent, announcer, or other person directly engaged in the gathering or presentation of news for any newspaper, periodical, press association, newspaper syndicate, wire service, or radio or television station.

QUALIFICATIONS

SEC. 4. (a) The privilege conferred by section 2 shall not apply to any information which has at any time been published, broadcast, or otherwise made public by the person claiming the privilege.

(b) The privilege conferred by section 3 shall not apply—

(1) to the source of any allegedly defamatory information in any case where the defendant, in a civil action for defamation, asserts a defense based on the source of such information; or

(2) to the source of any information concerning the details of any grand jury or other proceeding which was required to be secret under the laws of the United States.

(c) In any case where a person claims a privilege conferred by section 2 or 3, the person seeking the information may apply to the United States district court for an order divesting the privilege. Such application shall be made to the district court in the district wherein the hearings, action, or other proceeding in which the information is sought is pending. The order shall be granted if the court, after hearing the parties, determines that there is substantial evidence that disclosure of the information is required to prevent a threat to human life, espionage, or foreign aggression.

[S. 3786, 92d Cong., Second Sess.]

Mr. CRANSTON introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL To protect confidential sources of the news media

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a person connected with or employed by the news media or press cannot be required by a court, the legislature, or any administrative body, to disclose before the Congress or any other Federal court or agency, any information or the source of any information procured for publication or broadcast.

MEMORANDUM IN SUPPORT OF PROPOSED "NEWSMAN'S PRIVILEGE ACT"

NATIONAL BROADCASTING CO.

This memorandum is submitted in support of the annexed "Newsmen's Privilege Act."

In recent years, numerous subpoenas have been served upon the press requiring testimony before various governmental bodies. It has consequently become far more difficult for the press to perform the already difficult task of providing to the public significant information relating to matters of public concern and public interest. The difficulties thus far encountered may well be accentuated unless suitable legislation is adopted.

Seventeen states currently offer some forms of protection for confidential communications made to journalists. These protections, such as they are, differ from state to state. Some are broader than S.1311, some are more narrowly defined and some generally parallel the lines of that bill. Judicial protection of the critical First Amendment rights threatened by the issuance of the subpoenas has thus far been inconsistent and often insufficient. The instant bill seeks to insure that the confidences required to enable the press adequately to inform the public will not be lost.

S.1311 has already been introduced in the Senate and is itself a significant improvement over the present patchwork of state and federal laws and rulings. The proposed bill, in several significant respects, varies from S.1311.

1. S.1311 would not by its terms prevent subpoenas from being served directly upon news media and could thus allow direct access by investigatory bodies to confidential files containing news material never published or broadcast.* The proposed draft eliminates this danger by including news media and their employees in its coverage.

2. S.1311, because of its lack of definitions, could invite substantial litigation as to its intended coverage. The proposed bill, by including definitional matter, seeks to overcome this weakness.

3. S.1311 has two significant qualifications. It does not extend its protection to the source of allegedly defamatory information in any case in which the defendant in an action for defamation asserts a defense based on such source; nor does it extend such protection to the source of information concerning grand jury or other secret proceedings.

The proposed bill eliminates these qualifications. With respect to actions based on claims of defamation, we believe claims for civil damages do not reach the stature required to override First Amendment rights of the public. Thus, in the *amicus curiae* brief of NBC in *United States* v. *Caldwell*, three minimal tests were set forth which must be met before a reporter could be required to testify: Probable cause to believe that the reporter possesses information specifically relevant to a specific probable violation of law; a showing by the investigatory body that the information sought cannot be obtained by alternative means; and a compelling and overriding interest in the information. Even if a suit for civil damages met the first two tests outlined above, it could not, in our opinion, meet the third test and therefore should not be afforded a position limiting the effective utilization of First Amendment rights.

As for the second qualification, we believe that sources concerned with grand jury or other secret proceedings are of no less value to the press than any other source. The possibility of illegal action by such sources is no more significant in this instance than in any other instance. Indeed, many of the sources of information concerning governmental function could be deemed to be in breach of some contractual or legal restriction on divulgence of information.

4. S.1311 provides a procedure wherein the privilege purportedly conferred by it may, under some circumstances, be divested by a United States district court. The New York statute, however, contains no such exceptions. We believe that the New York view is the better one and that the decision as to whether to reveal either sources or information should be left to the judgment of the person to whom the privilege is afforded.

A BILL To provide a privilege against disclosure of confidential information and the sources of information obtained by newsmen and news media

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Newsmen's Privilege Act."

DEFINITIONS

SEC. 2. As used in this Act, the following definitions shall apply:

(1) "News" shall mean written, oral or pictorial information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare.

(2) "Newspaper" shall mean a paper that is printed and distributed periodically that contains news.

(3) "Magazine" shall mean a publication containing news which is published and distributed periodically.

(4) "Radio or television station" shall mean a station, network, group or affiliation of stations, equipped to engage in the transmission by radio or television signals of writings, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus and services (among other things, the receipt, forwarding and delivering of communications) incidental to

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* Of the one hundred and twenty-three (123) subpoenas served upon NBC and CBS and their wholly-owned stations between 1969 and July 1971 (attached as Appendix A to NBC's *amicus curiae* brief in *United States* v. *Caldwell*) over seventy were addressed to either the station generally or to station custodians or librarians.

such transmission, intended to be received by the public, directly or by the intermediary of relay stations.

(5) "News medium" shall mean a newspaper, magazine, radio station and television station.

(6) "Journalist" shall mean one who is engaged in gathering, preparing, editing, analyzing, commenting on, writing or broadcasting news for a newspaper, magazine, radio station or television station.

(7) "Confidential information" shall mean any information, received or obtained by any journalist, news media employee or agent, in such capacity, not published or broadcast, which information said journalist, news media employee or agent deems to be of a secret nature.

(8) "Source" shall mean any person, document, record or animate or inanimate supplier of information.

NONDISCLOSURE OF CONFIDENTIAL INFORMATION

SEC. 3. No news medium or journalist or employee or agent thereof, shall be required by any court, grand jury, agency, department or commission of the United States or by either House of or any committee of Congress to disclose any confidential information received, or obtained in the capacity of news medium or journalist, or employee or agent thereof.

NONDISCLOSURE OF SOURCES

SEC. 4. No news medium or journalist or employee or agent thereof, shall be required by any court, grand jury, agency, department or commission of the United States or by either House of or any committee of Congress to disclose the source of any information received, or obtained in the capacity of news medium or journalist or employee or agent thereof.

JUDICIAL DECISIONS, ADMINISTRATIVE OPINIONS

SUPREME COURT OF THE UNITED STATES

(Nos. 1873 and 1885—October Term, 1970)

NEW YORK TIMES COMPANY, PETITIONER, *v.* UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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UNITED STATES, PETITIONER, (1885) *v.* THE WASHINGTON POST COMPANY ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

[June 30, 1971]

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

I adhere to the view that the Government's case against the Washhington Post should have been dismissed and that the injunction against the New York Times should have been vacated without oral argument when the cases were first presented to this Court. I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment. Furthermore, after oral arguments, I agree completely that we must affirm the judgment of the Court of Appeals for the District of Columbia and reverse the judgment of the Court of Appeals for the Second Circuit for the reasons stated by my Brothers DOUGLAS and BRENNAN. In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment.

Our Government was launched in 1789 with the adoption of the Constitution. The Bill of Rights, including the First Amendment, followed in 1791. Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says, but rather means that the Government can halt the publication of current news of vital importance to the people of this country.

In seeking injunctions against these newspapers and in its presentation to the Court, the Executive Branch seems to have forgotten the essential purpose and history of the First Amendment. When the Constitution was adopted, many people strongly opposed it because the document contained no Bill of Rights to safeguard certain basic freedoms.[1] They especially feared that the new powers granted to a central government might be interpreted to permit the government to curtail freedom of religion, press, assembly, and speech. In response to an overwhelming public clamor, James Madison offered a series of amendments to satisfy citizens that these great liberties would remain safe and beyond the power of government to abridge. Madison proposed what later became the First Amendment in three parts, two of which are set out below, and one of which proclaimed: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; *and the freedom of the press, as one of the*

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[1] In introducing the Bill of Rights in the House of Representatives, Madison said: "[B]ut I believe that the great mass of the people who opposed [the Constitution,], disliked it because it did not contain effectual provisions against the encroachments on particular rights. . . ." 1 Annals of Congress 433 (1834). Congressman Goodhue added: "[I]t is the wish of many of our constituents, that something should be added to the Constitution, to secure in a stronger manner their liberties from the inroads of power." *Id.*, at 426.

great bulwarks of liberty, shall be inviolable."[2] The amendments were offered to *curtail* and *restrict* the general powers granted to the Executive, Legislative, and Judicial Branches two years before in the original Constitution. The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly. Yet the Solicitor General argues and some members of the Court appear to agree that the general powers of the Government adopted in the original Constitution should be interpreted to limit and restrict the specific and emphatic guarantees of the Bill of Rights adopted later. I can imagine no greater perversion of history. Madison and the other Framers of the First Amednment, able men that they were, wrote in language they earnestly believed could never be misunderstood: "Congress shall make no law . . . abridging the freedom of the press. . . ." Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Governments power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Viet Nam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.

The Government's case here is based on premises entirely different from those that guided the Framers of the First Amendment. The Solicitor General has carefully and emphatically stated:

> "Now, Mr. Justice [BLACK], your construction of . . . [the First Amendment] is well known, and I certainly respect it. You say that no law means no law, and that should be obvious. I can only say, Mr. Justice that to me it is equally obvious that 'no law' does not mean 'no law', and I would seek to persuade the Court that that is true. . . . [T]here are other parts of the Constitution that grant power and responsibilities to the Executive and . . . the First Amendment was not intended to make it impossible for the Executive to function or to protect the security of the United States."[3]

And the Government argues in its brief that in spite of the First Amendment, "[t]he authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from two interrelated sources: the constitutional power of the President over the conduct of foreign affairs and his authority as Commander-in-Chief."[4]

In other words, we asked to hold that despite the First Amendment's emphatic command, the Executive Branch, the Congress, and the Judiciary can make laws enjoining publication of current news and abridging freedom of the press in the name of "national security." The Government does not even attempt to rely on any act of Congress. Instead it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to "make" a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law.[5] See concurring opinion of MR. JUSTICE DOUGLAS, *post*, at —. To find that the President has "inherent power" to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make "secure." No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this Nation for all time.

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[2] The other parts were:

"The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

"The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances." 1 Annals of Congress 434 (1834). (Emphasis added.)

[3] Transcript of Oral Argument, at 76.

[4] Brief for United States, at 12.

[5] Compare the views of the Solicitor General with those of James Madison, the author of the First Amendment. When speaking of the Bill of Rights in the House of Representatives, Madison said: "If they [the first ten amendments] are incorporated into the Constitu-

The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged. This thought was eloquently expressed in 1937 by Mr. Chief Justice Hughes—great man and great Chief Justice that he was—when the Court held a man could not be punished for attending a meeting run by Communists.

> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."[6]

SUPREME COURT OF THE UNITED STATES

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(1873)

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(1885)

UNITED STATES, PETITIONER, *v.* THE WASHINGTON POST COMPANY ET AL.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

[June 30, 1971]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK joins, concurring.

While I join the opinion of the Court I believe it necessary to express my views more fully.

It should be noted at the outset that the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech or of the press." That leaves, in my view, no room for governmental restraint on the press.[1]

There is, moreover, no statute barring the publication by the press of the material which the Times and Post seek to use. 18 U.S.C. § 793(e) provides that "who-

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tion, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Congress 439 (1834).

[6] *DeJonge* v. *Oregon*, 299 U.S. 353, 365 (1937).

[1] See *Beauharnais* v. *Illinois*, 343 U.S. 250, 267 (dissenting opinion of MR. JUSTICE BLACK), 284 (my dissenting opinion); *Roth* v. *United States*, 354 U.S. 476, 508 (my dissenting opinion which MR. JUSTICE BLACK joined); *Yates* v. *United States*, 354 U.S. 298, 339 (separate opinion of MR. JUSTICE BLACK which I joined); *New York Times* v. *Sullivan*, 376 U.S. 254, 293 (concurring opinion of MR. JUSTICE BLACK which I joined); *Garrison* v. *Louisiana*, 379 U.S. 64, 80 (my concurring opinion which MR. JUSTICE BLACK joined).

ever having unauthorized possession of, access to, or control over any document, writing, . . . or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates . . . the same to any person not entitled to receive it . . . shall be fined not more than $10,000 or imprisoned not more than ten years or both."

The Government suggests that the word "communicates" is broad enough to encompass publication.

There are eight sections in the chapter on espionage and censorship, §§ 792–799. In three of those eight "publish" is specifically mentioned: § 794(b) provides "Whoever in time of war, with the intent that the same shall be communicated to the enemy, collects records, *publishes*, or communicates . . . [the disposition of armed forces]."

Section 797 prohibits "reproduces, *publishes*, sells, or gives away" photos of defense installations.

Section 798 relating to cryptography prohibits: "communicates, furnishes, transmits, or otherwise makes available . . . *or publishes*."[2]

Thus it is apparent that Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act.

The other evidence that § 793 does not apply to the press is a rejected version of § 793. That version read: "During any national emergency resulting from a war to which the U.S. is a party or from threat of such a war, the President may, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense, which in his judgment is of such character that it is or might be useful to the enemy." During the debates in the Senate the First Amendment was specifically cited and that provision was defeated. 55 Cong. Rec. 2166.

Judge Gurfein's holding in the *Times* case that this Act does not apply to this case was therefore preeminently sound. Moreover, the Act of September 23, 1950, in amending 18 U.S.C. § 793 states in § 1(b) that:

> "Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect." 64 Stat. 987.

Thus Congress has been faithful to the command of the First Amendment in this area.

So any power that the Government possesses must come from its "inherent power."

The power to wage war is "the power to wage war successfully." See *Hirabayashi* v. *United States*, 320 U.S. 81, 93. But the war power stems from a declaration of war. The Constitution by Article I, § 8, gives Congress, not the President, power "to declare war." Nowhere are presidential wars authorized. We need not decide therefore what leveling effect the war power of Congress might have.

These disclosures[3] may have a serious impact. But that is no basis for sanctioning a previous restrain on the press. As stated by Chief Justice Hughes in *Near* v. *Minnesota*, 283 U.S. 697, 719–720:

> ". . . While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes

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[2] These papers contain data concerning the communications system of the United States, the publication of which is made a crime. But the criminal sanction is not urged by the United States as the basis of equity power.

[3] There are numerous sets of this material in existence and they apparently are not under any controlled custody. Moreover, the President has sent a set to the Congress. We start then with a case where there already is rather wide distribution of the material that is destined for publicity, not secrecy. I have gone over the material listed in the *in camera* brief of the United States. It is all history, not future events. None of it is more recent than 1968.

> the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct."

As we stated only the other day in *Organization for a Better Austin* v. *Keefe*, — U.S. —, "any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity."

The Government says that it has inherent powers to go into court and obtain an injunction to protect that national interest, which in this case is alleged to be national security.

Near v. *Minnesota*, 283 U.S. 697, repudiated that expansive doctrine in no uncertain terms.

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be. See Emerson, The System of Free Expressions, c. V (1970); Chafee, Free Speech in the United States, c. XIII (1941). The present cases will, I think, go down in history as the most dramatic illustration of that principle. A debate of large proportions goes on in the Nation over our posture in Vietnam. That debate antedated the disclosure of the contents of the present documents. The latter are highly relevant to the debate in progress.

Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be "open and robust debate." *New York Times, Inc.* v. *Sullivan*, 376 U.S. 254, 269–270.

I would affirm the judgment of the Court of Appeals in the *Post* case, vacate the stay of the Court of Appeals in the *Times* case and direct that it affirm the District Court.

The stays in these cases that have been in effect for more than a week constitute a flouting of the principles of the First Amendment as interpreted in *Near* v. *Minnesota*.

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

[June 30, 1971]

MR. JUSTICE BRENNAN, concurring.

I

I write separately in these cases only to emphasize what should be apparent: that our judgment in the present cases may not be taken to indicate the propriety, in the future, of issuing temporary stays and restraining orders to block the publication of material sought to be suppressed by the Government. So far as I can determine, never before has the United States sought to enjoin a newspaper from publishing information in its possession. The relative novelty of the questions presented, the necessary haste with which decisions were reached, the magnitude of the interests asserted, and the fact that all the parties have concentrated their arguments upon the question whether permanent restraints were proper may have justified at least some of the restraints heretofore imposed in these cases. Certainly it is difficult to fault the several courts below for seeking to assure that the issues here involved were preserved for ultimate review by this Court. But even if it be assumed that some of the interim restraints were proper in the two cases before us, that assumption has no bearing upon the propriety of similar judicial action in the future. To begin with, there has now been ample time for reflection and judgment: whatever values there may be in the preservation of novel questions for appellate review may not support any restraints in the future. More important, the First Amendment stands as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented by these cases.

II

The error which has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise. The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.* Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overriden. Our cases have thus far indicated that such cases may arise only when the Nation "is at war," *Schenck* v. *United States*, 249 U.S. 47, 52 (1919), during which times "no one would question but that a Government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Near* v. *Minnesota*, 283 U.S. 697, 716 (1931). Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at isue would cause the happening of an event of that nature. "The chief purpose of [the First Amendment's] guarantee [is] to prevent previous restraints upon publication." *Near* v. *Minnesota*, *supra*, at 713. Thus, only governmental allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary. And therefore, every restraint issued in this case, whatever its form, has violated the First Amendment—and none the less so because that restraint was justified as necessary to afford the court an opportunity to examine the claim more thoroughly. Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue.

***Freedman* v. *Maryland*, 380 U.S. 51 (1965), and similar cases regarding temporary restraints of allegedly obscene materials are not in point. For those cases rest upon the proposition that "obscenity is not protected by the freedoms of speech and press." *Roth* v. *United States*, 354 U.S. 476 (1957). Here there is no question but that the material sought to be suppressed is within the protection of the First Amendment; the only question is whether, notwithstanding that fact, its publication may be enjoined for a time because of the presence of an overwhelming national interest. Similarly, copyright cases have no pertinence here: the Government is not asserting an interest in the particular form of words chosen in the documents, but is seeking to suppress the ideas expressed therein. And the copyright laws, of course, protect only the form of expression and not the ideas expressed.

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[June 30, 1971]

MR. JUSTICE STEWART, with whom MR. JUSTICE WHITE joins, concurring.

In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative[1] and Judicial[2] branches, has been pressed to the very hilt since the advent of the nuclear missile age. For better or for worse, the simple fact is that a President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government.

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.

Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is.[3] If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is an awesome responsibility, requiring judgment and wisdom of a high order. I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained. But be that as it may, it is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign perogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

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[1] The President's power to make treaties and to appoint ambassadors is of course limited by the requirement of Article II, § 1, of the Constitution that he obtain the advice and consent of the Senate. Article I, § 8, empowers Congress to "raise and support Armies," and "provide and maintain a Navy." And, of course, Congress alone can declare war. This power was last exercised almost 30 years ago at the inception of World War II. Since the end of that war in 1945, the Armed Forces of the United States have suffered approximately half a million casualties in various parts of the world.

[2] See *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103; *Hirabayashi* v. *United States*, 320 U.S. 81; *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304; cf. *Mora* v. *McNamara*, cert. denied 389 U.S. 934.

[3] "It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted. . . ." *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, at 320.

This is not to say that Congress and the courts have no role to play. Undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of very colorable relevance to the apparent circumstances of these cases. And if a criminal prosecution is instituted, it will be the responsibility of the courts to decide the applicability of the criminal law under which the charge is brought. Moreover, if Congress should pass a specific law authorozing civil proceedings in this field, the courts would likewise have the duty to decide the constitutionality of such a law as well as its applicability to the facts proved.

But in the cases before us we are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the Executive, not the Judiciary. We are asked, quite simply, to prevent the publication by two newspapers of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us. I join the judgments of the Court.

SUPREME COURT OF THE UNITED STATES

(Nos. 1873 and 1885.—October Term, 1970)

(1873)

New York Times Company, Petitioner, *v.* United States

On Writ of Certiorari in the United States Court of Appeals for the Second Circuit

(1885)

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United States, Petitioner, *v.* The Washington Post Company et al.

On Writ of Certiorari in the United States Court of Appeals for the District of Columbia Circuit

[June 30, 1971]

Mr. Justice White, with whom Mr. Justice Stewart joins, concurring.

I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system. I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations.[1] Nor, after examining the materials the Government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosure will have that result. But I nevertheless agree that the United States has not satisfied the very heavy burden which it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these.

The Government's position is simply stated: The responsibility of the Executive for the conduct of the foreign affairs and for the security of the Nation is so basic that the President is entitled to an injunction against publication of a newspaper story whenever he can convince a court that the information to be revealed threatens "grave and irreparable" injury to the public interest;[2] and the injunction should issue whether or not the material to be published is classified, whether or not publication would be lawful under relevant criminal statutes enacted by Congress and regardless of the circumstances by which the newspaper came into possession of the information.

At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press. Much of the difficulty inheres in the "grave and irreparable danger" standard suggested by the United States. If the United States were to have judgment under such a standard in these cases, our decision would be of little guidance to other courts in other cases, for the material at issue here would not be available from the Court's opinion or from public records, nor would it be published by the press. Indeed, even today where we hold that the United States has not met its burden, the material remains sealed in court records and it is properly not discussed in today's opinions. Moreover, because the material poses substantial dangers to national interests and because of the hazards of criminal sanctions, a responsible press may choose never to publish the more sensitive materials. To sustain the Government in these cases would start the courts down a long and hazardous road that I am not willing to travel as least without congressional guidance and direction.

It is not easy to reject the proposition urged by the United States and to deny relief on its good-faith claims in these cases that publication will work serious damage to the country. But that discomfiture is considerably dispelled by the infrequency of prior restraint cases. Normally, publication will occur and the damage be done before the Government has either opportunity or grounds for suppression. So here, publication has already begun and a substantial part of the threatened damage has already occurred. The fact of a massive breakdown in security is known, access to the documents by many unauthorized people is undeniable and the efficacy of equitable relief against these or other newspapers to avert anticipated damage is doubtful at best.

What is more, terminating the ban on publication of the relatively few sensitive documents the Government now seeks to suppress does not mean that the law either requires or invites newspapers or others to publish them or that they will be immune from criminal action if they do. Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.

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[1] The Congress has authorized a strain of prior restraints against private parties in certain instances. The National Labor Relations Board routinely issues cease-and-desist orders against employers whom it finds have threatened or coerced employees in the exercise of protected rights. See 29 U.S.C. § 160(c). Similarly, the Federal Trade Commission is empowered to impose cease-and-desist orders against unfair methods of competition. 15 U.S.C. § 45(c). Such orders can, and quite often do, restrict what may be spoken or written under certain circumstances. See, *e.g., NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616–620 (1969). Art. I, § 8 of the Constitution authorizes Congress to secure the "exclusive right" of authors to their writings, and no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another. See *Westermann Co.* v. *Dispatch Co.*, 249 U.S. 100 (1919). Newspapers do themselves rely from time to time on the copyright as a means of protecting their accounts of important events. However, those enjoined under the statutes relating to the National Labor Relations Board and the Federal Trade Commission are private parties, not the press; and when the press is enjoined under the copyright laws the complainant is a private copyright holder enforcing a private right. These situations are quite distinct from the Government's request for an injunction against publishing information about the affairs of government, a request admittedly not based on any statute.

[2] The "grave and irreparable danger" standard is that asserted by the Government in this Court. In remanding to Judge Gurfein for further hearings in the *Times* litigation, five members of the Court of Appeals for the Second Circuit directed him to determine whether disclosure of certain items specified with particularity by the Government would "pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined."

When the Espionage Act was under consideration in 1917, Congress eliminated from the bill a provision that would have given the President broad powers in time of war to proscribe, under threat of criminal penalty, the publication of various categories of information related to the national defense.[3] Congress at that time was unwilling to clothe the President with such far-reaching powers to monitor the press, and those opposed to this part of the legislation assumed that a necessary concomitant of such power was the power to "filter out the news to the people through some man." 55 Cong. Rec. 2008 (1917) (remarks of Senator Ashurst). However, these same members of Congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed. Senator Ashurst, for example, was quite sure that the editor of such a newspaper "should be punished if he did publish information as to the movements of the fleet, the troops, the aircraft, the location of powder factories, the location of defense works, and all that sort of thing." 55 Cong. Rec. 2009 (1917).[4]

The criminal code contains numerous provisions potentially relevant to these cases. Section 797[5] makes it a crime to publish certain photographs or drawings of military installations. Section 798,[6] also in precise language, proscribes knowing and willful publication of any classified information concerning the cryptographic systems or communication intelligence activities of the United States as well as any information obtained from communication intelligence operations.[7] If any of the material here at issue is of this nature, the newspapers are presumably now on full notice of the position of the United States and must face the consequences if they publish. I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.

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[3] "Whoever, in time of war, in violation of reasonable regulations to be prescribed by the President, which he is hereby authorized to make and promulgate, shall publish any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense calculated to be useful to the enemy, shall be punished by a fine . . . or by imprisonment. . . ." 55 Cong. Rec. 2100 (1917).

[4] Senator Ashurst also urged that ". . . 'freedom of the press' means freedom from the restraints of a censor, means the absolute liberty and right to publish whatever you wish; but you take your chances of punishment in the courts of your country for the violation of the laws of libel, slander and treason." 55 Cong. Rec. 2105 (1917).

[5] Section 797, 18 U.S.C., provides:

"On and after thirty days from the date upon which the President defines any vital military or naval installation or equipment as being within the category contemplated under section 795 of this title, whoever reproduces, publishes, sells, or gives away any photograph, sketch, picture, drawing, map, or graphical representation of the vital military or naval installations or equipment so defined, without first obtaining permission of the commanding officer of the military or naval post, camp, or station concerned, or higher authority, unless such photograph, sketch, picture, drawing, map, or graphical representation has clearly indicated thereon that it has been censored by the proper military or naval authority, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

[6] In relevant part 18 U.S.C. § 798 provides:

"(a) Whoever knowingly and willfully communicates, furnishes transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information—

"(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or

"(2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or

"(3) concerning the communication intelligence activities of the United States or any foreign government; or

"(4) obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

[7] The purport of 18 U.S.C. § 798 is clear. Both the House and Senate Reports on the bill, in identical terms, speak of furthering the security of the United States by preventing disclosure of information concerning the cryptographic systems and the communication intelligence systems of the United States, and explaining that "[t]his bill makes it a crime to reveal the methods, techniques, and matériel used in the transmission by this Nation of enciphered or coded messages. . . . Further, it makes it a crime to reveal methods used by this Nation in breaking the secret codes of a foreign nation. It also prohibits under certain

The same would be true under those sections of the criminal code casting a wider net to protect the national defense. Section 793(e)[8] makes it a criminal act for any unauthorized possessor of a document "relating to national defense" either (1) willfully to communicate or cause to be communicated that document to any person not entitled to receive it or (2) willfully to retain the document and fail to deliver it to an officer of the United States entitled to receive it. The subsection was added in 1950 because pre-existing law provided no penalty for the unauthorized possessor unless demand for the documents was made.[9] "The

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penalties the divulging of any information which may have come into this Government's hands as a result of such a code-breaking." H.R. Rep. No. 1895, 81st Cong., 2d Sess., 1 (1950). The narrow reach of the statute was explained as covering "only a small category of classified matter, a category which is both vital and vulnerable to an almost unique degree." *Id.*, at 2. Existing legislation wa deemed inadequate.

"At present two other acts protect this information, but only in a limited way. These are the Espionage Act of 1917 (40 Stat. 217) and the act of June 10, 1933 (48 Stat. 122). Under the first, unauthorized revelation of information of this kind can be penalized only if it can be proved that the person making the revelation did so with an intent to injure the United States. Under the second, only diplomatic codes and messages transmitted in diplomatic codes are protected. The present bill is designed to protect against knowing and willful publication or any other revelation of all important information affecting the United States communication intelligence operations and all direct information about all United States codes and ciphers." *Ibid.*

Section 798 obviously was intended to cover publications by nonemployees of the Government and to ease the Government's burden in obtaining convictions. See H.R. Rep. No. 1895, *supra*, at 2–5. The identical Senate Report, not cited in parallel in the next of this footnote, is S. Rep. No. 111, 81st Cong., 1st Sess. (1949).

[8] Section 793(e) of 18 U.S.C. provides that:

"(e) Whoever having unauthorized possession of, access, to or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;"

is guilty of an offense punishable by 10 years in prison, a $10,000 fine, or both. It should also be noted that 18 U.S.C. § 793(g), added in 1950, see 64 Stat. 1004–1005 (1950); S. Rep. No. 2369, 81st Cong., 2d Sess., 9 (1950), provides that "[i]f two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy."

[9] The amendment of § 793 that added subsection (e) was part of the Subversive Activities Control Act of 1950, which was in turn Title I of the Internal Security Act of 1950. See 64 Stat. 987 (1950). The report of the Senate Judiciary Committee best explains the purposes of the amendment:

"Section 18 of the bill amends section 793 of title 18 of the United States Code (espionage statute). The several paragraphs of section 793 of title 18 are designated as subsections (a) through (g) for purposes of convenient reference. The significant changes which would be made in section 793 of title 18 are as follows:

"(1) Amends the fourth paragraph of section 793, title 18 (subsec. (d)), to cover the unlawful dissemination of 'information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation.' *The phrase 'which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation' would modify only 'information relating to the national defense' and not the other items enumerated in the subsection.* The fourth paragraph of section 793 is also amended to provide that only those with lawful possession of the items relating to national defense enumerated therein may retain them subject to demand therefor. Those who have unauthorized possession of such items are treated in a separate subsection.

"(2) Amends section 793, title 18 (subsec. (e)), to provide that unauthorized possessors of items enumerated in paragraph 4 of section 793 must surrender possession thereof to the proper authorities without demand. Existing law provides no penalty for the unauthorized possession of such items unless a demand for them is made by the person entitled to receive them. The dangers surrounding the unauthorized possession of such items are self-evident, and it is deemed advisable to require their surrender in such a case, regardless of demand, especially since their unauthorized possession may be unknown to the authorities who would otherwise make the demand. The only difference between subsection (d) and subsection (e) of section 793 is that a demand by the person entitled to receive the items would be a necessary element of an offense under subsection (d) where the possession is lawful, whereas such a demand would not be a necessary element of an offense under subsection (e) where the possession is unauthorized." S. Rep. No. 2369, 81st Cong., 2d Sess., 8–9 (1950) (emphasis added).

It seems clear from the foregoing, contrary to the intimations of the District Court for the Southern District of New York in this case, that in prosecuting for communicating or withholding a "document" as contrasted with similar action with respect to "information" dangers surrounding the unauthorized possession of such items are self-evident, and it is deemed advisable to require their surrender in such a case, regardless of demand, especially since their unauthorized possession may be unknown to the authorities who would otherwise make the demand." S. Rep. No. 2369, 81st Cong., 2d Sess., 9 (1950). Of course, in the cases before us, the unpublished documents have been demanded by the United States and their import has been made known at least to counsel for the newspapers involved. In *Gorin* v. *United States*, 312 U.S. 19, 28 (1941), the words "national defense" as used in a predecessor of § 793 were held by a unanimous court to have "a well understood connotation"—a "generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness"—and to be "sufficiently definite to apprise the public of prohibited activities" and to be consonant with due process. 312 U.S., at 28. Also, as construed by the Court in *Gorin*, information "connected with the national defense" is obviously not limited to that threatening "grave and irreparable" injury to the United States.[10]

It is thus clear that Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585–586 (1952); see also *id.*, at 593–628 (Frankfurter, J., concurring). It has not, however, authorized the injunctive remedy against threatened publication. It has apparently been satisfied to rely on criminal sanctions and their deterrent effect on the responsible as well as the irresponsible press. I am not, of course, saying that either of these newspapers has yet committed a crime or that either would commit a crime if they published all the material now in their possession. That matter must await resolution in the context of a criminal proceeding if one is instituted by the United States. In that event, the issue of guilt or innocence would be determined by procedures and standards quite different from those that have purported to govern these injunctive proceedings.

SUPREME COURT OF THE UNITED STATES

(Nos. 1873 and 1885.—October term, 1970)

(1873)

New York Times Company, Petitioner, *v.* United States

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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(1885)

United States, Petitioner, *v.* The Washington Post Company et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

[June 30, 1971]

Mr. Justice Marshall, concurring.

The Government contends that the only issue in this case is whether in a suit by the United States, "the First Amendment bars a court from prohibiting a

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the Government need not prove an intent to injure the United States or to benefit a foreign nation but only willful and knowing conduct. The District Court relied on *Gorin* v. *United States*, 312 U.S. 19 (1941). But that case arose under other parts of the predecessor to § 793, see 312 U.S., at 21–22—parts that imposed different intent standards not repeated in § 793(d) or § 793(e). Cf. 18 U.S.C. §§ 793(a), (b), and (c). Also, from the face of subsection (e) and from the context of the act of which it was a part, it seems undeniable that a newspaper, as well as others unconnected with the Government, are vulnerable to prosecution under § 793(e) if they communicate or withhold the materials covered by that section. The District Court ruled that "communication" did not reach publication by a newspaper of documents relating to the national defense. I intimate no views on the correctness of that conclusion. But neither communication nor publication is necessary to violate the subsection.

[10] Also relevant is 18 U.S.C. § 794. Subsection (b) thereof forbids in time of war the collection or publication, with intent that it shall be communicated to the enemy, any informa-

newspaper from publishing material whose disclosure would pose a grave and immediate danger to the security of the United States." Brief of the Government, at 6. With all due respect, I believe the ultimate issue in this case is even more basic than the one posed by the Solicitor General. The issue is whether this Court or the Congress has the power to make law.

In this case there is no problem concerning the President's power to classify information as "secret" or "top secret." Congress has specifically recognized Presidential authority, which has been formally exercised in Executive Order 10501, to classify documents and information. See, *e.g.*, 18 U.S.C. § 798; 50 U.S.C. § 783.[1] Nor is there any issue here regarding the President's power as Chief Executive and Commander-in-Chief to protect national security by disciplining employees who disclose information and by taking precautions to prevent leaks.

The problem here is whether in this particular case the Executive Branch has authority to invoke the equity jurisdiction of the courts to protect what it believes to be the national interest. See *In re Debs*, 158 U.S. 564, 584 (1895). The Government argues that in addition to the inherent power of any government to protect itself, the President's power to conduct foreign affairs and his position as Commander-in-Chief give him authority to impose censorship on the press to protect his ability to deal effectively with foreign nations and to conduct the military affairs of the country. Of course, it is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander-in-Chief. *Chicago & Southern Air Lines, Inc.* v. *Waterman Corp.*, 333 U.S. 103 (1948); *Hirabayashi* v. *United States*, 320 U.S. 81, 93 (1943); *United States* v. *Curtiss-Wright Export Co.*, 299 U.S. 304 (1936).[2] And in some situations it may be that under whatever inherent powers the Government may have, as well as the implicit authority derived from the President's mandate to conduct foreign affairs and to act as Commander-in-Chief there is a basis for the invocation of the equity jurisdiction of this Court as an aid to prevent the publication of material damaging to "national security," however that term may be defined.

It would, however, be utterly inconsistent with the concept of separation of power for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. There would be a similar damage to the basic concept of these coequal branches of Government if when the Executive has adequate authority granted by Congress to protect "national security" it can choose instead to invoke the contempt power of a court to enjoin the threatened conduct. The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret law. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). It did not provide for government by injunction in which the courts and the Executive can "make law" without regard to the action of Congress. It may be more convenient for the Executive if it need only convince a judge to prohibit conduct rather than to ask the Congress to pass a law and it may be more convenient to enforce a contempt order than seek a criminal conviction in a jury trial. Moreover, it may be considered politically wise to get a court to share the responsibility for arresting those who the Executive has probable cause to believe are violating the law. But convenience and political considerations of the moment do not justify a basic departure from the principles of our system of government.

In this case we are not faced with a situation where Congress has failed to provide the Executive with broad power to protect the Nation from disclosure of damaging state secrets. Congress has on several occasions given extensive consideration to the problem of protecting the military and strategic secrets of the United States. This consideration has resulted in the enactment of statutes making it a crime to receive, disclose, communicate, withhold, and publish certain documents, photographs, instruments, appliances, and information. The bulk of these statutes are found to chapter 37 of U.S.C., Title 18, entitled Espionage and Censorship.[3] In that chapter, Congress has provided penalties ranging from a $10,000 fine to death for violating the various statutes.

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tion with respect to the movements of military forces, "or with respect to the plans or conduct . . . of any naval or military operations . . . or any other information relating to the public defense, which might be useful to the enemy. . . ."

[1] See n. 3, *infra*.

[2] But see *Kent* v. *Dulles*, 357 U.S. 116 (1958); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

[3] There are several other statutory provisions prohibiting and punishing the dissemination of information, the disclosure of which Congress thought sufficiently imperiled national security to warrant that result. These include 42 U.S.C. §§ 2161 through 2166 relating to the authority of the Atomic Energy Commission to classify and declassify "Restricted

Thus it would seem that in order for this Court to issue an injunction it would require a showing that such an injunction would enhance the already existing power of the Government to act. See *Bennett* v. *Laman*, 277 N.Y. 368, 14 N. E. 2d 439 (1938). It is a traditional axiom of equity that a court of equity will not do a useless thing just as it is a traditional axiom that equity will not enjoin the commission of a crime. See Z. Chaffe & E. Re, Equity 935–954 (5th ed. 1967) ; 1 H. Joyce, Injunctions §§ 58–60a (1909). Here there has been no attempt to make such a showing. The Solicitor General does not even mentionin his brief whether the Government considers there to be probable cause to believe a crime has been committed or whether there is a conspiracy to commit future crimes.

If the Government had attempted to show that there was no effective remedy under traditional criminal law, it would have had to show that there is no arguably applicable statute. Of course, at this stage this Court could not and cannot determine whether there has been a violation of a particular statute nor decide the constitutionality of any statute. Whether a good-faith prosecution could have been instituted under any statute could, however, be determined.

At least one of the many statutes in this area seems relevant to this case. Congress has provided in 18 U.S.C. § 793(e) that whoever "having unauthorized possession of, access to, or control over any document, writing, code book, signal book . . . or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits . . . the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both." 18 U.S.C. § 793(e). Congress has also made it a crime to conspire to commit any of the offenses listed in 18 U.S.C. § 793(e).

It is true that Judge Gurfein found that Congress had not made it a crime to publish the items and material specified in § 793(e) : He found that the words "communicates, delivers, transmits . . ." did not refer to publication of newspaper stories. And that view has some support in the legislative history and conforms with the past practice of using the statute only to prosecute those charged with ordinary espionage. But see 103 Cong. Rec. 10449 (remarks of Sen. Humphrey). Judge Gurfein's view of the statute is not, however, the only plausible construction that could be given. See my Brother WHITE's concurring opinion.

Even if it is determined that the Government could not in good faith bring criminal prosecutions against the New York Times and the Washington Post, it is clear that Congress has specifically rejected passing legislation that would have clearly given the President the power he seeks here and made the current activity of the newspapers unlawful. When Congress specifically declines to make conduct unlawful it is not for this Court to redecide those issues—to overrule Congress. See *Youngstown Sheet & Tube* v. *Sawyer*, 345 U.S. 579 (1952).

On at least two occasions Congress has refused to enact legislation that would have made the conduct engaged in here unlawful and given the President the power that he seeks in this case. In 1917 during the debate over the original Espionage Act, still the basic provisions of § 793, Congress rejected a proposal to give the President in time of war or threat of war authority to directly prohibit by proclamation the publication of information relating to national defense that might be useful to the enemy. The proposal provided that:

Data" ["Restricted Data" is a term of art employed uniquely by the Atomic Energy Act]. Specifically, 42 U.S.C. § 2162 authorizes the Atomic Energy Commission to classify certain information. 42 U.S.C. § 2274, subsection (a) provides penalties for a person who "communicates, transmits, or discloses . . . with intent to injure the United States or an intent to secure an advantage to any foreign nation. . . ." "Restricted Data." Subsection (b) of § 2274 provides lesser penalties for one who "communicates, transmits, or discloses" such information "with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation. . . ." Other sections of Title 42 of the U.S.C. dealing with atomic energy prohibit and punish acquisition, removal, concealment, tampering with, alteration, mutilation, or destruction of documents incorporating "Restricted Data" and provide penalties for employees and former employees of the Atomic Energy Commission, the armed services, contractors and licensees of the Atomic Energy Commission. 42 U.S.C. §§ 2276, 2277. Title 50 U.S.C. Appendix § 781 (part of the National Defense Act of 1941, as amended, 55 Stat. 236) prohibits the making of any sketch or other representation of military installations or any military equipment located on any military installation, as specified; and indeed Congress in the National Defense Act conferred jurisdiction on federal district courts over civil actions "to enjoin any violation" thereof. 50 U.S.C. App. § 1152. 50 U.S.C. § 783(b) makes it unlawful for any officers or employees of the United States or any corporation which is owned by the United States to communicate material which has been "classified" by the President to any person whom that governmental employee knows or has reason to believe is an agent or representative of any foreign government or any Communist organization.

> "During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President my, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the enemy. Whoever violates any such prohibition shall be punished by a fine of not more than $10,000 or by imprisonment for not more than 10 years, or both: *Provided*, That nothing in this section shall be construed to limit or restrict any discussion, comment, or criticism of the acts or policies of the Government or its representatives or the publication of the same." 55 Cong. Rec. 1763.

Congress rejected this proposal after war against Germany had been declared even though many believed that there was a grave national emergency and that the threat of security leaks and espionage were serious. The Executive has not gone to Congress and requested that the decision to provide such power be reconsidered. Instead, the Executive comes to this Court and asks that it be granted the power Congress refused to give.

In 1957 the United States Commission on Government Security found that "[a]airplane journals, scientific periodicals, and even the daily newspaper have featured articles containing information and other data which should have been deleted in whole or in part for security reasons." In response to this problem the Commission, which was chaired by Senator Cotton, proposed that "Congress enact legislation making it a crime for any person willfully to disclose without proper authorization, for any purpose whatever, information classified 'secret' or 'top secret,' knowing, or having reasonable grounds to believe, such information to have been so classified." Report of Commission on Government Security 619–620 (1957). After substantial floor discussion on the proposal, it was rejected. See 103 Cong. Rec. 10447–10450. If the proposal that Senator Cotton championed on the floor had been enacted, the publication of the documents involved here would certainly have been a crime. Congress refused, however, to make it a crime. The Government is here asking this Court to remake that decision. This Court has no such power.

Either the Government has the power under statutory grant to use traditional crimnal law to protect the country or, if there is no basis for arguing that Congress has made the activity a crime, it is plain that Congress has specifically refused to grant the authority the Government seeks from this Court. In either case this Court does not have authority to grant the requested relief. It is not for this Court to fling itself into every breach perceived by some Government official nor is it for this Court to take on itself the burden of enacting law, especially law that Congress has refused to pass.

I believe that the judgment of the United States Court of Appeals for the District of Columbia should be affirmed and the judgement of the United States Court of Appeals for the Second Circuit should be reversed insofar as it remands the case for further hearings.

SUPREME COURT OF THE UNITED STATES

(Nos. 1873 and 1885.—October Term, 1970)

(1873)

NEW YORK TIMES COMPANY, PETITIONER, *v.* UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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(1885)

UNITED STATES, PETITIONER, *v.* THE WASHINGTON POST COMPANY ET AL.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

[June 30, 1971]

MR. CHIEF JUSTICE BURGER, dissenting.

So clear are the constitutional limitations on prior restraint against expression, that from the time of *Near* v. *Minnesota*, 283 U.S. 697 (1931), until recently in *Organization for a Better Austin* v. *Keefe*, —— U.S. —— (1971), we have had little occasion to be concerned with cases involving prior restraints against news reporting on matters of public interest. There is, therefore, little variation among the members of the Court in terms of resistance to prior restraints against publication. Adherence to this basic constitutional principle, however, does not make this case a simple one. In this case, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the Executive. Only those who view the First Amendment as an absolute in all circumstances—a view I respect, but reject—can find such a case as this to be simple or easy.

This case is not simple for another and more immediate reason. We do not know the facts of the case. No District Judge knew all the facts. No Court of Appeals judge knew all the facts. No member of this Court knows all the facts.

Why are we in this posture, in which only those judges to whom the First Amendment is absolute and permits of no restraint in any circumstances or for any reason, are really in a position to act?

I suggest we are in this posture because these cases have been conducted in unseemly haste. Mr. JUSTICE HARLAN covers the chronology of events demonstrating the hectic pressures under which these cases have been processed and I need not restate them. The prompt setting of these cases reflects our universal abhorrence of prior restraint. But prompt judicial action does not mean unjudicial haste.

Here, moreover, the frenetic haste is due in large part to the manner in which the *Times* proceeded from the date it obtained the purloined documents. It seems reasonably clear now that the haste precluded reasonable and deliberate judicial treatment of these cases and was not warranted. The precipitous action of this Court aborting a trial not yet completed is not the kind of judicial conduct which ought to attend the disposition of a great issue.

The newspapers make a derivative claim under the First Amendment; they denominate this right as the public right-to-know; by implication, the *Times* asserts a sole trusteeship of that right by virtue of its journalist "scoop." The right is asserted as an absolute. Of course, the First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout of fire in a crowded theater. There are other exceptions, some of which Chief Justice Hughes mentioned by way of example in *Near* v. *Minnesota*. There are no doubt other exceptions no one has had occasion to describe or discuss. Conceivably such exceptions may be lurking in these cases and would have been flushed had they been properly considered in the trial courts, free from unwarranted deadlines and frenetic pressures. A great issue of this kind should be tried in a judicial atmosphere conducive to thoughtful, reflective deliberation, especially when haste, in terms of hours, is unwarranted in light of the long period the *Times*, by its own choice, deferred publication.

It is not disputed that the *Times* has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the *Times*, presumably in its capacity as trustee of the public's "right to know," has held up publication for purposes it considered proper and thus public knowledge was delayed. No doubt this was for a good reason: the analysis of 7,000 pages of complex material drawn from a vastly greater volume of material would inevitably take time and the writing of good news stories takes time. But why should the United States Government, from whom this information was illegally acquired by someone, along with all the counsel, trial judges, and appellate judges be placed under needless pressure? After these months of deferral, the alleged right-to-know has somehow and suddenly become a right that must be vindicated instanter.

Would it have been unreasonable, since the newspaper could anticipate the government's objections to release of secret material, to give the government an opportunity to review the entire collection and determine whether agreement could be reached on publication? Stolen or not, if security was not in fact jeopardized, much of the material could no doubt have been declassified, since it spans a period ending in 1968. With such an approach—one that great newspapers have in the past practiced and stated editorially to be the duty of an honorable press—the newspapers and government might well have narrowed the area of disagreement as to what was and was not publishable, leaving the remainder to be resolved in orderly litigation if necessary. To me it is hardly believable that a newspaper long regarded as a great institution in American life would fail to perform one of the basic and simple duties of every citizen with respect to the discovery or possession of stolen property or secret government documents. That duty, I had thought—perhaps naively—was to report forthwith, to responsible public officers. This duty rests on taxi drivers, Justices and the New York Times. The course followed by the *Times*, whether so calculated or not, removed any possibility of orderly litigation of the issues. If the action of the judges up to now has been correct, that result is sheer happenstance.[1]

Our grant of the writ before final judgment in the *Times* case aborted the trial in the District Court before it had made a complete record pursuant to the mandate of the Court of Appeals, Second Circuit.

The consequence of all this melancholy series of events is that we literally do not know what we are acting on. As I see it we have been forced to deal with litigation concerning rights of great magnitude without an adequate record, and surely without time for adequate treatment either in the prior proceedings or in this Court. It is interesting to note that counsel in oral argument before this Court were frequently unable to respond to questions on factual points. Not surprisingly they pointed out that they had been working literally "around the clock" and simply were unable to review the documents that give rise to these cases and were not familiar with them. This Court is no better posture. I agree with MR. JUSTICE HARLAN and MR. JUSTICE BLACKMUN but I am not prepared to reach the merits.[2]

I would affirm the Court of Appeals for the Second Circuit and allow the District Court to complete the trial aborted by our grant of certiorari meanwhile preserving the *status quo* in the *Post* case. I would direct that the District Court on remand give priority to the *Times* case to the exclusion of all other business of that court but I would not set arbitrary deadlines.

I should add that I am in general agreement with much of what MR. JUSTICE WHITE has expressed with respect to penal sanctions concerning communication or retention of documents or information relating to the national defense.

We all crave speedier judicial processes but when judges are pressured as in these cases the result is a parody of the judicial process.

SUPREME COURT OF THE UNITED STATES

(Nos. 1873 and 1885.—October Term, 1970)

(1873)

NEW YORK TIMES COMPANY PETITIONER, *v.* UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

(1885)

UNITED STATES, PETITIONER *v.* THE WASHINGTON POST COMPANY ET AL.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

[June 30, 1971]

MR. JUSTICE HARLAN, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

These cases forcefully call to mind the wise admonition of Mr. Justice Holmes, dissenting in *Northern Securities Co.* v. *United States*, 193 U.S. 197, 400–401 (1904):

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[1] Interestingly the *Times* explained its refusal to allow the government to examine its own purloined documents by saying in substance this might compromise *their* sources and informants! The *Times* thus asserts a right to guard the secrecy of its sources while denying that the Government of the United States has that power.

[2] With respect to the question of inherent power of the Executive to classify papers, records and documents as secret, or otherwise unavailable for public exposure, and to secure aid of the courts for enforcement, there may be an analogy with respect to this Court. No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.

> "Great cases like hard cases made bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

With all respect, I consider that the Court has been almost irresponsibly feverish in dealing with these cases.

Both the Court of Appeals for the Second Circuit and the Court of Appeals for the District of Columbia Circuit rendered judgment on June 23. The New York Times' petition for certiorari, its motion for accelerated consideration thereof, and its application for interim relief were filed in this Court on June 24 at about 11 a.m. The application of the United States for interim relief in the *Post* case was also filed here on June 24, at about 7:15 p.m. This Court's order setting a hearing before us on June 26 at 11 a.m., a course which I joined only to avoid the possibility of even more peremptory action by the Court, was issued less than 24 hours before. The record in the *Post* case was filed with the Clerk shortly before 1 p.m. on June 25; the record in the *Times* case did not arrive until 7 or 8 o'clock that same night. The briefs of the parties were received less than two hours before argument on June 26.

This frenzied train of events took place in the name of the presumption against prior restraints created by the First Amendment. Due regard for the extraordinarily important and difficult questions involved in these litigations should have led the Court to shun such a precipitate timetable. In order to decide the merits of these cases properly, some or all of the following questions should have been faced:

1. Whether the Attorney General is authorized to bring these suits in the name of the United States. Compare *In re Debs*, 158 U.S. 564 (1895), with *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). This question involves as well the construction and validity of a singularly opaque statute—the Espionage Act, 18 U.S.C. § 793(e).
2. Whether the First Amendment permits the federal courts to enjoin publication of stories which would present a serious threat to national security. See *Near* v. *Minnesota*, 283 U.S. 697, 716 (1931) (dictum).
3. Whether the threat to publish highly secret documents is of itself a sufficient implication of national security to justify an injunction on the theory that regardless of the contents of the documents harm enough results simply from the demonstration of such a breach of secrecy.
4. Whether the unauthorized disclosure of any of these particular documents would seriously impair the national security.
5. What weight should be given to the opinion of high officers in the Executive Branch of the Government with respect to questions 3 and 4.
6. Whether the newspapers are entitled to retain and use the documents notwithstanding the seemingly uncontested facts that the documents, or the originals of which they are duplicates, were purloined from the Government's possession and that the newspapers received them with knowledge that they had been feloniously acquired. Cf. *Liberty Lobby, Inc.* v. *Pearson*, 390 F. 2d 489 (CADC 1968).
7. Whether the threatened harm to the national security or the Government's possessory interest in the documents justifies the issuance of an injunction against publication in light of—
   - a. The strong First Amendment policy against prior restraints on publication;
   - b. The doctrine against enjoining conduct in violation of criminal statutes; and
   - c. The extent to which the materials at issue have apparently already been otherwise disseminated.

These are difficult questions of fact, of law, and of judgment; the potential consequences of erroneous decision are enormous. The time which has been available to us, to the lower courts,* and to the parties has been wholly inadequate

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*The hearing in the *Post* case before Judge Gesell began at 8 a.m. on June 21, and his decision was rendered, under the hammer of a deadline imposed by the Court of Appeals, shortly before 5 p.m. on the same day. The hearing in the *Times* case before Judge Gurfein was held on June 18 and his decision was rendered on June 19. The Government's appeals in the two cases were heard by the Courts of Appeals for the District of Columbia and Second Circuits, each court sitting *en banc*, on June 22. Each court rendered its decision on the following afternoon.

or giving these cases the kind of consideration they deserve. It is a reflection on he stability of the judicial process that these great issues—as important as any hat have arisen during my time on the Court—should have been decided under he pressures engendered by the torrent of publicity that has attended these litiations from their inception.

Forced as I am to reach the merits of these cases, I dissent from the opinion nd judgments of the Court. Within the severe limitations imposed by the time onstraints under which I have been required to operate, I can only state my easons in telescoped form, even though in different circumstances I would have elt constrained to deal with the cases in the fuller sweep indicated above.

It is a sufficient basis for affirming the Court of Appeals for the Second Circuit the *Times* litigation to observe that its order must rest on the conclusion that ecause of the time elements the Government had not been given an adequate pportunity to present its case to the District Court. At least this conclusion was ot an abuse of discretion.

In the *Post* litigation the Government had more time to prepare; this was pparently the basis for the refusal of the Court of Appeals for the District of olumbia Circuit on rehearing to conform its judgment to that of the Second ircuit. But I think there is another and more fundamental reason why this dgment cannot stand—a reason which also furnishes an additional ground for t reinstating the judgment of the District Court in the *Times* litigation, set ide by the Court of Appeals. It is plain to me that the scope of the judicial nction in passing upon the activities of the Executive Branch of the Government in the field of foreign affairs is very narrowly restricted. This view is, I ink, dictated by the concept of separation of powers upon which our constitunal system rests.

In a speech on the floor of the House of Representatives, Chief Justice John arshall, then a member of that body, stated:

> "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." Annals, 6th Cong., col. 613 (1800).

om that time, shortly after the founding of the Nation, to this, there has been substantial challenge to this description of the scope of executive power. See *ited States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–321 (1936), llecting authorities.

From this constitutional primacy in the field of foreign affairs, it seems to me at certain conclusions necessarily follow. Some of these were stated concisely President Washington, declining the request of the House of Repesentaes for the papers leading up to the negotiation of the Jay Treaty:

> "The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolite; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers." 1 J Richardson, Messages and Papers of the Presidents 194–195 (1899).

The power to evaluate the "pernicious influence" of premature disclosure is however, lodged in the Executive alone. I agree that, in performance of its y to protect the values of the First Amendment against political pressures, judiciary must review the initial Executive determination to the point of isfying itself that the subject matter of the dispute does lie within the proper pass of the President's foreign relations power. Constitutional considerations bid "a complete abandonment of judicial control." Cf. *United States* v. *nolds*, 345 U.S. 1, 8 (1953). Moreover, the judiciary may properly insist that determination that disclosure of the subject matter would irreparably impair national security be made by the head of the Executive Department conned—here the Secretary of State or the Secretary of Defense—after actual sonal consideration by that officer. This safeguard is required in the analogous of executive claims of privilege for secrets of state. See *United States* v. *nolds, supra* at 8 and n. 20; *Duncan* v. *Cammell, Laird & Co.*, [1942] A. C. 638 (House of Lords).

at in my judgment the judiciary may not properly go beyond these two iries and redetermine for itself the probable impact of disclosure on the onal security.

"[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the

> political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial instrusion or inquiry." *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948) (Jackson, J.).

Even if there is some room for the judiciary to override the executive determination, it is plain that the scope of review must be exceedingly narrow. It can see no indication in the opinions of either the District Court or the Court of Appeals in the *Post* litigation that the conclusions of the Executive were given even the deference owing to an administrative agency, much less that owing to a co-equal branch of the Government operating within the field of its constitutional prerogative.

Accordingly, I would vacate the judgment of the Court of Appeals for the District of Columbia Circuit on this ground and remand the case for further proceedings in the District Court. Before the commencement of such further proceedings, due opportunity should be afforded the Government for procuring from the Secretary of State or the Secretary of Defense or both an expression of their views on the issue of national security. The ensuing review by the District Court should be in accordance with the views expressed in this opinion. And for the reasons stated above I would affirm the judgment of the Court of Appeals for the Second Circuit.

Pending further hearings in each case conducted under the appropriate ground rules, I would continue the restraints on publication. I cannot believe that the doctrine prohibiting prior restraints reaches to the point of preventing courts from maintaining the *status quo* long enough to act responsibly in matters of such national importance as those involved here.

SUPREME COURT OF THE UNITED STATES

(Nos. 1873 and 1885.—October Term, 1970)

(1873)

New York Times Company, Petitioners, *v.* United States

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

(1885)

United States, petitioner, *v.* The Washington Post Company et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

[June 30, 1971]

Mr. Justice Blackmun.

I join Mr. Justice Harlan in his dissent. I also am in substantial accord with much that Mr. Justice White says, by way of admonition, in the latter part of his opinion.

At this point the focus is on *only* the comparatively few documents specified by the Government as critical. So far as the other material—vast in amount—is concerned, let it be published and published forthwith if the newspapers, once the strain is gone and the sensationalism is eased, still feel the urge so to do.

But we are concerned here with the few documents specified from the 47 volumes. Almost 70 years ago Mr. Justice Holmes, dissenting in a celebrated case observed:

> "Great cases like hard cases make bad law. For great cases are called great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise

> a kind of hydraulic pressure . . . ." *Northern Securities Co.* v. *United States*, 193 U.S. 197, 400–401 (1904).

The present cases, if not great, are at least unusual in their posture and implications, and the Holmes observation certainly has pertinent application.

The New York Times clandestinely devoted a period of three months examining the 47 volumes that came into its unauthorized possession. Once it had begun publication of material from those volumes, the New York case now before us emerged. It immediately assumed, and ever since has maintained, a frenetic pace and character. Seemingly, once publication started, the material could not be made public fast enough. Seemingly, from then on, every deferral or delay, by restraint or otherwise, was abhorrent and was to be deemed violative of the First Amendment and of the public's "right immediately to know." Yet that newspaper stood before us at oral argument and professed criticism of the Government for not lodging its protest earlier than by a Monday telegram following the initial Sunday publication.

The District of Columbia case is much the same.

Two federal district courts, two United States courts of appeals, and this Court—within a period of less than three weeks from inception until today—have been pressed into hurried decision of profound constitutional issues on inadequately developed and largely assumed facts without the careful deliberation that, hopefully, should characterize the American judicial process. There has been much writing about the law and little knowledge and less digestion of the facts. In the New York case the judges, both trial and appellate, had not yet examined the basic material when the case was brought here. In the District of Columbia case, little more was done, and what was accomplished in this respect was only on required remand, with the Washington Post, on the excuse that it was trying to protect its source of information initially refusing to reveal what material it actually possessed, and with the district court forced to make assumptions as to that possession.

With such respect as may be due to the contrary view, this, in my opinion, is not the way to try a law suit of this magnitude and asserted importance. It is not the way for federal courts to adjudicate, and to be required to adjudicate, issues that allegedly concern the Nation's vital welfare. The country would be none the worse off were the cases tried quickly, to be sure, but in the customary and properly deliberative manner. The most recent of the material, it is said, dates no later than 1968, already about three years ago, and the Times itself took three months to formulate its plan of procedure and, thus, deprived the public for that period.

The First Amendment, after all, is only one part of an entire Constitution. Article II of the great document vests in the Executive Branch primary power over the conduct of foreign affairs and places in that branch the responsibility for the Nation's safety. Each provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. First Amendment absolutism has never commanded a majority of this Court. See, for example, *Near* v. *Minnesota*, 283 U.S. 697, 708 (1931), and *Schenck* v. *United States*, 249 U.S. 47, 52 (1919). What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent. Such standards are not yet developed. The parties here are in disagreement as to what those standards should be. But even the newspapers concede that there are situations where restraint is in order and constitutional. Mr. Justice Holmes gave us a suggestion when he said in *Schenck*,

> "It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." 249 U.S., at 52.

I therefore would remand these cases to be developed expeditiously, of course, but on a schedule permitting the orderly presentation of evidence from both sides, with the use of discovery, if necessary, as authorized by the rules, and

with the preparation of briefs, oral argument and court opinions of a quality better than has been seen to this point. In making this last statement, I criticize no lawyer or judge. I know from past personal experience the agony of time pressure in the preparation of litigation. But these cases and the issues involved and the courts, including this one, deserve better than has been produced thus far.

It may well be that if these cases were allowed to develop as they should be developed, and to be tried as lawyers should try them and as courts should hear them, free of pressure and panic and sensationalism, other light would be shed on the situation and contrary considerations, for me, might prevail. But that is not the present posture of the litigation.

The Court, however, decides the cases today the other way. I therefore add one final comment.

I strongly urge, and sincerely hope, that these two newspapers will be fully aware of their ultimate responsibilities to the United States of America. Judge Wilkey, dissenting in the District of Columbia case, after a review of only the affidavits before his court (the basic papers had not then been made available by either party), concluded that there were a number of examples of documents that, if in the possession of the Post, and if published, "could clearly result in great harm to the nation," and he defined "harm" to mean "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate. . . ." I, for one, have now been able to give at least some cursory study not only to the affidavits, but to the material itself. I regret to say that from this examination I fear that Judge Wilkey's statements have possible foundation. I therefore share his concern. I hope that damage already has not been done. If, however, damage has been done, and if, with the Court's action today, these newspapers proceed to publish the critical documents and there results therefrom "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate," to which list I might add the factors of prolongation of the war and of further delay in the freeing of United States prisoners, then the Nation's people will know where the responsibility for these sad consequences rests.

SUPREME COURT OF THE UNITED STATES

SYLLABUS

BRANZBURG v. HAYES ET AL., JUDGES

Certiorari to the Court of Appeals of Kentucky

No. 70–85 Argued February 23, 1972—Decided June 29, 1972*

The First Amendment does not relieve a newspaper reporter of the obligation that all citizens have to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, and therefore the Amendment does not afford him a constitutional testimonial privilege for an agreement he makes to conceal facts relevant to a grand jury's investigation of a crime or to conceal the criminal conduct of his source or evidence thereof. Pp. 13–43. No. 70–85, 461 S.W. 2d 34 and No. 70–94, —— Mass. ——, 266 N.E. 2d 297, affirmed; No. 70–57, 434 F. 2 1081, reversed.

White, J., wrote the opinion of the Court, in which Burger, C. J., and Blackmun, Powell, and Rehnquist, J. J., joined. Powell, J., filed a concurring opinion. Douglas, J., filed a dissenting opinion. Stewart, J., filed a dissenting opinion, in which Brennan and Marshall, JJ., joined.

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*Together with No. 70–94, *In re Pappas,* on certiorari to the Supreme Judicial Court of Massachusetts, and No. 70–57, *United States* v. *Caldwell,* on certiorari to the United States Court of Appeals for the Ninth Circuit.

SUPREME COURT OF THE UNITED STATES

(Nos. 70–85, 70–94, and 70–57)

70–85

PAUL M. BRANZBURG *v.* JOHN P. HAYES, JUDGE, ETC., ET AL.

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70–94

On Writ of Certiorari to the Court of Appeals of Kentucky

IN THE MATTER OF PAUL PAPPAS, PETITIONER

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts

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70–57

UNITED STATES, PETITIONER, *v.* EARL CALDWELL

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

[June 29, 1972]

Opinion of the Court by MR. JUSTICE WHITE, announced by THE CHIEF JUSTICE.

The issue in these cases is whether requiring newsmen to appear and testify before State or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment. We hold that it does not.

I

The writ of certiorari in No. 70–85, *Branzburg* v. *Hayes* and *Branzburg* v. *Meigs*, brings before us two judgments of the Kentucky Court of Appeals, both involving petitioner Branzburg, a staff reporter for the Courier-Journal, a daily newspaper published in Louisville, Jefferson County, Kentucky.

On November 15, 1969, the Courier-Journal carried a story under petitioner's by-line describing in detail his observations of two young residents of Jefferson County synthesizing hashish from marihuana, an activity which, they asserted, earned them about $5,000 in three weeks. The article included a photograph of a pair of hands working above a laboratory table on which was a substance identified by the caption as hashish. The article stated that petitioner had promised not to reveal the identity of the two hashish makers.[1] Petitioner was shortly subpoenaed by the Jefferson County grand jury; he appeared, but refused to identify the individuals he had seen possessing marihuana or the persons he had seen making hashish from marihuana.[2] A state trial court judge[3] ordered petitioner to answer these questions and rejected his contention that the Kentucky reporters' privilege statute, Ky. Rev. Stat. 421.100,[4] the First Amendment of the United States Constitution of §§ 1, 2, and 8 of the Kentucky Constitution authorized his refusal to answer. Petitioner then sought prohibiion and mandamus in the Kentucky Court of Appeals on the same grounds, but the Court of Appeals denied the petition. *Branzburg* v. *Pound*, 461 S. W. 2d 345 (1970), modified on denial of rehearing, *id.*, (1971). It held that petitioner had abandoned his First Amendment argument in a supplemental memorandum he had filed and tacitly rejected his argument based on the Kentucky Constitution. It also construed Ky. Rev. Stat. 421.100 as affording a newsman the privilege of refusing to divulge the identity of an informant who supplied him with information but held that the statute did not permit a reporter to refuse to testify about events he had observed personally, including the identities of those persons he had observed.

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[1] The article contained the following paragraph: "'I don't know why I'm letting you do his story,' [one informant] said quietly. 'To make the narcs (narcotics detectives) mad, guess. That's the main reason.' However, Larry and his partner asked for and received a promise that their names would be changed." R., at 3–4.

[2] The Foreman of the grand jury reported that petitioner Branzburg had refused to anwer the following two questions: "#1. On November 12, or 13, 1969, who was the person r persons you observed in possession of Marijuana, about which you wrote an article in the Courier-Journal on November 15, 1969? #2. On November 12, or 13, 1969, who was the erson or persons you observed compounding Marijuana, producing same to a compound nown as Hashish?" R., at 6.

[3] Judge J. Miles Pound. The present respondent in this case, Hon. John P. Hayes, is the uccessor of Judge Pound.

[4] Ky. Rev. Stat. 421.100 provides:

No person shall be compelled to disclose in any legal proceeding or trial before any court, r before any grand or petit jury, or before the presiding officer of any tribunal, or his agent r agents, or before the General Assembly, or any committee thereof, or before any city or ounty legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television roadcasting station by which he is engaged or employed, or with which he is connected."

The second case involving petitioner Branzburg arose out of his later story published on January 10, 1971, which described in detail the use of drugs in Frankfort, Franklin County, Kentucky. The article reported that in order to provide a comprehensive survey of the "drug scene" in Frankfort, petitioner had "spent two weeks interviewing several dozen drug users in the capital city" and had seen some of them smoking marihuana. A number of conversations with and observations of several unnamed drug users were recounted. Subpoenaed to appear before a Franklin County grand jury "to testify in the matter of violation of statutes concerning use and sale of drugs," petitioner Branzburg moved to quash the summons;[5] the motion was denied although an order was issued protecting Brazburg from revealing "confidential associations, sources of information" but requiring that he "answer any questions which concern or pertain to any criminal act, the commission of which was actually observed by [him]." Prior to the time he was slated to appear before the grand jury, petitioner sought mandamus and prohibition from the Kentucky Court of Appeals, arguing that if he were forced to go before the grand jury or to answer questions regarding the identity of informants or disclose information given to him in confidence, his effectiveness as a reporter would be greatly damaged. The Court of Appeals once again denied the requested writs, reaffirming its construction of Ky. Rev. Stat. 421.100, and rejecting petitioner's claim of a First Amendment privilege. It distinguished *Caldwell* v. *United States*, 434 F. 2d 1081 (CA9 1970), and it also announced its "misgivings" about that decision, asserting that it represented "a drastic departure from the generally recognized rule that the sources of information of a newspaper reporter are not privileged under the First Amendment." It characterized petitioner's fear that his ability to obtain news would be destroyed as "so tenuous that it does not, in the opinion of this court, present an abridgement of freedom of the press within the meaning of that term as used in the Constitution of the United States."

Petitioner sought a writ of certiorari to review both judgments of the Kentucky Court of Appeals, and we granted the writ.[6] 402 U.S. 942 (1971).

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[5] Petitioner's Motion to Quash argued:

"If Mr. Branzburg were required to disclose these confidences to the Grand Jury, or any other person, he would thereby destroy the relationship of trust which he presently enjoys with those in the drug culture. They would refuse to speak to him; they would become even more reluctant than they are now to speak to any newsman; and the news media would thereby be vitally hampered in their ability to cover the views and activities of those involved in the drug culture. The inevitable effect of the subpoena issued to Mr. Branzburg, if it not be quashed by this Court, will be to suppress vital First Amendment freedoms of Mr. Branzburg, of the Courier-Journal, of the news media, and of those involved in the drug culture by driving a wedge of distrust and silence between the news media and the drug culture. This Court should not sanction a use of its process entailing so drastic an incursion upon First Amendment freedoms in the absence of compelling Commonwealth interest in requiring Mr. Branzburg's appearance before the Grand Jury. It is insufficient merely to protect Mr. Branzburg's right to silence after he appears before the Grand Jury This Court should totally excuse Mr. Branzburg from responding to the subpoena and even entering the Grand Jury room. Once Mr. Branzburg is required to go behind the closed doors of the Grand Jury room, his effectiveness as a reporter in these areas is totally destroyed. The secrecy that surrounds Grand Jury testimony necessarily introduces uncertainties in the minds of those who fear a betrayal of their confidences." R., at 43–44.

[6] After the Kentucky Court of Appeals' decision in *Branzburg* v. *Meigs* was announced petitioner filed a rehearing motion in *Branzburg* v. *Pound* suggesting that the Court had not passed upon his First Amendment argument and calling to the Court's attention the recent Ninth Circuit decision in *Caldwell* v. *United States*. On Jan. 22, 1971, the Court denied petitioner's motion and filed an amended opinion in the case, adding a footnote, 461 S.W. 2d, at 346 n. 1, to indicate that petitioner had abandoned his First Amendment argument and elected to rely wholly on Ky. Rev. Stat. 421.100 when he filed a Supplemental Memorandum before oral argument. In his Petition for Prohibition and Mandamus, petitioner had clearly relied on the First Amendment, and he had filed his Supplemental Memorandum in response to the State's Memorandum in Opposition to the granting of the writs. As its title indicates, this Memorandum was complementary to petitioner's earlier Petition and it dealt primarily with the State's construction of the phrase "source of information"

In the Matter of Paul Pappas, No. 70–94, originated when petitioner Pappas, a television newsman-photographer working out of the Providence, Rhode Island, office of a New Bedford, Massachusetts, television station, was called to New Bedford on July 30, 1970, to report on civil disorders there which involved fires and other turmoil. He intended to cover a Black Panther news conference at that group's headquarters in a boarded-up store. Petitioner found the streets around the store barricaded, but he ultimately gained entrance to the area and recorded and photographed a prepared statement read by one of the Black Panther leaders at about 3:00 p.m.[7] He then asked for and received permission to re-enter the area. Returning at about 9:00 p.m. that evening, he was allowed to enter and remain inside Panther headquarters. As a condition of entry, Pappas agreed not to disclose anything he saw or heard inside the store except an anticipated police raid which Pappas, "on his own," was free to photograph and report as he wished. Pappas stayed inside the headquarters for about three hours, but there was no police raid, and petitioner wrote no story and did not otherwise reveal what had transpired in the store while he was there. Two months later, petitioner was summoned before the Bristol County Grand Jury and appeared, answered questions as to his name, address, employment, and what he had seen and heard outside Panther headquarters, but refused to answer any questions about what had taken place inside headquarters while he was there, claiming that the First Amendment afforded him a privilege to protect confidential informants and their information. A second summons was then served upon him, again directing him to appear before the Grand Jury and "to give such evidence as he knows relating to any matters which may be inquired of on behalf of the commonwealth before . . . the Grand Jury." His motion to quash on First Amendment and other grounds was denied by the trial judge who, noting the absence of a statutory newsman's privilege in Massachusetts, ruled that petitioner had no constitutional privilege to refuse to divulge to the Grand Jury what he had seen and heard, including the identity of persons he had observed. The case was reported for decision to the Supreme Judicial Court of Massachusetts.[8] The record there did not include a transcript of the hearing on the motion to quash nor did it reveal the specific questions petitioner had refused to answer, the expected nature of his testimony, the nature of the grand jury investigation, or the likelihood of the grand jury securing the information it sought from petitioner by other means.[9] The Supreme Judicial Court, however, took "judicial notice that in July, 1970, there were serious civil disorders in New Bedford, which involved street barricades, exclusion of the public from certain streets, fires, and similar turmoil. We were told at the arguments that there was gunfire in certain streets. We assume that the grand jury investigation was an appropriate effort to discover and indict those responsible for criminal acts."— Mass. —, 266 N.E. 2d, at 299. The Court then reaffirmed prior Massachusetts holdings that testimonial privileges were "exceptional" and "limited," stating

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in Ky. Rev. Stat. 421.100. The passage which the Kentucky Court of Appeals cited to indicate abandonment of petitioner's First Amendment claim is as follows:

> "Thus, the controversy continues as to whether a newsman's source of information should be privileged. However, that question is not before the Court in this case. The Legislature of Kentucky has settled the issue, having decided that a newsman's source of information is to be privileged. Because of this there is no point in citing Professor Wigmore and other authorities who speak against the grant of such a privilege. The question has been many times debated, and the Legislature has spoken. The only question before the Court is the construction of the term 'source of information' as it was intended by the Legislature."

Though the passage itself is somewhat unclear, the surrounding discussion indicates that petitioner was asserting here that the question of whether a common law privilege should be recognized was irrelevant since the legislature had already enacted a statute. In his earlier discussion, petitioner had analyzed certain cases in which the First Amendment argument was made but indicated that it was not necessary to reach this question if the statutory phrase "source of information" were interpreted expansively. We do not interpret this discussion as indicating that petitioner was abandoning his First Amendment claim if the Court of Appeals did not agree with his statutory interpretation argument, and we hold that the constitutional question in *Branzburg* v. *Pound* was properly preserved for review.

[7] Petitioner's news films of this event were made available to the Bristol County District Attorney. R., at 4.

[8] The case was reported by the superior court directly to the Supreme Judicial Court for an interlocutory ruling under Mass. Gen. Law, c. 287, § 30A and Mass. Gen. Law, c. 231, § 111. The Supreme Judicial Court's decision appears at —— Mass. ——, 266 N.E. 2d 297 (1971).

[9] "We do not have before us the text of any specific questions which Pappas has refused to answer before the grand jury, or any petition to hold him for contempt for his refusal. We have only general statements concerning (a) the inquiries of the grand jury, and (b) the materiality of the testimony sought from Pappas. The record does not show the expected nature of his testimony or what likelihood there is of being able to obtain that testimony from persons other than news gatherers." —— Mass. ——, 226 N.E. 2d, at 299 (footnote omitted).

that "[t]he principle that the public 'has a right to every man's evidence'" had usually been preferred, in the Commonwealth, to countervailing interests. *Ibid.* The Court rejected the holding of the Ninth Circuit in *Caldwell* v. *United States*, *supra*, and "adhere[d] to the view that there exists no constitutional newsman's privilege, either qualified or absolute, to refuse to appear and testify before a court or grand jury.[10] — Mass. —, 266 N.E. 2d, at 302–303. Any adverse effect upon the free dissemination of news by virtue of petitioner's being called to testify was deemed to be only "indirect, theoretical, and uncertain." — Mass. —, 266 N.E. 2d, at 302. The court concluded that "The obligation of newsmen . . . is that of every citizen, . . . to appear when summoned, with relevant written or other material when required, and to answer relevant and reasonable inquiries." — Mass. —, 266 N.E. 2d, at 303. The court nevertheless noted that grand juries were subject to supervision by the presiding judge, who had the duty "to prevent oppressive, unnecessary, irrelevant, and other improper inquiry and investigation," to insure that a witness' Fifth Amendment rights were not infringed, and to assess the propriety, necessity, and pertinence of the probable testimony to the investigation in progress.[11] *Ibid.* The burden was deemed to be on the witness to establish the impropriety of the summons or the questions asked. The denial of the motion to quash was affirmed and we granted a writ of certiorari to petitioner Pappas. 402 U.S. 942 (1971).

United States v. *Caldwell*, No. 70–57, arose from subpoenas issued by a federal grand jury in the Northern District of California to respondent Earl Caldwell, a reporter for the New York Times assigned to cover the Black Panther Party and other black militant groups. A subpoena *duces tecum* was served on respondent on February 2, 1970, ordering him to appear before the grand jury to testify and to bring with him notes and tape recordings of interviews given him for publication by officers and spokesmen of the Black Panther Party concerning the aims, purposes, and activities of that organization.[12] Respondent objected to the scope of this subpoena, and an agreement between his counsel and the government attorneys resulted in a continuance. A second subpoena was served on March 16, which omitted the documentary requirement and simply ordered Caldwell "to appear . . . to testify before the Grand Jury." Respondent and his employer, the New York Times,[13] moved to quash on the ground that the unlimited breadth of the subpoenas and the fact that Caldwell would have to appear in secret before the grand jury would destroy his working relationship with the Black Panther Party and "suppress vital First Amendment freedoms . . . by driving a wedge of distrust and silence between the news media and the militants." R., at 7. Respondent argued that "so drastic an incursion upon First Amendment freedoms" should not be permitted "in the absence of a compelling governmental interest—not shown here—in requiring Mr. Caldwell's appearance before the grand jury." *Ibid.* The motion was supported by *amicus curiae* memoranda from other publishing concerns and by affidavits from newsmen asserting the unfavorable impact on news sources of requiring reporters to appear before grand juries. The Government filed three memoranda in opposition to the motion to quash, each supported by affidavits. These documents stated that the grand jury was investigating, among other things, possible violations of a number of criminal statutes, including 18 U.S.C. § 871 (threats against the President), 18 U.S.C. § 1751 (assassination, attempts to assassinate, conspiracy to assassinate the President), 18 U.S.C. § 231 (Civil disorders), (18 U.S.C. § 2101 (interstate travel to incite a riot), and 18 U.S.C. § 1341 (mail frauds and swindles). It was

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[10] The Court expressly declined to consider, however, appearances of newsmen before legislative or administrative bodies. —— Mass. ——, 266 N.E. 2d, at 303 n. 10.

[11] The Court noted that "a presiding judge may consider in his discretion" the argument that the use of newsmen as witnesses is likely to result in unnecessary or burdensome use of their work product, —— Mass. ——, 266 N.E. 2d, at 304 n. 13, and cautioned that "We do not suggest that a general investigation of mere political or group association of persons, without substantial relation to criminal events, may not be viewed by a judge in a somewhat different manner from an investigation of particular criminal events concerning which a newsman may have knowledge." —— Mass. ——, 266 N.E. 2d, at 304 n. 14.

[12] The subpoena ordered production of "Notes and tape recordings of interviews covering the period from January 1, 1969, to date, reflecting statements made for publication by officers and spokesmen for the Black Panther Party concerning the aims and purposes of said organization and the activities of said organization, its officers, staff, personnel and members, including specifically but not limited to interviews given by David Hilliard and Raymond 'Masai' Hewitt." R., at 20.

[13] The New York Times was granted standing to intervene as a party on the motion to quash the subpoenas. *Application of Caldwell*, 311 F. Supp. 358, 359 (N.D. Cal. 1970). It did not file an appeal from the District Court's contempt citation, and it did not seek certiorari here. It has filed an *amicus curiae* brief, however.

ecited that on November 15, 1969, an officer of the Black Panther Party made a
ublicly televised speech in which he had declared that "We will kill Richard
ixon" and that this threat had been repeated in three subsequent issues of the
arty newspaper. R., at 66, 77. Also referred to were various writings by Caldwell
bout the Black Panther Party, including an article published in the New York
imes on December 14, 1969, stating that "[i]n their role as the vanguard in a
evolutionary struggle the Panthers have picked up guns" and quoting the Chief
f Staff of the Party as declaring that "We advocate the very direct overthrow
f the Government by way of force and violence. By picking up guns and moving
gainst it because we recognize it as being oppressive and in recognizing that we
now that the only solution to it is armed struggle [*sic*]." R., at 62. The Govern-
ient also stated that the Chief of Staff of the Party had been indicted by the
rand jury on December 3, 1969, for uttering threats against the life of the Presi-
ent in violation of 18 U.S.C. § 871 and that various efforts had been made to se-
ure evidence of crimes under investigation through the immunization of persons
llegedly associated with the Black Panther Party.

On April 6, the District Court denied the motion to quash, *Application of*
aldwell, 311 F. Supp. 358 (ND Cal. 1970), on the ground that "*every person*
ithin the jurisdiction of the government" is bound to testify upon being properly
ummoned. *Id.*, at 360 (emphasis in original). Nevertheless, the court accepted
espondent's First Amendment arguments to the extent of issuing a protective
rder providing that although respondent must divulge whatever information
ad been given to him for publication, he "shall not be required to reveal con-
dential associations, sources or information received, developed or maintained
y him as a professional journalist in the course of his efforts to gather news
r dissemination to the public through the press or other news media." The
urt held that the First Amendment afforded respondent a privilege to refuse
isclosure of such confidential information until that had been "a showing by
e Government of a compelling and overriding national interest in requiring
r. Caldwell's testimony which cannot be served by any alternative means." 311
. Supp., at 362.

Subsequently,[14] the term of the grand jury expired, a new grand jury was
nvened, and a new subpoena *ad testificandum* was issued and served on May 22,
70. A new motion to quash by respondent and memorandum in opposition by
e Government were filed, and by stipulation of the party, the motion was sub-
itted on the prior record. The court denied the motion to quash, repeating the
otective provisions in its prior order but this time directing Caldwell to ap-
ar before the grand jury pursuant to the May 22 subpoena. Respondent refused
appear before the grand jury, and the court issued an order to show cause
hy he should not be held in contempt. Upon his further refusal to go before
e grand jury, respondent was ordered committed for contempt until such time
he complied with the court's order or until the expiration of the term of the
and jury.

Respondent Caldwell appealed the contempt order,[15] and the Court of Appeals
versed. *Caldwell* v. *United States*, 434 F. 2d 1081 (CA9 1970). Viewing the
ue before it as whether Caldwell was required to appear before the grand
ry at all, rather than the scope of permissible interrogation, the court first
termined that the First Amendment provided a qualified testimonial privilege
newsmen; in its view, requiring a reporter like Caldwell to testify would
ter his informants from communicating with him in the future and would
use him to censor his writing in an effort to avoid being subpoenaed. Absent
mpelling reasons for requiring his testimony, he was held privileged to with-
ld it. The court also held, for similar First Amendment reasons, that absent
me special showing of necessity by the Government, attendance by Caldwell
a secret meeting of the grand jury was something he was privileged to refuse
cause of the potential impact of such an appearance on the flow of news to
e public. We granted the United States' petition[16] for certiorari. 402 U.S.
2 (1971).

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[14] Respondent appealed from the District Court's April 6 denial of his motion to quash on
ril 17, 1970, and the Government moved to dismiss that appeal on the ground that the
ler was interlocutory. On May 12, 1970, the Ninth Circuit dismissed the appeal without
nion.

[15] The Government did not file a cross-appeal and did not challenge the validity of the
trict Court protective order in the Court of Appeals.

[16] The petition presented a single question: "Whether a newspaper reporter who has
blished articles about an organization can, under the First Amendment, properly refuse
appear before a grand jury investigating possible crim[illegible] of that organization
o have been quoted in the published articles."

I

Petitioners Branzburg and Pappas and respondent Caldwell press First Amendment claims that may be simply put; that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment. Although petitioners do not claim an absolute privilege against official interrogation in all circumstances, they assert that the reporter should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure. Principally relied upon are prior cases emphasizing the importance of the First Amendment guarantees to individual development and to our system of representative government,[17] decisions requiring that official action with adverse impact on First Amendment rights be justified by a public interest that is "compelling" or "paramount," [18] and those precedents establishing the principle that justifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association.[19] The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information.[20]

We do not question the significance of free speech, press or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news freedom of the press could be eviscerated. But this case involves no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence.[21] The claim is however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them.

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[17] *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 145 (1967) (opinion of Harlan, J.); *Ne York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); *Talley* v. *California*, 362 U.S. 6 64–65 (1960); *Bridges* v. *California*, 314 U.S. 252, 263 (1941); *Grosjean* v. *America Press Co., Inc.*, 297 U.S. 233, 250 (1936); *Near* v. *Minnesota*, 283 U.S. 697, 722 (1931).

[18] *NAACP* v. *Button*, 371 U.S. 415, 439 (1963); *Thomas* v. *Collins*, 323 U.S. 516, 5 (1945); *DeGregory* v. *Attorney General of New Hampshire*, 383 U.S. 825, 829 (1966 *Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960); *Schneider* v. *State*, 308 U.S. 147, 1 (1939); *NAACP* v. *Alabama*, 357 U.S. 449, 464 (1958).

[19] *Freedman* v. *Maryland*, 380 U.S. 51, 56 (1965); *NAACP* v. *Alabama*, 377 U.S. 288, 3 (1964); *Martin* v. *City of Struthers*, 319 U.S. 141, 147 (1943); *Elfbrandt* v. *Russell*, 3 U.S. 11, 18 (1966).

[20] There has been a great deal of writing in recent years on the existence of a newsman constitutional right of nondisclosure of confidential information. See, *e.g.*, Beaver, Th Newsman's Code, The Claim of Privilege, and Everyman's Right to Evidence, 47 Ore. Rev. 243 (1968); Guest & Stanzler, The Constitutional Argument for Newsmen Concealin Their Sources, 64 Nw. U.L. Rev. 18 (1969): Note, Reporters and Their Sources: The Co stitutional Right to a Confidential Relationship, 80 Yale L.J. 317 (1970); Note, The Ne man's Privilege: Government Investigations, Criminal Prosecutions and Private Liti tion, 58 Calif. L. Rev. 1198 (1970); Note, The Right of the Press to Gather Informatio 71 Col. L. Rev. 838 (1971); Nelson, The Newsmen's Privilege Against Disclosure of Co fidential Sources of Information, 24 Vand. L. Rev. 667 (1971).

[21] "In general, then, the mere fact that a communication was made in express confidenc or in the implied confidence of a confidential relation, does not create a privilege. . . . N pledge of privacy nor oath of secrecy can avail against demand for the truth in a court justice." 8 J. Wigmore, Evidence § 2286 (McNaughton rev. 1961). This was not always th rule at common law, however. In 17th century England, the obligations of honor amon

It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial interests may be enforced against the press as againt others, despite the possible burden that may be imposed. The Court has emphasized that "[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. *Associated Press* v. *NLRB*, 301 U.S. 103, 132–133 (1937). It was there held that the Associated Press, a news-gathering and disseminating organization, was not exempt from the requirements of the National Labor Relations Act. The holding was reaffirmed in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 192–193 (1946), where the Court rejected the claim that applying the Fair Labor Standards Act to a newspaper publishing business would abridge the freedom of press guaranteed by the First Amendment. See also *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178 (1946). *Associated Press* v. *United States*, 326 U.S. 1 (1945), similarly overruled assertions that the First Amenement precluded application of the Sherman Act to a news gathering and disseminating organization. Cf. *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer's Publishing Co.*, 293 U.S. 268, 276 ,1934); *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139 (1969); *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155–156 (1951). Likewise, a newspaper may be subjected to nondiscriminatory forms of general taxation, *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943).

The prevailing view is that the press is not free with impunity to publish everything and anything it desires to publish. Although it may deter or regulate what is said or published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279–280 (1964); *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 147 (1967) (opinion of Harlan, J.,); *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 277 (1971). A newspaper or a journalist may also be punished for contempt of court, in appropriate circumstances. *Craig* v. *Harney*, 331 U.S. 367, 377–278 (1947).

It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. *Zemel* v. *Rusk*, 381 U.S. 1, 16–17 (1965); *New York Times Co.* v. *United States*, 403 U.S. 713, 728–730 (1971), (STEWART, J., concurring); *Tribune Review Publishing Co.* v. *Thomas*, 254 F. 2d 883, 885 (CA 1958); *In the Matter of United Press Anns.* v. *Valente*, 308 U.Y. 71, 77, 123 N. E. 2d 777, 778 (1954). In *Zemel* v. *Rusk*, *supra*, for example, the Court sustained the Government's refusal to validate passports to Cuba even though that restriction "rendered less than wholly free the flow of information concerning that country." *Id.*, at 16. The ban on travel was held constitutional, for "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Id.*, at 17.[22]

Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal. In *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966), for example, the Court reversed

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gentlemen were occasionally recognized as privileging from compulsory disclosure information obtained in exchange for a promise of confifidence. See *Bulstrod* v. *Letchmere*, 22 Eng. Rep. 1019 (1676); *Lord Grey's Trial*, 9 How. St. Tr. 127 (1682).

[22] "There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right." 381 U.S., at 16–17.

a state court conviction where the trial court failed to adopt "stricter rules governing the use of the courtroom by newsmen as Sheppard's counsel requested," neglected to insulate witnesses from the press, and made no "effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides." *Id.*, at 358, 359. "[T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters." *Id.*, at 361. See also *Estes* v. *Texas*, 381 U. S. 532, 539–540 (1965) ; *Rideau* v. *Louisiana*, 373 U. S 723, 726 (1963).

It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation. At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury. See, *e. g.*, *Ex parte Lawrence*, 116 Cal. 298, 48 P. 124 (1897) ; *Plunkett* v. *Hamilton*, 136 Ga. 72, 70 S. E. 781 (1911) ; *Clein* v. *State*, 52 So. 2d 117 (Fla. 1950) ; *In re Grunow*, 84 N. J. L. 235, 85 A. 1011 (1913) ; *People ex rel. Mooney* v. *Sheriff*, 269 N. Y. 291, 199 N. E. 415 (1936) ; *Joslyn* v. *People*, 67 Col. 297, 184 P. 375 (1919) ; *Adams* v. *Associated Press*, 46 F. R. D. 439 (SD Tex. 1969) ; *Brewster* v. *Boston Herald-Traveler Corp.*, 20 F. R. D. 416 (Mass. 1957). See generally Annot., 7 A. L. R. 3d 591 (1966). In 1958, a newsgatherer asserted for the first time that the First Amendment exempted confidential information from public disclosure pursuant to a subpoena issued in a civil suit, *Garland* v. *Torre*, 259 F. 2d 545 (CA2), cert. denied, 358 U. S. 910 (1958), but the claim was denied, and this argument has been almost uniformly rejected since then, although there are occasional dicta that, in circumstances not presented, a newsman might be excused. *In re Goodfader*, 45 Haw. 317, 367 P. 2d 472 (1961) ; *In re Taylor*, 412 Pa. 32, 193 A. 2d 181 (1963) ; *State* v. *Buchanan*, 250 Ore. 244, 436 P. 2d 729, cert denied, 392 U.S. 905 (1968) ; *Murphy* v. *Colorado* (Colo. Supreme Court), cert. denied, 365 U. S. 843 (1961) (unreported, discussed in *In re Goodfader*, *supra*, 45 Haw., at 366, 367 P. 2d, at 498 (Mizuha, J., dissenting)). These courts have applied the presumption against the existence of an asserted testimonial privilege, *United States* v. *Bryan*, 339 U. S. 323, 331 (1950), and have concluded that the First Amendment interest asserted by the newsman was outweighed by the general obligation of a citizen to appear before a grand jury or at trial, pursuant to a subpoena, and give what information he possesses. The opinions of the state courts in *Branzburg* and *Pappas* are typical of the prevailing view, although a few recent cases such as *Caldwell*, have recognized and given effect to some form of constitutional newsman's privilege. See *State* v. *Knops*, 49 Wis. 2d 647, 183 N. W. 2d 93 (1971) (dictum) ; *Alioto* v. *Cowles Communication, Inc.*, C. A. 52150 (ND Cal. 1969) ; *In re Grand Jury Witnesses*, 322 F. Supp. 573 (ND Cal. 1970) ; *People* v. *Dohrn*, Crim. No. 69–3808 (Cook County, Ill., Cir. Ct. 1970).

The prevailing constitutional view of the newsman's privilege is very much rooted in the ancient role of the grand jury which has the dual function of determing if there is proable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions.[23] Grand jury proceedings are constitutionally mandated for the institution of federal criminal prosecutions for capital or other serious crimes, and "its constitutional prerogatives are rooted in long centuries of Anglo-American history." *Hannah* v. *Larche*, 363 U.S. 420, 489 (1960) (Frankfurter, J., concurring). The Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[24] The adoption of the grand jury "in our Constitution as the sole method of preferring charges in serious criminal cases shows the high place it held as an instrument of justice." *Costello* v. *United States*, 350 U.S. 359, 362 (1956). Although state systems of criminal procedure differ greatly among themselves, the grand jury is similarly guaranteed by many state constitutions and plays an important role in fair and effective law enforcement in the overwhelming majority of the States.[25] Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair* v. *United States*, 250 U.S. 273, 282 (1919). Hence the grand jury's authority to subpoena witnesses is not only historic, *id.*, at 279–281, but essential to its task. Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the long standing principle that "the public has a right to every man's evidence," except for those persons protected by a constitutional common law, or statutory privilege, *United States* v. *Bryan*, 339 U.S. 323, 331 (1950); *Blackmer* v. *United States*, 284 U.S. 421, 438 (1932); 8 J. Wigmore, Evidence § 2192 (McNaughton rev. 1961), is particularly applicable to grand jury proceedings.[26]

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[23] "Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution ; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962) (footnote omitted).

[24] It has been held that "infamous" punishments include confinement at hard labor, *United States* v. *Moreland*, 258 U.S. 433 (1922) ; incarceration in a penitentiary, *Mackin* v. *United States*, 117 U.S. 348 (1886) ; and imprisonment for more than a year, *Barkman* v. *Sanford*, 162 F. 2d 592 (CA5), cert. denied, 332 U.S. 816 (1947). Fed. Rule Crim. Proc. 7(a) has codified these holdings: "An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment, or if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information."

A number of States have provided newsmen a statutory privilege of varying breadth,[27] but the majority have not done so, and none has been provided by federal statute.[28] Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the First Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.[29] Fair and effective law enforcement

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[25] Although indictment by grand jury is not part of the due process of law guaranteed to State criminal defendants by the Fourteenth Amendment, *Hurtado* v. *California*, 110 U.S. 516 (1884), a recent study reveals that 32 States require that certain kinds of criminal prosecutions be initiated by indictment. Spain, The Grand Jury, Past and Present: A Survey, 1 Am. Crim. L.Q. 119, 126–142 (1964). In the 18 States in which the prosecutor may proceed by information, the grand jury is retained as an alternative means of invoking the criminal process and as an investigative tool. *Ibid.*

[26] Jeremy Bentham vividly illustrated this maxim:

"Are men of the first rank and consideration, are men high in office, men whose time is not less valuable to the public than to themselves—are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary—they and everybody! . . . Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly." 4 The Works of Jeremy Bentham 320 (Bowring ed. 1843).

In *United States* v. *Burr*, 25 F. Cas. 30, 34 (Cir. Ct. D. Va. 1807) (No. 14,692d), Chief Justice Marshall, sitting on Circuit, opined that in proper circumstances a subpoena could be issued to the President of the United States.

[27] Thus far, 17 States have provided some type of statutory protection to a newsman's confidential sources:

Ala. Code Recompiled Tit. 7, § 370 (1960); Alaska Stat. § 09.25.150 (1967, 1970 Cum. Supp.); Ariz. Rev. Stat. Ann. § 12–2237 (1969 Supp.); Ark. Stat. Ann. § 43–917 (1964); Cal. Evid. Code Ann. § 1070 (West 1966); Ind. Ann. Stat. § 2–1733 (1968); Ky. Rev. Stat. § 421.100 (1969); La. Rev. Stat. § 45:1451–54 (1970 Cum. Supp.); Md. Ann. Code Art. 35, § 2 (1971); Mich. Stat. Ann. § 28.945(1) (1954); Mont. Rev. Codes Ann. Tit. 93, ch. 601–2 (1964); Nev. Rev. Stat. § 48.087 (1969); N.J. Stat. Ann. Tit. 2A ch. 84A, §§ 21, 29 (Supp. 1969); N.M. Stat. Ann. § 20–1–12.1 (1953, 1967 Rev.); N.Y. Civ. Rights Law § 79–h (McKinney 1970); Ohio Rev. Code Ann. § 2739.12 (1953); Pa. Stat. Ann. Tit. 28, § 330 (1959, 1970 Cum. Supp.).

[28] Such legislation has been introduced, however. See, *e.g.*, S. 1311, S. 3552, 91st Cong., 2d Sess. (1970); H.R. 16328, H.R. 16704, 91st Cong., 2d Sess. (1970); S. 1851, 88th Cong., 1st Sess. (1963); H.R. 8519, H.R. 7787, 88th Cong., 1st Sess. (1963); S. 965, 86th Cong., 1st Sess. (1959); H.R. 355, 86th Cong., 1st Sess. (1959). For a general analysis of proposed congressional legislation, see Staff of Senate Committee on the Judiciary, 89th Cong., 2d Sess., The Newsman's Privilege (Comm. Print 1966).

[29] The creation of new testimonial privileges has been met with disfavor by commentators since such privileges obstruct the search for truth. Wigmore condemns such privileges as "so many derogations from a positive general rule [that everyone is obligated to testify when properly summoned]" and as "obstacle[s] to the administration of justice." 8 Wigmore, On Evidence, § 2192 (McNaughton rev. 1961). His criticism that *"all privileges of exemption from this general duty are exceptional* and are therefore to be discountenanced," *id.*, at § 2192, p. 73 (emphasis in original) has been frequently echoed. Morgan, "Foreward," Model Code of Evidence 22–30 (1942); Chafee, Government and Mass Communications 496–497 (1947); ABA Committee on Improvements in the Law of Evidence, Report, 63 A.B.A. Reports 595 (1938); McCormick. On Evidence 159 (1972); Chafee, "Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?," 52 Yale L.J. 607 (1943; Ladd, "Privileges," 1969 Law and the Social Order 555, 556 (1969); 58 Am. Jur., Witnesses § 546 (1948); 97 C.J.S., Witnesses § 259

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aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering which is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

This conclusion itself involves no restraint on what newspapers may publish or on the type of quality of information reporters may seek to acquire, nor does it threaten the vast bulk of confidential relationships between reporters and their sources. Grand juries address themselves to the issues of whether crimes have been committed and who committed them. nly where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas. Nothing before us indicates that a large number or percentage of *all* confidential news sources fall into either category and would in any way be deterred by our holding that the Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task.

The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection. It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate otherwise valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial. The Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens though reprehensible conduct forbidden to all other persons. To assert the contrary proposition

> "is to answer it, since it involves in its very statement the contention that the freedom of the press is a freedom to do wrong with impunity, and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. . . . It suffices to say that, however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing." *Toledo Newspaper Co.* v. *United States*, 247 U.S. 402, 419–420 (1918).[30]

Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.

There remain those situations where a source is not engaged in criminal conduct but has information suggesting illegal conduct by others. Newsmen frequently receive information from such sources pursuant to a tacit or express agreement to withhold the source's name and suppress any information that

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(1957); *McMann* v. *Securities and Exchange Commission*, 87 F. 2d 377, 378 (CA2 1938) (L. Hand, J.). Neither the ALI's Model Code of Evidence (1942), the National Conference of Commissioners on Uniform State Laws' Uniform Rules of Evidence (1953), nor the Proposed Rules of Evidence for the United States Courts and Magistrates (rev. ed. 1971) have included a newsman's privilege.

[30] The holding in this case involved a construction of the Contempt Act of 1831, 4 Stat. 487, which permitted summary trial of contempts "so near [to the court] as to obstruct the administration of justice." The Court held that the Act required only that the conduct have a "direct tendency to prevent and obstruct the discharge of judicial duty." 247 U.S., at 419. This view was overruled and the Act given a much narrower reading in *Nye* v. *United States*, 813 U.S. 33, 47–52 (1941). See *Bloom* v. *Illinois*, 391 U.S. 194, 205–206 (1968).

the source wishes not published. Such informants presumably desire anonymity in order to avoid being entangled as a witness in a criminal trial or grand jury investigation. They may fear that disclosure will threaten their job security or personal safety or that it will simply result in dishonor or embarrassment.

The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational, nor are the records before us silent on the matter. But we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury. The available data indicates that some newsmen rely a great deal on confidential sources and that some informants are particularly sensitive to the threat of exposure and may be silenced if it is held by this Court that, ordinarily, newsmen must testify pursuant to subpoenas,[31] but the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common law and constitutional rule regarding the testimonial obligations of newsmen. Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative.[32] It would be difficult to canvass the views of the informants themselves; surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in the light of the professional self-interest of the interviewees.[33] Reliance by the press on confidential informants does not mean that all such sources will in fact dry up because of the later possible appearance of the newsman before a grand jury. The reporter may never be called and if he objects to testifying, the prosecution may not insist. Also, the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena: quite often, such informants are members of a minority political or cultural group which relies heavily on the media to propagate its views, publicize its aims, and magnify its exposure to the public. Moreover, grand juries characteristically conduct secret proceedings, and law enforcement officers are themselves experienced in dealing with informers and have their own methods for protecting them without interference with the effective administration of justice. There is little before us indicating that informants whose interest in avoiding exposure is that it may threaten job security, personal safety, or peace of mind, would in fact, be in a worse position, or would think they would be, if they risked placing their trust in public officials as well as reporters. We doubt if the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime will always or very often be deterred by the prospect of dealing with those public authorities characteristically charged with the duty to protect the public interest as well as his.

Accepting the fact, however, that an undetermined number of informants not themselves implicated in crime will nevertheless, for whatever reason, refuse to talk to newsmen if they fear identification by a reporter in an official investigation, we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.

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[31] Respondent Caldwell attached a number of affidavits from prominent newsmen to his initial motion to quash which detail the experiences of such journalists after they have been subpoenaed. R., at 22–61.

[32] Cf., *e.g.*, the results of a study conducted by Guest & Stanzler, which appears as an appendix to their article, "The Constitutional Argument for Newsmen Concealing their Sources," 64 Nw. U. L. Rev. 18, 57 (1969). A number of editors of daily newspapers of varying circulation were asked the question, "Excluding one- or two-sentence gossip items, on the average how many stories based on information received in confidence are published in your paper each year? Very rough estimate." Answers varied significantly *e.g.*, "Virtually innumerable," Tucson Daily Citizen (41,969 daily circ.), "Too many to remember," Los Angeles Herald-Examiner (718,221 daily circ.), "Occasionally," Denver Post (252,084 daily circ.), "Rarely" Cleveland Plain Dealer (370,499 daily circ.), "Very rare, some politics," Oregon Journal (146,403 daily circ.). This study did not purport to measure the extent of deterrence of informants caused by subpoenas to the press.

[33] In his Press Subpoenas: An Empirical and Legal Analysis 6–12 (1971), Prof. Blasi discusses these methodological problems. Prof. Blasi's survey found that slightly more than half of the 975 reporters questioned said that they relied on regular confidential sources for at least 10% of their stories. *Id.*, at 21. Of this group of reporters, only 8% were able to say with some certainty that their professional functioning had been adversely affected by the threat of subpoena; another 11% were not certain whether or not they had been adversely affected. *Id.*, at 53.

We note first that the privilege claimed is that of the reporter, not the informant, and that if the authorities independently identify the informant, neither his own reluctance to testify nor the objection of the newsman would shield him from grand jury inquiry, whatever the impact on the flow of news or on his future usefulness as a secret source of information. More important, it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy. Historically, the common law recognized a duty to raise the "hue and cry" and report felonies to the authorities.[34] Misprision of a felony—that is, the concealment of a felony "which a man knows but never assented to . . . [so as to become] either principal or accessory," 4 Blackstone, Commentaries, c. 9, *121 (Lewis ed. 1902), was often said to be a common law crime.[35] The first Congress passed a statute, 1 Stat. 113, as amended, 35 Stat. 1114, 62 Stat. 684, which is still in effect, defining a federal crime of misprison:

> "Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States shall be [guilty of misprison]." 18 U.S.C. § 4.[36]

It is apparent from this statute, as well as from our history and that of England, that concealment of crime and agreements to do so are not looked upon with favor. Such conduct deserves no encomium, and we decline now to afford it First Amendment protection by denigating the duty of a citizen whether reporter or informer, to respond to grand jury subpoena and answer relevant questions put to him.

Of course, the press has the right to abide by its agreement not to publish all the information it has, but the right to withhold news is not equivalent to a First Amendment exemption from the ordinary duty of all other citizens to furnish relevant information to a grand jury performing an important public function. Private restraints on the flow of information are not so favored by the First Amendment that they override all other public interests. As Justice Black declared in another context, "Freedom of the Press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

Neither are we now convinced that a virtually impenetrable constitutional shield, beyond legislative or judicial control, should be forged to protect a private system of informers operated by the press to report on criminal conduct, a system that would be unaccountable to the public, would pose a threat to the citizen's justifiable expectations of privacy, and would equally protect well-intentioned informants and those who for pay or otherwise betray their trust to their employer or associates. The public through its elected and appointed law enforcement officers regularly utilizes informers, and in proper circumstances may assert a privilege against disclosing the identity of these informers. But:—

> "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." *Roviaro* v. *United States*, 353 U.S. 53, 59 (1957).

Such informers enjoy no constitutional protection. Their testimony is available to the public when desired by grand juries or at criminal trials; their identity cannot be concealed from the defendant when it is critical to his case. *Roviaro* v. *United States*, *supra*, at 60–61, 62; *McCray* v. *Illinois*, 386 U.S. 300, 310 (1967); *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968); *Alford* v. *United States*,

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[34] See Statute of Westminister the First, 3 Edw. I, c. IX, at 43 (1275); Statute of Winchester, 13 Edw. I, c. VI, at 114–115 (1285); Sheriffs Act of 1887, 50 & 51 Vict., c. 55, § 8(1); 4 Blackstone, Commentaries, c. 21, *293–*295 (Lewis ed. 1902); 2 Holdsworth, History of English Law 80–81, 101–102 (3d ed. 1927); 4 *ibid.*, at 521–522.

[35] See, *e.g.*, *Scrope's Case*, 3 Co. Inst. 36 (1415); *Rex* v. *Couper*, 87 Eng. Rep. 611 (1696); Proceedings under a Special Commission for the County of York, 31 Stat. Tr. 969 (1913); *Sykes* v. *Director of Public Prosecutions*, 3 W. L. R. 371 (1961). But see Glazebrook, Misprison of Felony—Shadow or Phantom?, 8 Am. J. Legal Hist. 189 (1964). See also Act 5 and 6 Edw. VI, c. 11 (1512).

[36] This statute has been construed, however, to require both knowledge of a crime and some affirmative act of concealment or participation. *Bratton* v. *United States*, 73 F. 2d 795 (CA10 1934); *United States* v. *Farrar*, 38 F. 2d 515, 516 (Mass. 1930), aff'd on other grounds, 281 U.S. 613 (1930); *United States* v. *Norman*, 391 F. 2d 212 (CA6 1968), cert. denied, 390 U.S. 1014 (1968); *Lancey* v. *United States*, 356 F. 2d 407 (CA9), cert. denied, 385 U.S. 922 (1966). Cf. *Marbury* v. *Brooks*, 7 Wheat. 556, 575 (1822) (Marshall, C. J.).

282 U.S. 687, 693 (1931). Clearly, this system is not impervious to control by the judiciary and the decision whether to unmask an informer or to continue to profit by his anonymity is in public, not private, hands. We think that it should remain there and that public authorities should retain the options of either insisting on the informer's testimony relevant to the prosecution of crime or of seeking the benefit of further information that his exposure might prevent.

We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this it not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.[37]

It is said that currently press subpoenas have multiplied,[38] that mutual distrust and tension between press and officialdom have increased, that reporting styles have changed, and that there is now more need for confidential sources, particularly where the press seeks news about minority cultural and political groups or dissident organizations suspicious of the law and public officials. These developments, even if true, are treacherous grounds for a far-reaching interpretation of the First Amendment fastening a nationwide rule on courts, grand juries, and prosecuting officials everywhere. The obligation to testify in response to grand jury subpoenas will not threaten these sources not involved with criminal conduct and without information relevant to grand jury investigations, and we cannot hold that the Constitution places the sources in these two categories either above the law or beyond its reach.

The argument for such a constitutional privilege rests heavily on those cases holding that the infringement of protected First Amendment rights must be no broader than necessary to achieve a permissible governmental purpose, see cases cited at n. 19. We do not deal, however, with a governmental institution that has abused its proper function, as a legislative committee does when it "expose[s] for the sake of exposure." *Watkins* v. *United States*, 354 U.S. 178, 200 (1957). Nothing in the record indicates that these grand juries were "prob[ing] at will and without relation to existing need." *DeGregory* v. *Attorney General of New Hampshire*, 383 U.S. 825, 829 (1966). Also, there is no attempt here by the grand juries to invade protected First Amendment rights by forcing wholesale disclosure of names and organizational affiliations for a purpose which is not germane to the determination of whether crime has been committed, cf. *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *NAACP* v. *Button*, 371 U.S. 415 (1963); *Bates* v. *Little Rock*, 361 U.S. 516 (1960), and the characteristic secrecy of grand jury proceedings is a further protection against the undue invasion of such rights. See Fed. Rule Crim. Proc. 6(e). The investigative power of the grand jury is necessarily broad if its public responsibility is to be adequately discharged. *Costello* v. *United States*, 350 U.S. 359, 364 (1956).

The requirements of those cases, see n. 18, *supra*, which hold that a State's interest must be "compelling" or "paramount" to justify even an indirect burden on First Amendment rights, are also met here. As we have indicated, the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen, and it appears to us that calling reporters to give testimony in the manner and for the reasons that other citizens are called "bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." *Bates* v. *Little Rock*, *supra*, at 525. If the test is that the Government "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest," *Gibson* v. *Florida Investigation Committee*, 372 U.S. 539, 546 (1963), it is quite apparent (1) that the State has the necessary interest in extirpating the traffic in illegal drugs, in forestalling assassination attempts on the President, and in preventing the community from being disrupted by violent

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[37] Though the constitutional argument for a newsman's privilege has been put forward very recently, newsmen have contended for a number of years that such a privilege was desirable. See, *e.g.*, *Siebert & Ryniker*, Editor and Publisher 36–37 (Sept. 1, 1934); Bird & Mervin, The Newspaper and Society 567 (1942). The first newsman's privilege statute was enacted by Maryland in 1896, and currently is codified as Md. Ann. Code Art. 35, § 2 (1971).

[38] A list of recent subpoenas to the news media is contained in the appendix to the brief of *amicus* New York Times in No. 70–57.

disorders endangering both persons and property; and (2) that, based on the stories Branzburg and Caldwell wrote and Pappas' admitted conduct, the grand jury called these reporters as they would others—because it was likely that they could supply information to help the Government determine whether illegal conduct had occurred and, if it had, whether there was sufficient evidence to return an indictment.

Similar considerations dispose of the reporters' claims that preliminary to requiring their grand jury appearance, the State must show that a crime has been committed and that they possess relevant information not available from other sources, for only the grand jury itself can make this determination. The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. To this end it must call witnesses, in the manner best suited to perform its task. "When the grand jury is performing its investigatory function into a general problem area, . . . society's interest is best served by a thorough and extensive investigation." *Wood* v. *Georgia*, 370 U.S. 375, 392 (1962). A grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." *United States* v. *Stone*, 429 F. 2d 138, 140 (CA2 1970). Such an investigation may be triggered by tips, rumors, evidence proferred by the prosecutor, or the personal knowledge of the grand jurors. *Costello* v. *United States*, *supra*, at 362. It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made:

> "It is impossible to conceive that in such cases the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who will be indicted." *Hale* v. *Henkel*, 201 U.S. 43, 65 (1906).

See also *Hendricks* v. *United States*, 223 U.S. 178 (1912); *Blair* v. *United States*, *supra*, at 282–283. We see no reason to hold that these reporters, any more than other citizens, should be excused from furnishing information that may help the grand jury in arriving at its initial determinations.

The privilege claimed here is conditional, not absolute; given the suggested preliminary showings and compelling need, the reporter would be required to testify. Presumably, such a rule would reduce the instances in which reporters could be required to appear, but predicting in advance when and in what circumstances they could be compelled to do so would be difficult. Such a rule would also have implications for the issuance of compulsory process to reporters at civil and criminal trials and at legislative hearings. If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem.[39] For them, it would appear that only an absolute privilege would suffice.

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[39] "Under the case-by-case method of developing rules, it will be difficult for potential informants and reporters to predict whether testimony will be compelled since the decision will turn on the judge's ad hoc assessment in different fact settings of 'importance' or 'relevance' in relation to the free press interest. A 'general' deterrent effect is likely to result. This type of effect stems from the vagueness of the tests and from the uncertainty attending their application. For example, if a reporter's information goes to the 'heart of the matter' in Situation X, another reporter and informant who subsequently are in Situation Y will not know if 'heart of the matter rule X' will be extended to them, and deterrence will thereby result. Leaving substantial discretion with judges to delineate those 'situations' in which rules of 'relevance' or 'importance' apply would therefore seem to undermine significantly the effectiveness of a reporter-informer privilege." Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L. J. 317, 341 (1970).

In re Grand Jury Witnesses, 322 F. Supp. 573 (N.D. Cal. 1970), illustrates the impact of this *ad hoc* approach. Here, the grand jury was as in *Caldwell*, investigating the Black Panther Party, and was "inquiring into matters which involve possible violations of Congressional acts passed to protect the person of the President (18 U.S.C. § 1751), to free him from threats (18 U.S.C. § 871), to protect our armed forces from unlawful interference (18 U.S.C. § 2387), conspiracy to commit the foregoing offenses (18 U.S.C. § 371), and related statutes prohibiting acts directed against the security of the government." *Id.*, at 577. The two witnesses, reporters for a Black Panther Party newspaper, were subpoenaed and given Fifth Amendment immunity against criminal prosecution, and they claimed a First Amendment journalists' privilege. The District Court order entered a protective order, allowing them to refuse to divulge confidential information until the Government demonstrated "a compelling and overriding national interest in requiring the testimony of [the witnesses] which cannot be served by any alternative means." *Id.*, at 574. The Government claimed that it had information that the witnesses had associated with persons who had conspired to perform some of the criminal acts which the grand jury was investigating. The court held the Government had met its burden and ordered the witnesses to testify: "The whole point of the investigation is to identify persons known to the [witnesses] who

We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. Cf. *In re Grand Jury Witnesses*, 322 F. Supp. 573, 574 (ND Cal. 1970). Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *City of Griffin*, 303 U.S. 444, 450, 452 (1938). See also *Mills* v. *Alabama*, 384 U.S. 214, 219 (1966); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 111 (1943). The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury.[40]

In each instance where a reporter is subpoenaed to testify, the courts would also be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporters' appearance: Is there probable cause to believe a crime has been committed? Is it likely that the reporter has useful information gained in confidence? Could the grand jury obtain the information elsewhere? Is the official interest sufficient to outweigh the claimed privilege?

Thus, in the end, by considering whether enforcement of a particular law served a "compelling" governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws. By requiring testimony from a reporter in investigations involving some crimes but not in others, they would be making a value judgment which a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. The task of judges, like other officials outside the legislative branch is not to make the law but to uphold it in accordance with their oaths.

At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to address the evil discerned and, equally important, to re-fashhion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First

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may have engaged in activities violative of the above indicated statutes, and also to ascertain the details of their alleged activities. All questions directed to such objectives of the investigation are unquestionably relevant, and any other evaluation thereof by the Court, without knowledge of the facts before the Grand Jury would clearly constitute 'undue interference of the Court.'" *Id.*, at 577.

Another illustration is provided by *State* v. *Knops*, 49 Wis. 2d 647, 183 N.W. 2d 93 (1971), in which a grand jury was investigating the August 24, 1970, bombing of Sterling Hall on the University of Wisconsin Madison campus. On August 26, 1970, an "underground" newspaper, the Madison Kaleidoscope, printed a front-page story entitled "The Bombers Tell Why and What Next—Exclusive to the Kaleidoscope." An editor of the Kaleidoscope was subpoenaed, appeared, asserted his Fifth Amendment right against self-incrimination, was given immunity, and then pleaded that he had a First Amendment privilege against disclosing his confidential informants. The Wisconsin Supreme Court rejected his claim and upheld his contempt sentence: "[Appellant] faces five very narrow and specific questions, all of which are founded on information which he himself has already volunteered. The purpose of these questions is very clear. The need for answers to them is 'overriding,' to say the least. The need for these answers is nothing short of the public's need (and right) to protect itself from physical attack by apprehending the perpetrators of such attacks." 49 Wis. 2d, at 658, 183 N.W. 2d., at 98–99.

[40] Such a privilege might be claimed by groups that set up newspapers in order to engage in criminal activity and to therefore be insulated from grand jury inquiry, regardless of Fifth Amendment grants of immunity. It might appear that such "sham" newspapers would be easily distinguishable, yet the First Amendment ordinarily prohibits courts from inquiring into the content of expression, except in cases of obscenity or libel, and protects speech and publications regardless of their motivation, orthodoxy, truthfulness, timeliness, or taste. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269–270 (1964); *Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684, 689 (1959); *Winters* v. *New York*, 333 U.S. 507, 510 (1948); *Thomas* v. *Collins*, 323 U.S. 516, 537 (1945). By affording a privilege to some organs of communication but not to others, courts would inevitably be discriminating on the basis of content.

Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to erect any bar to state courts responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.

In addition, there is much force in the pragmatic view that the press has at its disposal powerful mechanisms of communication and is far from helpless to protect itself from harassment or substantial harm. Furthermore, if what the newsmen urged in these cases is true—that law enforcement cannot hope to gain and may suffer from subpoenaing newsmen before grand juries—prosecutors will be loath to risk so much for so little. Thus, at the federal level the Attorney General has already fashioned a set of rules for federal officials in connection with subpoenaing members of the press to testify before grand juries or at criminal trials.[41] These rules are a major step in the direction petitioners desire to move. They may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and federal officials.

Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment.[42] Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.

III

We turn, therefore, to the disposition of the cases before us. From what we have said, it necessarily follows that the decision in *United States* v. *Caldwell*, No. 70–57, must be reversed. If there is no First Amendment privilege to refuse to answer the relevant and material questions asked during a good-faith grand jury investigation, then it is *a fortiori* true that there is no privilege to refuse to appear before such a grand jury until the Government demonstrates some "compelling need" for a newsman's testimony. Other issues were urged upon us, but since they were not passed upon by the Court of Appeals, we decline to address them in the first instance.

The decisions in No. 70–85, *Branzburg* v. *Hayes* and *Branzburg* v. *Meigs* must be affirmed. Here, petitioner refused to answer questions that directly related to criminal conduct which he had observed and written about. The Kentucky Court of Appeals noted that marihuana is defined as a narcotic drug by statute. Ky. Rev. Stat. § 218.010(14), and that unlicensed possession or compounding of it is a felony punishable by both fine and imprisonment. Ky. Rev. Stat. § 218.210. It held that petitioner "saw the commission of the statutory felonies of unlawful possession of marijuana and the unlawful conversion of it into hashish," in *Branzburg* v. *Pound*, 461 S. W. 2d, at 346. Petitioner may be presumed to have observed similar violations of the state narcotics laws during the research he did for the story which forms the basis of the subpoena in *Branzburg* v. *Meigs*. In both cases, if what petitioner wrote was true, he had direct information to provide the grand jury concerning the commission of serious crimes.

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[41] The "Guidelines for Subpoenas to the News Media" were first announced in a speech by the Attorney General on August 10, 1970, and then were expressed in Department of Justice Memo No. 692 (September 2, 1970), which was sent to all United States attorneys by the Assistant Attorney General in charge of the Criminal Division. The Guidelines state that "The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weight that limiting effect against the public interest to be served in the fair administration of justice" and that "The Department of Justice does not consider the press 'an investigative arm of the government.' Therefore, all reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press." The Guidelines provide for negotiations with the press and require the express authorizing of the Attorney General for such subpoenas. The principles to be applied in authorizing such subpoenas are stated to be whether there is "sufficient reason to believe that the information sought [from the journalist] is essential to a successful investigation," and whether the Government has unsuccessfully attempted to obtain the information from alternative non-press sources. The Guidelines provide, however, that in "emergencies and other unusual situations," subpoenas may be issued which do not exactly conform to the Guidelines.

[42] Cf. *Younger* v. *Harris*, 401 U.S. 37, 49, 43–54 (1971).

The only question presented at the present time in *In the Matter of Paul Pappas*, No. 70–94, is whether petitioner Pappas must appear before the grand jury to testify pursuant to subpoena. The Massachusetts Supreme Judicial Court characterized the record in this case as "meager," and it is not clear what petitioner will be asked by the grand jury. It is not even clear that he will be asked to divulge information received in confidence. We affirm the decision of the Massachusetts Supreme Judicial Court and hold that petitioner must appear before the grand jury to answer the questions put to him, subject, of course, to the supervision of the presiding judge as to "the propriety, purposes, and scope of the grand jury inquiry and the pertinence of the probably testimony." ——— Mass. ———, 266 N. E. 2d, at 303–304.

So ordered.

Mr. Justice Douglas would reverse the judgments in *Branzburg* v. *Hayes* and *In the Matter of Pappas* for the reasons stated in his dissent in *United States* v. *Caldwell, post* ——.

SUPREME COURT OF THE UNITED STATES

Nos. 70–85, 70–94, and 70–57

(70–85)

Paul M. Branzburg, petitioner, *v.* John P. Hayes, Judge, etc., et al.

On Writ of Certiorari to the Court of Appeals of Kentucky

(70–94)

In the Matter of Paul Pappas, petitioner

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts

(70–57)

United States, petitioner *v.* Earl Caldwell

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

[June 29, 1972]

Mr. Justice Stewart, with whom Mr. Justice Brennan and Mr. Justice Marshall join, dissenting.

The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society. The question whether a reporter has a constitutional right to a confidential relationship with his source is of first impression here, but the principles which should guide our decision are as basic as any to be found in the Constitution. While Mr. Justice Powell's enigmatic concurring opinion gives some hope of a more flexible view in the future, the Court in these cases holds that a newsman has no First Amendment right to protect his sources when called before a grand jury. The Court thus invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government. Not only will this decision impair performance of the press' constitutionally protected functions, but it will, I am convinced, in the long run, harm rather than help the administration of justice.

I respectfully dissent.

I

The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of informa- historic independence of the press by attempting to annex the journalistic protection of a free press, *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250; *New*

York Times v. *Sullivan*, 376 U.S. 254, 269,[1] because the guarantee is "not for the benefit of the press so much as for the benefit of us all." *Time, Inc.* v. *Hill*, 385 U.S. 374, 389.[2]

Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised,[3] and a free press is thus indispensable to a free society. Not only does the press enhance personal self-fulfillment by providing the people with the widest possible range of fact and opinion, but it also is an incontestable precondition of self-government. The press "has been a mighty catalyst in awakening interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences. . . ." *Estes* v. *Texas*, 381 U.S. 532, 539; *Mills* v. *Alabama*, 384 U.S. 214, 219; *Grosjean*, *supra*, at 250. As private and public aggregations of power burgeon in size and the pressures for conformity necessarily mount, there is obviously a continuing need for an independent press to disseminate a robust variety of information and opinion through reportage, investigation and criticism, if we are to preserve our constitutional tradition of maximizing freedom of choice by encouraging diversity of expression.

A

In keeping with this tradition, we have held that the right to publish is central to the First Amendment and basic to the existence of constituional democracy. *Grosjean*, *supra*, at 250; *New York Times*, *supra*, at 270.

A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated. We have, therefore, recognized that there is a right to publish without prior governmental approval, *Near* v. *Minnesota*, 283 U.S. 697; *New York Times* v. *United States*, 403 U.S. 713, a right to distribute information, see, *e.g.*, *Lovell* v. *Griffin*, 303 U.S. 444, 452; *Marsh* v. *Alabama*, 326 U.S. 501; *Martin* v. *City of Struthers*, 319 U.S. 141; *Grosjean*, *supra*, and a right to receive printed matter, *Lamont* v. *Postmaster General*, 381 U.S. 301.

No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist. *Zemel* v. *Rusk*, 381 U.S. 1.[4] Note, The Right of the Press to Gather Information, 71 Col. L. Rev. 838 (1971). As Madison wrote: "A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both." 6 Writings of James Madison 398 (Hunt ed. 1906).

B

The right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source. This proposition follows as a matter of simple logic once three factual predicates are recognized: (1) newsmen require informants to gather news; (2) confidentiality—the promise or understanding that names or certain aspects of communications will be kept off-the-record—is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) the existence of an unbridled subpoena power—the absence of a constitutional right protecting, in *any* way, a confidential relationship from compulsory process—will either deter sources from divulging information or deter reporters from gathering and publishing information.

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[1] We have often described the process of informing the public as the core purpose of the constitutional guarantee of free speech and a free press. See, *e.g.*, *Stromberg* v. *California*, 283 U.S. 359, 369; *De Jonge* v. *Oregon*, 299 U.S. 353, 365; *Smith* v. *California*, 361 U.S. 147, 153.

[2] As I see it, a reporter's right to protect his source is bottomed on the constitutional guarantee of a full flow of information to the public. A newsman's personal First Amendment rights or the associational rights of the newsman and the source are subsumed under that broad societal interest protected by the First Amendment. Obviously, we are not here concerned with the parochial personal concerns of particular newsmen or informants.

"The newsman-informer relationship is different from . . . other relationships whose confidentiality is protected by statute, as the attorney-client and physician-patient relationships. In the case of other statutory privileges, the right of nondisclosure is granted to the person making the communication in order that he will be encouraged by strong assurances of confidentiality to seek such relationships which contribute to his personal well-being. The judgment is made that the interests of society will be served when individuals consult physicians and lawyers; the public interest is thus advanced by creating a zone of privacy that the individual can control. However, in the case of the reporter-informer relationship, society's interest is not in the welfare of the informant *per see*, but rather in creating conditions in which information possessed by news sources can reach public attention." Note, 80 Yale L. J. 317, 343 (1970) (footnotes omitted) (hereinafter "Yale Note").

[3] See generally Z. Chafee, Free Speech in the United States (1941). A. Meikeljohn, Free Speech and Its Relation to Self-Government (1948); T. Emerson, Toward a General Theory of the First Amendment (1963).

[4] In *Zemel* v. *Rusk*, 381 U.S. 1, we held that the Secretary of State's denial of a passport for travel to Cuba did not violate a citizen's First Amendment rights. The rule was justified by the "weightiest considerations of national security" and we concluded that the "right to speak and publish does not carry with it the *unrestrained* right to gather information." *Id.*, at 16–17 (emphasis supplied). The necessary implication is that some right to gather information does exist.

It is obvious that informants are necessary to the news-gathering process as we know it today. If it is to perform its constitutional mission, the press must do far more than merely print public statements or publish prepared handouts. Familiarity with the people and circumstances involved in the myriad background activities that result in the final product called "news" is vital to complete and responsible journalism, unless the press is to be a captive mouthpiece of "newsmakers."[5]

It is equally obvious that the promise of confidentiality may be a necessary prerequisite to a productive relationship between a newsman and his informants. An officeholder may fear his superior; a member of the bureaucracy, his associates; a dissident, the scorn of majority opinion. All may have information valuable to the public discourse, yet each may be willing to relate that information only in confidence to a reporter whom he trusts either because of excessive caution or because of a reasonable fear of reprisals or censure for unorthodox views. The First Amendment concern must not be with the motives of any particular news source, but rather with the conditions in which informants of all shades of the spectrum may make information available through the press to the public. Cf. *Talley* v. *California*, 362 U. S. 60, 65; *Bates* v. *City of Little Rock*, 361 U. S. 147; *NAACP* v. *Alabama*, 357 U. S. 449.[6]

In *Caldwell*, the District Court found that "confidential relationships . . . are commonly developed and maintained by professional journalists, and are indispensable to their work of gathering, analyzing and publishing news."[7] Commentators and individual reporters have repeatedly noted the importance of confidentiality.[8] And surveys among reporters and editors indicate that the promise of nondisclosure is necessary for many types of news-gathering.[9]

Finally, and most important, when governmental officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it, because uncertainty about exercise of the power will lead to "self-censorship." *Smith* v. *California*, 361 U.S. 147, 149–154; *New York Times* v. *Sullivan*, 376 U.S. 254, 279. The uncertainty arises, of course, because the judiciary has traditionally imposed virtually no limitations on the grand jury's broad investigatory powers. See Antell, The Modern Grand Jury: Benighted Supergovernment, 51 A. B. A. J. (1965). See also Part II, *infra*.

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[5] In *Caldwell* v. *United States*, 434 F. 2d 1081, the Government claimed that Caldwell need not maintain a confidential relationship with members of the Black Panther Party and provide independent reporting of their activities, since the Party and its leaders could issue statements on their own. But as the Court of Appeals for the Ninth Circuit correctly observed:

"It is not enough that Black Panther press releases and public addresses by Panther leaders may continue unabated in the wake of subpoenas such as the one here in question. It is not enough that the public's knowledge of groups such as the Black Panthers should be confined to their deliberate public pronouncements or distant news accounts of their occasional dramatic forays into the public view. The need for an untrammeled press takes on special urgency in times of widespread protest and dissent. In such times the First Amendment protections exist to maintain communication with dissenting groups and to provide the public with a wide range of information about the nature of protest and heterodoxy. See, *e.g.*, *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940)." *Id.*, at 1084–1085.

[6] As we observed in *Talley* v. *California*, 362 U.S. 60, "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. . . . Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. . . . Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes." *Id.*, at 64–65. And in *Lamont* v. *Postmaster General*, 381 U.S. 301, we recognized the importance to First Amendment values of the right to receive information anonymously.

[7] *Application of Caldwell*, 311 F. Supp. 358, 361.

[8] See, *e.g.*, F. Chalmers, A Gentleman of the Press: The Biography of Colonel John Bayne MacLean 74–75 (1969); H. Klurfield, Behind the Lines: The World of Drew Pearson 50, 52–55 (1968); A. Krock, Memoirs: Sixty Years on the Firing Line 181, 184–185 (1968); E. Larsen, First with the Truth 22–23 (1968); R. Ottley, The Lonely Warrior—The Life and Times of Robert S. Abbott 143–145 (1955); C. L. Sulzberger, A Long Row of Candles, Memoirs and Diaries 24, 241 (1969).

As Walter Cronkite, a network television reporter, said in an affidavit in *Caldwell*: "In doing my work, I (and those who assist me) depend constantly on information, ideas, leads and opinions received in confidence. Such material is essential in digging out newsworthy facts and equally important in assessing the importance and analyzing the significance of public events."

[9] See Guest & Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources, 64 Nw. L. Rev. 18 (1969); Blasi, Press Subpoenas: An Empirical and Legal Analysis, Study Report of the Reporters' Committee on Freedom of the Press 20–29 (1972) (hereinafter, "Blasi").

After today's decision, the potential informant can never be sure that his identity or off-the-record communications will not subsequently be revealed through the compelled testimony of a newsman. A public spirited person inside government, who is not implicated in any crime, will now be fearful of revealing corruption on other governmental wrong-doing, because he will now know he can subsequently be identified by use of compulsory process. The potential source must, therefore, choose between risking exposure by giving information or avoiding the risks by remaining silent.

The reporter must speculate about whether contact with a controversial source or publication of controversial material will lead to a subpoena. In the event of a subpoena, under today's decision, the newsman will know that he must choose between being punished for contempt if he refuses to testify, or violating his profession's ethics[10] and impairing his resourcefulness as a reporter if he discloses confidential information.[11]

Again, the common sense understanding that such deterrence will occur is buttressed by concrete evidence. The existence of deterrent effects through fear and self-censorship was impressively developed in the District Court in *Caldwell*.[12] Individual reporters[13] and commentators[14] have noted such effects. Surveys have verified that an unbridled subpoena power will substantially impair the flow of news to the public, especially in sensitive areas involving governmental officials, financial affairs, political figures, dissidents, or minority groups that require in-depth, investigative reporting.[15] And the Jusitce Department has recognized that "compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights."[16] *No* evidence contradicting the existence of such deterrent effects was offered at the trials or in the briefs here by the petitioners in *Caldwell* or by the respondents in *Branzburg* and *Pappas*.

The impairment of the flow of news cannot, of course, be proven with scientific precision, as the Court seems to demand. Obviously, not every news-gathering relationship requires confidentiality. And it is difficult to pinpoint precisely how many relationships do require a promise or understanding of nondisclosure. But we have never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist; we have never before required proof of the exact number of people potentially affected by governmental action, who would actually be dissuaded from engaging in First Amendment activity.

Rather, on the basis of common sense and available information, we have asked, often implicitly, (1) whether there was a rational connection between the cause (the governmental action) and the effect (the deterrence or impairment of First Amendment activity) and (2) whether the effect would occur with some regularity, *i.e.*, would not be *de minimis*. See, *e.g.*, *Grosjean*, *supra*, at 244–245; *Burstyn* v. *Wilson*, 343 U.S. 495, 503; *Sweezy* v. *New Hampshire*, 354 U.S. 234, 248; *NAACP* v. *Alabama*, 357 U.S. 449, 461–466; *Smith* v. *California*, 361 U.S. 147, 150–154; *Bates* v. *City of Little Rock*, 361 U.S. 516, 523–524; *Talley* v. *California*, 362 U.S. 60, 64–65; *Shelton* v. *Tucker*, 364 U.S. 479, 485–486; *Cramp* v. *Board of Public Instruction*, 368 U.S. 278; 286; *NAACP* v. *Button*, 371 U.S. 415, 431–438; *Gibson* v. *Florida Legislative Investigative Committee*, 372 U.S. 539, 555–557; *New York Times* v. *Sullivan*, 376 U.S. 254, 277–278; *Freedman* v. *Maryland*, 380 U.S. 51, 59; *DeGregory* v. *New Hampshire Attorney General*, 383 U.S. 825; *Elfbrandt* v. *Russell*, 384 U.S. 11, 16–19. And, in making this determination, we have shown a special solicitude towards the "indispensable liberties" protected by the First Amendment. *NAACP* v. *Alabama*, 371 U.S., at 461; *Bantam Books Inc.* v. *Sullivan*, 372 U.S. 58, 66, for "freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference." *Bates*, *supra*, at 523.[17] Once this threshold inquiry has been satisfied, we have then examined the competing interests in determining whether there is an unconstitutional infringement of First Amendment freedoms.

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[10] The American Newspaper Guild has adopted the following rule as part of the newsman's code of ethics: "Newspaper men shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigative bodies." G. Bird and F. Mervin. The Newspaper and Society 567 (1942).

[11] Obviously if a newsman does not honor a confidence he will have difficulty establishing other confidential relationships necessary for obtaining information in the future. See Siebert and Ryniker, Editor and Publisher, September 1, 1934, 36–37.

[12] The court found that "compelled disclosure of information received by a journalist within the scope of . . . confidential relationships jeopardizes those relationships and thereby impairs the journalist's ability to gather, analyze and publish news." *Application of Caldwell*, 311 F. Supp. 358, 361.

[13] See n. 8, *supra*.

[14] Recent commentary is nearly unanimous in urging either an absolute or qualified newsman's privilege. See, *e.g.*, Goldstein, Newsmen and Their Confidential Sources, New Republic, March 21, 1970, 13–14; Note, 80 Yale L. J. 317 (1970); Note, N. Y. U. L. Rev. 617 (1971); Nelson, The Newsmen's Privilege Against Disclosure of Confidential Sources and Information, 24 Vand. L. Rev. 667 (1971); Note, 71 Col. L. Rev. 838 (1971); Comment, 4 Journal of Law Reform 85 (1971); Comment, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 119 (1970); Comment, 58 Calif. L. Rev. 1198 (1970). But see the Court's opinion, *ante*, at 24, n. 29. And see generally articles collected in Yale Note, n. 2.

Recent decisions are in conflict both as to the importance of the deterrent effects and, *a fortiori*, as to the existence of a constitutional right to a confidential reporter-source relationship. See the Court's opinion, *ante*, at 20, and cases collected in Yale Note, at 318, n. 6–7.

[15] See Blasi 6–71; Guest and Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources, 64 Nw. L. Rev. 18, 43–50 (1969).

[16] Department of Justice Memo No. 692, September 2, 1970.

For example, in *NAACP* v. *Alabama*, 357 U.S. 449, we found that compelled disclosure of the names of those in Alabama who belonged to the NAACP "is likely to affect adversely the ability [of the NAACP] and its members to pursue their beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." *Id.*, at 463. In *Talley*, *supra*, we held invalid a city ordinance which forbade circulation of any handbill that did not have the distributor's name on it, for there was "no doubt that such an identification procedure would tend to restrict freedom to distribute information and thereby freedom of expression." *Id.*, at 64–65. And in *Burstyn*, *supra*, we found deterrence of First Amendment activity inherent in a censor's power to exercise unbridled discretion under an overbroad statute. *Id.*, at 503.

Surely the analogous claim of deterrance here is as securely grounded in evidence and common sense as the claims in the cases cited above, although the Court calls the claim "speculative." See *ante*, at 28. The deterrence may not occur in every confidential relationship between a reporter and his source.[18] But it will certainly occur in certain types of relationships involving sensitive and controversial matters. And such relationships are vital to the free flow of information.

To require any greater burden of proof is to shirk our duty to protect values securely embedded in the Constitution. We cannot await an unequivocal—and therefore unattainable—imprimatur from empirical studies.[19] We can and must accept the evidence developed in the record, and elsewhere, that overwhelmingly supports the premise that deterrence will occur with regularity in important types of news-gathering relationships.[20]

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[17] Although, as the Court points out, we have held that the press is not free from the requirements of the National Labor Relations Act, the Fair Labor Standards Act, the anti-trust laws or nondiscriminatory taxation, *ante*, at 17, these decisions were concerned "only with restraints on certain business or commercial practices of the press." *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139. And due weight was given to First Amendment interests. For example, the "First Amendment far from providing an argument against application of the Sherman Act . . . provides powerful reasons to the contrary." *Associated Press* v. *United States*, 326 U.S. 1, 20.

[18] The fact that *some* informants will not be deterred from giving information by the prospect of the unbridled exercise of the subpoena power only means that there will not *always* be a conflict between the grand jury's inquiry and the protection of First Amendment activities. But even if the percentage of such informants is relatively large (compared to the total "universe" of potential informants, there will remain a large number of people in "absolute" terms who *will* be deterred, and the flow of news through mass circulation newspapers and electronic media will inevitably be impaired.

[19] Empirical studies, after all, can only provide facts. It is the duty of courts to give legal significance to facts; and it is the special duty of this Court to understand the constitutional significance of facts. We must often proceed in a state of less than perfect knowledge, either because the facts are murky or the methodology used in obtaining the facts is open to question. It is then that we must look to the Constitution for the values that inform our presumptions. And the importance to our society of the full flow of information to the public has buttressed this Court's historic presumption in favor of First Amendment values.

[20] See, *e.g.*, the uncontradicted evidence presented in affidavits from newsmen in *Caldwell*, Appendix to No. 70–57, at 22–61 (statements from Gerald Fraser, Thomas Johnson, John Kifner, Timothy Knight, Nicholas Proffitt, Anthony Ripley, Wallace Turner, Gilbert Noble

Thus, we cannot escape the conclusion that when neither the reporter nor his source can rely on the shield of confidentiality against unrestrained use of the grand jury's subpoena power, valuable information will not be published and the public dialogue will inevitably be impoverished.

II

Posed against the First Amendment's protection of the newsman's confidential relationships in these cases is society's interest in the use of the grand jury to administer justice fairly and effectively. The grand jury serves two important functions: "to examine into the commission of crimes" and "to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will." *Hale* v. *Henkel,* 201 U.S. 43, 59. And to perform these functions the grand jury must have available to it every man's relevant evidence. See *Blair* v. *United States,* 250 U.S. 273, 281; *Blackmer* v. *United States,* 284 U.S. 421, 438.

Yet the longstanding rule making every person's evidence available to the grand jury is not absolute. The rule has been limited by the Fifth Amendment,[21] the Fourth Amendment,[22] and the evidentiary privileges of the common law.[23] So it was that in *Blair, supra,* after recognizing that the right against compulsory self-incrimination prohibited certain inquiries, the Court noted that "some confidential matters are shielded from considerations of policy, and perhaps in other cases for *special reasons* a witness may be excused from telling all he knows." *Id.,* at 281 (emphasis supplied). And in *United States* v. *Bryan,* 393 U.S. 323, the Court observed that any exemption from the duty to testify before the grand jury "presupposes a very real interest to be protected." *Id.,* at 331-332.

Such an interest must surely be the First Amendment protection of a confidential relationship that I have discussed above in Part I. As noted there, this protection does not exist for the purely private interests of the newsmen or his informant, nor even, at bottom, for the First Amendment interests of either partner in the newsgathering relationship.[24] Rather it functions to insure nothing less than democratic decisionmaking through the free flow of information to the public, and it serves, thereby, to honor the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times* v. *Sullivan,* 376 U.S., at 270.

In striking the proper balance between the public interest in the efficient administration of justice and the First Amendment guarantee of the fullest flow of information, we must begin with the basic proposition that because of their "delicate and vulnerable" nature, *NAACP* v. *Button,* 371 U.S. 415, 433, and their transcendent importance for the just functioning of our society, First Amendment rights require special safeguards.

A

This Court has erected such safeguards when government, by legislative investigation or other investigative means, has attempted to pierce the shield of privacy inherent in freedom of association.[25] In no previous case have we considered the extent to which the First Amendment limits the grand jury subpoena power. But the Court has said that the "Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be com-

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Anthony Lukas, Martin Arnold, David Burnham, Jon Lowell, Frank Morgan, Min Yee, Walter Cronkite, Eric Sevareid, Mike Wallace, Dan Rather, Marvin Kalb).

[21] See *Blau* v. *United States,* 340 U.S. 159; *Quinn* v. *United States,* 349 U.S. 155; *Curcio* v. *United States,* 354 U.S. 118; *Malloy* v. *Hogan,* 378 U.S. 1.

[22] See *Silverthrone Lumber Co.* v. *United States,* 251 U.S. 385.

[23] See Committee on Rules of Practice and Procedure of Judicial Conference of the United States, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates (1971); 8 J. Wigmore, Evidence §§ 2290-2391 (McNaughten ed. 1961).

[24] Although there is a longstanding presumption against creation of common law testimonial privileges, *United States* v. *Bryan,* 339 U.S. 323, 331, these privileges are grounded in an "individual interest which has been found . . . to outweigh the public interest in the search for truth" rather than in the broad public concerns which inform the First Amendment. *Id.,* at 331.

[25] The protection of information from compelled disclosure for broad purposes of public policy has been recognized in decisions involving police informers, see *Roviaro* v. *United States,* 353 U.S. 53, *United States* v. *Ventresca,* 380 U.S. 102, 108, *Aguilar* v. *Texas,* 378 U.S. 108, 114, *McCray* v. *Illinois,* 386 U.S. 300, and military and state secrets, *United States* v. *Reynolds,* 345 U.S. 1.

pelled to give evidence against themselves. They cannot be subjected to unreasonable searches and seizures. Nor can the First Amendment freedoms of speech, press . . . or political speech and association be abridged." *Watkins* v. *United States*, 354 U.S. 178, 188. And in *Sweezy* v. *New Hampshire*, 354 U.S. 234, it was stated: "it is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas." *Id.*, at 245 (plurality opinion).

The established method of "carefully" circumscribing investigative powers is to place a heavy burden of justification on government officials when First Amendment rights are impaired. The decisions of this Court have "consistently held that only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can jusify limiting First Amendment freedoms." *NAACP* v. *Button*, 371 U. S. 415, 438. And "it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the state *show a substantial relation between the information sought and a subject of overriding and compelling state interest.*" *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539, 546 (emphasis supplied). See also *DeGregory* v. *Attorney General of New Hampshire*, 383 U. S. 825; *NAACP* v. *Alabama*, 357 U. S. 449; *Sweezy, supra; Watkins, supra.*

Thus, when an investigation impinges on First Amendment rights, the government must not only show that the inquiry is of "compelling and overriding importance" but it must also "convincingly" demonstrate that the investigation is "substantially related" to the information sought.

Governmental officials must, therefore, demonstrate that the information sought is *clearly* relevant to a *precisely* defined subject of governmental inquiry. *Watkins, supra; Sweezy, supra.*[26] They must demonstrate that it is reasonable to think the witness in question has that information. *Sweezy, supra; Gibson, supra.*[27] And they must show that there is not any means of obtaining the information less destructive of First Amendment liberties. *Shelton* v. *Tucker*, 364 U. S. 479, 488; *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293, 296–297.[28]

These requirements, which we have recognized in decisions involving legislative and evecutive investigations, serve established policies reflected in numerous First Amendment decisions arising in other contexts. The requirements militate against vague investigations which, like vague laws, create uncertainty and needlessly discourage First Amendment activity.[29] They also insure that a legitimate governmental purpose will not be pursued by means that "broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton, supra*, at 488.[30] As we said in *Gibson, supra*, "Of course, a legislative investigation—as any investigation—must proceed 'step by step,' . . . but step by step or in totality, an adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights." *Id.*, at 557.

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[26] As we said in *Watkins* v. *United States*, 354 U.S. 178:
"[W]hen First Amendment rights are threatened, the delegation of power to the [legislative] committee must be clearly revealed in its charter. . . . It is the responsibility of the Congress . . . to insure that compulsory process is used only in furtherance of a legislative purpose. That requires that the instructions to an investigating commitee spell out the group's jurisdiction and purpose with sufficient particularity. . . . The more vague the committee's charter is, the greater becomes the possibility that the committee's specific actions are not in conformity with the will of the parent House of Congress." *Id.*, at 198–201.

[27] We noted in *Sweezy* v. *Hampshire*, 354 U.S. 234:
"The State Supreme Court itself recognized that there was a weakness in its conclusion that the menace of forcible overthrow of the government justified sacrificing constitutional rights. There was a missing link in the chain of reasoning. The syllogism was not complete. *There was nothing to connect the questioning of the petitioner with this fundamental interest of the state.*" *Id.*, at 251 (emphasis supplied).

[28] See generally Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464 (1969).

[29] See *Watkins, supra*, at 208–209. See generally *Baggett* v. *Bullitt*, 377 U.S. 360, 372; *Speiser* v. *Randall*, 357 U.S. 513, 526; *Ashton* v. *Kentucky*, 384 U.S. 195, 200–201; *Dombrowski* v. *Pfister*, 380 U.S. 479, 486; *Smith* v. *California*, 361 U.S. 147, 150–152 (1959); *Winters* v. *New York*, 333 U.S. 507; *Stromberg* v. *California*, 283 U.S. 359, 369. See also Note, The Chilling Effect in Constitutional Law, 69 Col. L. Rev. 808 (1969).

[30] See generally *Zwickler* v. *Koota*, 389 U.S. 241, 249–250, and cases cited therein; *Coates* v. *Cincinnati*, 402 U.S. 611, 616; *Cantwell* v. *Connecticut*, 310 U.S. 296, 307; *De Jonge* v. *Oregon*, 299 U.S. 353, 364–365; *Schneider* v. *State*, 308 U.S. 147, 164; *Cox* v. *Louisiana*, 379 U.S. 559, 562–564 (1965). Cf. *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). See also Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970).

I believe the safeguards developed in our decisions involving governmental investigations must apply to the grand jury inquiries in these cases. Surely the function of the grand jury to aid in the enforcement of the law is no more important than the function of the legislature, and its committees, to make the law. We have long recognized the value of the role played by legislative investigations, see, *e.g.*, *United States* v. *Rumely*, 345 U.S. 41, 43; *Barenblatt* v. *United States*, 360 U.S. 109, 111–112, for the "power of Congress to conduct investigations is broad . . . [encompassing] surveys of defects in our social, economic or political system for the purpose of enabling Congress to remedy them." *Watkins, supra*, at 187. Similarly, the associational rights of private individuals, which have been the prime focus of our First Amendment decisions in the investigative sphere, are hardly more important than the First Amendment rights of mass circulation newspapers and electronic media to disseminate ideas and information, and of the general public to receive them. Moreover, the vices of vagueness and overbreadth which legislative investigations may manifest are also exhibited by grand jury inquiries, since grand jury investigations are not limited in scope to specific criminal acts, see, *e.g.*, *Wilson* v. *United States*, 221 U.S. 361, *Hendricks* v. *United States*, 223 U.S. 178, 184, *United States* v. *Johnson*, 319 U.S. 503, and since standards of materiality and relevance are greatly relaxed. *Holt* v. *United States*, 218 U.S. 245; *United States* v. *Costello*, 350 U.S. 359. See generally Note, The Grand Jury as an Investigatory Body, 74 Harv. L. Rev. 590, 591–592 (1961).[31] For, as the United States notes in its brief in *Caldwell*, the grand jury "need establish no factual basis for commencing an investigation, and can pursue rumors which further investigation may prove groundless."

Accordingly, when a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information which is clearly relevant to a specific probable violation of law;[32] (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.[33]

This is not to say that a grand jury could not issue a subpoena until such a showing were made, and it is not to say that a newsman would be in any way privileged to ignore any subpoena that was issued. Obviously, before the government's burden to make such a showing were triggered, the reporter would have to move to quash the subpoena, asserting the basis on which he considered the particular relationship a confidential one.

B

The crux of the Court's rejection of any newsman's privilege is its observation that only "where news sources themselves are implicated in crime or possess information *relevant* to the grand jury's task need they or the reporter be concerned about grand jury subpoenas." See *ante*, at 25 (emphasis supplied). But this is a most misleading construct. For it is obviously not true that the only persons about whom reporters will be forced to testify will be those "confidential informants involved in actual criminal conduct" and those having "information suggesting illegal conduct by others." See *ante*, at 25, 27. As noted above, given the grand jury's extraordinarily broad investigative powers and the weak standards of relevance and materiality that apply during such inquiries, reporters, if they have no testimonial privilege, will be called to give information about informants who have neither committed crimes nor have information about crime. It is to avoid deterrence of such sources and thus to prevent needless injury to First Amendment values that I think the government must be required to show probable cause that the newsman has information which is clearly relevant to a specific probable violation of criminal law.[34]

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[31] In addition, witnesses customarily are not allowed to object to questions on the grounds of materiality or relevance, since the scope of the grand jury inquiry is deemed to be of no concern to the witness. *Blair* v. *United States*, 417 F. 2d 384, cert. denied, 399 U.S. 935. Nor is counsel permitted to be present to aid a witness. See *In re Groban*, 352 U.S. 330.

See generally Younger, The Grand Jury Under Article III, 46 Crim. L.C. & P.S. 214 (1955); Note, 104 U. Pa. L. Rev. 429 (1955); Watts, Grand Jury: Sleeping Watchdog or Expensive Antique, 37 N.C. L. Rec. 290 (1959); Whyte, "Is the Grand Jury Necessary," 45 Va. L. Rev. 469 (1959); Note, 2 Col. L. and Soc. Prob 58 (1965); Antell, The Modern Grand Jury: Benighted Supergovernment, 51 A.B.A.J. 153 (1965); Orfield, The Federal Grand Jury, 22 F.R.D. 343.

[32] The standard of proof employed by most grand juries, federal and State, is simply "probable cause" to believe that the accused has committed a crime. See Note, 1963 Wash. U. L. Q. 102; L. Hall *et al.*, Modern Criminal Procedure 793–794 (1969). Generally speaking, it is extremely difficult to challenge indictments on the ground that they are not supported by adequate or competent evidence. Cf. *Costello* v. *United States*, 350 U.S. 359; *Beck* v. *Washington*, 369 U.S. 541.

[33] Cf. *Garland* v. *Torre*, 259 F. 2d 545. The Second Circuit Court of Appeals declined to provide a testimonial privilege to a newsman called to testify at a civil trial. But the court recognized a newsman's First Amendment right to a confidential relationship with his source and concluded: "It is to be noted that we are not dealing here with the use of judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality. . . . The question asked went to the heart of the plaintiff's claim." *Id.*, at 549–550 (citations omitted).

Similarly, a reporter may have information from a confidential source which is "related" to the commission of crime, but the government may be able to obtain an indictment or otherwise achieve its purposes by subpoenaing persons other than the reporter. It is an obvious but important truism that when government aims have been fully served, there can be no legitimate reason to disrupt a confidential relationship between a reporter and his source. To do so would not aid the administration of justice and would only impair the flow of information to the public. Thus, it is to avoid deterrence of such sources that I think the government must show that there are no alternative means for the grand jury to obtain the information sought.

Both the "probable cause" and "alternative means" requirements would thus serve the vital function of mediating between the public interest in the administration of justice and the constitutional protection of the full flow of information. These requirements would avoid a direct conflict between these competing concerns, and they would generally provide adequate protection for newsmen. See Part III, *infra*.[35] No doubt the courts would be required to make some delicate judgments in working out this accommodation. But that, after all, is the function of courts of law. Better such judgments, however difficult, than the simplistic and stultifying absolutism adopted by the Court in denying any force to the First Amendment in these cases.[36]

The error in the Court's absolute rejection of First Amendment interests in these cases seems to me to be most profound. For in the name of advancing the administration of justice, the Court's decision, I think, will only impair the achievement of that goal. People entrusted with law enforcement responsibility, no less than private citizens, need general information relating to controversial social problems. Obviously, press reports have great value to government, even when the newsman cannot be compelled to testify before a grand jury. The sad paradox of the Court's position is that when a grand jury may exercise an unbridled subpoena power, and sources involved in sensitive matters become fearful of disclosing information, the newsman will not only cease to be a useful grand jury witness; he will cease to investigate and publish information about issues of public import. I cannot subscribe to such an anomalous result, for, in my view, the interests protected by the First Amendment are not antagonistic to the administration of justice. Rather, they can, in the long run, only be complementary, and for that reason must be given great "breathing space." *NAACP* v. *Button*, 371 U. S. 415, 433.

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[34] If this requirement is not met, then the government will basically be allowed to undertake a "fishing expedition" at the expense of the press. Such general, exploratory investigations will be most damaging to confidential news-gathering relationships, since they will create great uncertainty in both reporters and their sources. The Court sanctions such explorations, by refusing to apply a meaningful "probable cause" requirement. See *ante*, at 35–36. As the Court states, a grand jury investigation "may be triggered by tips, rumors, evidence proferred by the prosecutor, or the personal knowledge of the grand jurors." *Ante*, at 36. It thereby invites government to try to annex the press as an investigative arm, since any time government wants to probe the relationships between the newsman and his source, it can, on virtually any pretext, convene a grand jury and compel the journalist to testify.

The Court fails to recognize that under the guise of "investigating crime" vindictive prosecutors can, using the broad powers of the grand jury which are, in effect, immune from judicial supervision, explore the newsman's sources at will, with no serious law enforcement purpose. The secrecy of grand jury proceedings affords little consolation to a news source; the prosecutor obviously will, in most cases, have knowledge of testimony given by grand jury witnesses.

[35] We need not, therefore, reach the question of whether government's interest in these cases is "overriding and compelling." I do not, however, believe, as the Court does, that *all* grand jury investigations automatically would override the newsman's testimonial privilege.

[36] The disclaimers in Mr. Justice Powell's concurring opinion leave room for the hope that in some future case the Court may take a less absolute position in this area.

III

In deciding what protection should be given to information a reporter receives in confidence from a news source, the Court of Appeals for the Ninth Circuit affirmed the holding of the District Court that the grand jury power of testimonial compulsion must not be exercised in a manner likely to impair First Amendment interests "until there has been a clear showing of compelling and overriding national interest that cannot be served by alternative means." *Caldwell* v. *United States*, 434 F. 2d 1081, 1086. It approved the request of respondent Caldwell for specification by the government of the "subject, direction or scope of the grand jury inquiry." *Id.*, at 1085. And it held that in the circumstances of this case Caldwell need not divulge confidential information.

I think this decision was correct. On the record before us the Unted States has not met the burden which I think the appropriate newsman's privilege should require.

In affidavits before the District Court, the United States said it was investigating possible violations of 18 U.S.C. § 871 (threats against the President), 18 U.S.C. § 1751 (assassination, attempts to assassinate, conspiracy to assassinate the President), 18 U.S.C. § 231 (civil disorders), 18 U.S.C. § 1201 (interstate travel to incite a riot), 18 U.S.C. § 1341 (mail fraud and swindles) and other crimes which were not specified. But, with one exception, there has been no factual showing in this case of the probable commission of, or of attempts to commit, any crimes.[37] The single exception relates to the allegation that a Black Panther Party leader, David Hilliard, violated 18 U.S.C. § 871 during the course of a speech in November 1969. But Caldwell was subpoenaed two months after an indictment was returned against Hilliard, and that charge could not, subsequent to the indictment, be investigated by a grand jury. See *In re National Window Glass Workers*, 287 Fed. 219; *United States* v. *Dardi*, 330 F. 2d 316, 336.[38] Furthermore, the record before us does not show that Caldwell probably had any information about the violation of any other federal crimes,[39] or that alternative means of obtaining the desired information were pursued.[40]

In the *Caldwell* case, the Court of Appeals further found that Caldwell's confidential relationship with the leaders of the Black Panther Party would be impaired if he appeared before the grand jury at all to answer questions, even though not privileged. *Caldwell* v. *United States*, 434 F. 2d, at 1088. On the particular facts before it.[41] the Court concluded that the very appearance by

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[37] See Blasi, at 61 ff.

[38] After Caldwell was first subpoenaed to appear before the grand jury, the Government did undertake, by affidavits, to "set forth facts indicating the general nature of the grand jury's investigation [and] witness Earl Caldwell's possession of information relevant to this general inquiry." In detailing the basis for the belief that a crime had probably been committed, the government simply asserted that certain actions had previously been taken *by other grand juries, and by Government counsel,* with respect to certain members of the Black Panther Party (*i.e.,* immunity grants for certain Black Panthers were sought; the Government moved to compel party members to testify before grand juries; and contempt citations were sought when party members refused to testify). No facts were asserted suggesting the actual commission of crime. The exception, as noted, involved David Hilliard's speech and its republication in the party newspaper, "The Black Panther," for which Hilliard had been indicted before Caldwell was subpoenaed.

[39] In its affidavits, the government placed primary reliance on certain articles published by Caldwell in the New York Times during 1969 (on June 15, July 20, July 22, July 27, and December 14). On December 14, 1969, Caldwell wrote:

"We are special, Mr. Hilliard said recently. We advocate the very direct overthrow of the Government by way of force and violence. By picking up guns and moving against it because we recognize it as being oppressive and in recognizing that we know that the only solution to it is armed struggle.

"In their role as the vanguard in a revolutionary struggle, the Panthers have picked up guns.

"Last week two of their leaders were killed during the police raid on one of their offices in Chicago. And in Los Angeles a few days earlier, three officers and three Panthers were wounded in a similar shooting incident. In these and in some other raids, the police have found caches of weapons, including high-powered rifles."

In my view, this should be read as indicating that Caldwell had interviewed Panther leaders. It does not indicate that he *probably* had knowledge of the crimes being investigated by the Government. And, to repeat, to the extent it does relate to Hilliard's threat, an indictment had already been brought on that matter. The other articles merely demonstrate that Black Panther Party leaders had told Caldwell their ideological beliefs—beliefs which were readily available to the Government through other sources, like the party newspaper.

[40] The Government did not attempt to show that means less impinging upon First Amendment interests had been pursued.

[41] In an affidavit filed with the District Court, Caldwell stated:

"I began covering and writing articles about the Black Panthers almost from the time of their inception, and I myself found that in those first months that they were very

Caldwell before the grand jury would jeopardize his relationship with his sources, leading to a severance of the news-gathering relationship and impairment of the flow of news to the public:[42]

> "Appellant asserted in affidavit that there is nothing to which he could testify (beyond that which he has already made public and for which, therefore, his appearance is unnecessary) that is not protected by the District Court's order. If this is true—and the Government apparently has not believed it necessary to dispute it—appellant's response to the subpoena would be a barren performance—one of no benefit to the Grand Jury. To destroy appellant's capacity as news gatherer for such a return hardly makes sense. Since the cost to the public of excusing his attendance is so slight, it may be said that there is here no public interest of real substance in competition with the First Amendment freedoms that are jeopardized.
>
> "If any competing public interest is ever to arise in a case such as this (where First Amendment liberties are threatened by mere appearance at a Grand Jury investigation) it will be on an occasion in which the witness, armed with his privilege, can still serve a useful purpose before the Grand Jury. Considering the scope of the privilege embodied in the protective order, these occasions would seem to be unusual. It is not asking too much of the Government to show that such an occasion is presented here." *Caldwell, supra,* at 1089.

I think this ruling was also correct in light of the particularized circumstances of the *Caldwell* case. Obviously, only in very rare circumstances would a confidential relationship between a reporter and his source be so sensitive that mere appearance before the grand jury by the newsman would substantially impair his newsgathering function. But in this case, the reporter made out a prima facie case that the flow of news to the public would be curtailed. And he stated, without contradiction, that the only nonconfidential material about which he could testify was already printed in his newspaper articles.[43] Since the United States has not attempted to refute this assertion, the appearance of Caldwell would on these facts, indeed be a "barren performance." But *this* aspect of the *Caldwell* judgment I would confine to its own facts. As the Court of Appeals

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brief and reluctant to discuss any substantive matter with me. However, as they realized I could be trusted and that my sole purpose was to collect my information and present it objectively in the newspaper and that I had no other motive, I found that not only were the party leaders available for in-depth interviews but also the rank and file members were cooperative in aiding me in the newspaper stories that I wanted to do. During the time that I have been covering the party, I have noticed other newspapermen representing legitimate organizations in the news media turned away because they were not known and trusted by the party leadership.

"As a result of the relationship that I have developed, I have been able to write lengthy stories about the Panthers that have appeared in The New York Times and have been of such a nature that other reporters who have not known the Panthers have not been able to write. Many of these stories have appeared in up to 50 or 60 other newspapers around the country.

"The Black Panther Party's method of operation with regard to members of the press is significantly different from that of other organizations. For instance, press credentials are not recognized as being of any significance. In addition, interviews are not normally designated as being 'backgrounders' or 'off the record' or 'for publication' or 'on the record.' Because no substantive interviews are given until a relationship of trust and confidence is developed between the Black Panther Party members and a reporter, statements are rarely made to such reporters on an expressed 'on' and 'off' the record basis. Instead, an understanding is developed over a period of time between the Black Panther Party members and the reporter as to matters which the Black Panther Party wishes to disclose for publications and those matters which are given in confidence. . . . Indeed, if I am forced to appear in secret grand jury proceedings, my appearance alone would be interpreted by the Black Panthers and other dissident groups as a possible disclosure of confidences and trusts and would similarly destroy my effectiveness as a newspaperman."

[42] "Militant groups might very understandably fear that, under the pressure of examination before a Grand Jury, the witness may fail to protect their confidences. . . . The Government characterizes this anticipated loss of communication as Black Panther reprisal. . . . But it is not an extortionate threat that we face. It is a human reaction as reasonable to expect as that a client will leave a lawyer when his confidence is shaken. . . . As the Government points out, loss of such a sensitive news source can also result from its reaction to indiscreet or unfavorable reporting or from a reporter's association with Government agents or persons disapproved of by the news source. Loss in such a case, however, results from an exercise of the choice and prerogative of a free press. It is not the result of Government compulsion." *Caldwell* v. *United States*, 434 F. 2d 1088.

[43] Caldwell stated in his affidavit filed with the District Court, see n. 40, *supra*:

"It would be virtually impossible for me to recall whether any particular matter disclosed to me by members of the Black Panther Party since January 1, 1969, was based on an understanding that it would or would not be confidential. Generally, those matters which were made on a nonconfidential or 'for publication' basis have been published in articles I have written in The New York Times; conversely, any matters which I have not thus far disclosed in published articles would have been given to me based on the understanding that they were confidential and would not be published."

appropriately observed: "The rule of this case is a narrow one. . . ." *Caldwell, supra*, at 1090.

Accordingly, I would affirm the judgment of the Court of Appeals in No. 70-57, *United States* v. *Caldwell.*[44] In the other two cases before us, No. 70-85, *Branzburg* v. *Hayes* and *Branzburg* v. *Meigs*, and No. 70-94, *In the Matter of Paul Pappas*, I would vacate the judgments and remand the cases for further proceedings not inconsistent with the views I have expressed in this opinion.

SUPREME COURT OF THE UNITED STATES

No. 70-57

UNITED STATES, PETITIONER, *v.* EARL CALDWELL

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

[June 29, 1972]

MR. JUSTICE DOUGLAS, dissenting.

Caldwell, a Black, is a reporter for the New York Times and was assigned to San Francisco with the hope that he could report on the activities and attitudes of the Black Panther Party. Caldwell in time gained the complete confidence of its members and wrote in-depth articles about them.

He was subpoenaed to appear and testify before a federal grand jury and to bring with him notes and tapes covering interviews with its members. A hearing on a motion to quash was held. The District Court ruled that while Caldwell must appear before the grand jury, he need not reveal confidential communications unless the court was satisfied that there was a "compelling and overriding national interest." See 311 F. Supp. 358. Caldwell filed a notice of appeal and the Court of Appeals dismissed the appeal without opinion.

Shortly thereafter a new grand jury was impanelled and it issued a new subpoena for Caldwell to testify. On a motion to quash, the District Court issued an order substantially identical to its earlier one.

Caldwell refused to appear and was held in contempt. On appeal the Court of Appeals vacated the judgment of contempt. It said that the revealing of confidential sources of information jeopardized a First Amendment freedom, that Caldwell need not appear before the grand jury absent a showing that there was a "compelling or overriding national interest" in pursuing such an interrogation.

The District Court had found that Caldwell's knowledge of the activities of the Black Panthers "derived in substantial part" from information obtained "within the scope of a relationship of trust and confidence." It also found that confidential relationships of this sort are commonly developed and maintained by professional journalists, and are indispensable to their work of gathering, analyzing, and publishing the news.

The District Court further had found that compelled disclosure of information received by a journalist within the scope of such confidential relationships jeopardized those relationships and thereby impaired the journalist's ability to gather, analyze, and publish the news.

The District Court finally had found that, without a protective order delimiting the scope of interrogation of Earl Caldwell by the grand jury, his appearance and examination before the jury would severely impair and damage his confidential relationships with members of the Black Panther Party and other militants, and thereby severely impair and damage his ability to gather, analyze, and publish news concerning them; and that it would also damage and impair the abilities of all reporters to gather, analyze, and publish news concerning them.

The Court of Appeals agreed with the findings of the District Court but held that Caldwell need not appear at all before the grand jury absent a "compelling need" shown by the Government. 434 F. 2d 1081.

It is my view that there is no "compelling need" that can be shown which qualifies the reporter's immunity from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime. His immunity in my view is therefore quite complete, for absent his involvement in a crime, the First Amendment protects him against an appearance before a grand jury and if he is involved in a crime, the Fifth Amendment stands as a barrier. Since in my view there is no area of inquiry not protected by a privilege, the reporter need not appear for the futile purpose of invoking one to each question. And, since in my view a newsman has an absolute right not to appear before a grand jury it follows for me that a journalist who voluntarily appears before that body may invoke his First Amendment privilege to specific questions. The basic issue is the extent to which the First Amendment (which is applicable to investigating committees, *Watkins* v. *United States*, 354 U.S. 178; *NAACP* v. *Alabama*, 357 U.S. 449, 463; *Gibson* v. *Florida Legislative Investigating Committee*, 372 U.S. 539; *Baird* v. *State Bar*, 401 U.S. 1, 6–7; *I re Stolar*, 401 U.S. 23) must yield to the Government's asserted need to know a reporter's unprinted information.

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[44] The District Court reserved jurisdiction to modify its order on a showing of a governmental interest which cannot be served by means other than Caldwell's grand jury testimony. The Government would thus have further opportunity in that court to meet the burden which, I think, protection of First Amendment rights requires.

The starting point for decision pretty well marks the range within which the end result lies. The New York Times, whose reporting functions are at issue here, takes the amazing position that First Amendment rights are to be balanced against other needs or conveniences of government.[1] My belief is that all of the "balancing" was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated, the timid, watered-down, emasculated versions of the First Amendment which both the Government and the New York Times advances in the case.

My view is close to that of the late Alexander Meiklejohn:[2]

> "For the understanding of these principles it is essential to keep clear the crucial difference between 'the rights' of the governed and 'the powers' of the governors. And at this point, the title 'Bill of Rights' is lamentably inaccurate as a designation of the first ten amendments. They are not a 'Bill of Rights' but a 'Bill of Powers and Rights.' The Second through the Ninth Amendments limit the powers of the subordinate agencies in order that due regard shall be paid to the private 'rights of the governed. The First and Tenth Amendments protect the governing 'powers' of the people from abridgment by the agencies which are established as their servants. In the field of our 'rights,' each one of us can claim 'due process of law.' In the field of our governing 'powers,' the notion of 'due process is irrelevant."

He also believed that "Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express,"[3] and that "[p]ublic discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power."[4]

Two principles which follow from this understanding of the First Amendment are at stake here. One is that the people, the ultimate governors, must have absolute freedom of and therefore privacy of their individual opinions and beliefs regardless of how suspect or strange they may appear to others. Ancillary to that principle is the conclusion that an individual must also have absolute privacy over whatever information he may generate in the course of testing his opinions and beliefs. In this regard, Caldwell's status as a reporter is less relevant than is his status as a student who affirmatively pursued empirical research to enlarge his own intellectual viewpoint. The second principle is that effective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination. In this respect, Caldwell's status as a newsgatherer and an integral part of that process becomes critical.

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[1] "The three minimal tests we contend must be met before testimony divulging confidences may be compelled from a reporter are these: 1. The government must clearly show that there is probable cause to believe that the reporter possesses information which is specifically relevant to a specific probable violation of law. 2. The government must clearly show that the information it seeks cannot be obtained by alternative means, which is to say, from sources other than the reporter. 3. The government must clearly demonstrate a compelling and overriding interest in the information." Amicus Brief, N.Y. Times, at 29.

[2] Meiklejohn, The First Amendment Is Absolute, 1961 Sup. Ct. Rev. 245, 254.

[3] *Id.*, at 256.

[4] *Id.*, at 257.

I

Government has many interests that compete with the First Amendment. Congressional investigations to determine how existing laws actually operate or whether new laws are needed. While congressional committees have broad powers, they are subject to the restraints of the First Amendment. As we said in *Watkins* v. *United States*, 354 U. S. 178, 197: "Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking."

Hence matters of belief, ideology, religious practices, social philosophy and the like are beyond the pale and of no rightful concern of government, unless the belief or the speech or other expression has been translated into action. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642; *Baird* v. *State Bar*, 401 U. S. 1, 6–7; *In re Stolar*, 401 U. S. 23.

Also at stake here is Caldwell's privacy of association. We have held that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP* v. *Alabama*, 357 U. S. 449, 462; *NAACP* v. *Button*, 371 U. S. 415.

As I said in *Gibson* v. *Florida Legislative Committee*, 372 U.S. 539, 565: ". . . the associational rights protected by the First Amendment . . . cover the entire spectrum in political ideology as well as in art, in journalism, in teaching, and in religion. [G]overnment is . . . precluded from probing the intimacies of spiritual and intellectual relationships in the myriad of such societies and groups that exist in this country, *regardless of the legislative purpose to be served* . . . . If that is not true, I see no barrier to investigation of newspapers, churches, political parties, clubs, societies, unions, and any other associations for their political, economic, social, philosophical, or religious vews." (Emphasis added.)

The Court has not always been consistent in its protection of these First Amendment rights and has sometimes allowed a government interest to override the absolutes of the First Amendment. For example, under the banner of the "clear and present danger" test,[5] and later under the influence of the "balancing" formula,[6] the Court has permitted men to be penalized not for any harmful conduct but solely for holding unpopular beliefs.

In recent years we have said over and again that where First Amendment rights are concerned any regulation "narrowly drawn,"[7] must be "compelling" and not merely "rational" as is the case where other activities are concerned.[8] But the "compelling" interest in regulation neither includes paring down or diluting the right, nor embraces penalizing one solely for his intellectual viewpoint; it concerns the State's interest, for example, in regulating the time and place or perhaps manner of exercising First Amendment rights. Thus one has an undoubted right to read and proclaim the First Amendment in the classroom or in a park. But he would not have the right to blare it forth from a sound truck rolling through the village at 2 a.m. The distinction drawn in *Cantwell* v. *Connecticut*, 310 U.S. 296, 303–304, should still stand: "[T]he Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[9]

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[5] *E.g., Schenck* v. *United States*, 249 U.S. 47 (wartime antidraft leafleting); *Debs* v. *United States*, 249 U.S. 211 (wartime anti-draft speech); *Abrams* v. *United States*, 250 U.S. 616 (wartime leafleting calling for general strike); *Feiner* v. *New York*, 340 U.S. 315 (arrest of radical speaker without attempt to protect him from hostile audience); *Dennis* v. *United States*, 341 U.S. 494 (reformulation of test as "not improbable" rule to sustain conviction of knowing advocacy of overthrow); *Scales* v. *United States*, 367 U.S. 203 (knowing membership in group which espouses forbidden advocacy is punishable). For a more detailed account of the infamy of the "clear and present danger" test see my concurring opinion in *Brandenburg* v. *Ohio*, 395 U.S. 444, 447.

[6] *E.g., Adler* v. *Board of Education*, 342 U.S. 485 (protection of schools from "pollution" outweighs public teachers' freedom to advocate violent overthrow); *Uphaus* v. *Wyman*, 360 U.S. 72, 79, 81 (preserving security of New Hampshire from subversives outweighs privacy of list of participants in suspect summer camp); *Barenblatt* v. *United States*, [illegible] U.S. 109 (legislative inquiry more important that protecting HUACS witness' refusal to answer whether a third person had been a communist); *Wilkinson* v. *United States*, [illegible] U.S. 399 (legislative inquiry more important than protecting HUAC witness' refusal to state whether he was currently a member of the Communist Party); *Braden* v. *United States*, 365 U.S. 431, 435 (legislative inquiry more important than protecting HUAC witness' refusal to state whether he had once been a member of the Communist Party); *Konigsberg* v. *State Bar*, 366 U.S. 36 (regulating membership of bar outweighs interest of applicants in refusing to answer question concerning communist affiliations); *In re Anastaplo*, 366 U.S. 82 (regulating membership of bar outweighs protection of applicant's belief in Declaration of Independence that citizens should revolt against an oppressive government); *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1 (national security outweighs privacy of association of leaders of suspect groups); *Law Students Research Council* v. *Wadmond*, 401 U.S. 154 (regulating membership of bar outweighs privacy of applicants' views on the soundness of the Constitution).

[7] Thus, we have held "overbroad" measures which unduly restricted the time, place, and manner of expression. *Schneider* v. *State*, 308 U.S. 147, 161 (anti-leafleting law); *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (anti-boycott statute); *Cantwell* v. *Connecticut*, 310 U.S. 296 (breach of peace measure); *Cox* v. *Louisiana*, 379 U.S. 536 (breach of peace measure); *Edwards* v. *South Carolina*, 372 U.S. 229 (breach of peace statute); *Cohen* v. *California*, 403 U.S. 15, 22 (breach of peace statute); *Gooding* v. *Wilson*, 405 U.S. —— (breach of

Under these precedents there is no doubt that Caldwell could not be brought before the grand jury for the sole purpose of exposing his political beliefs. Yet today the Court effectively permits that result under the guise of allowing an attempt to elicit from him "factual information." To be sure, the inquiry will be couched only in terms of extracting Caldwell's recollection of what was said to him during the interviews, but the fact remains that his questions to the Panthers and therefore the respective answers were guided by Caldwell's own preconceptions and views about the Black Panthers. His entire experience was shaped by his intellectual viewpoint. Unlike the random bystander, those who affirmatively set out to test an hypothesis, as here, have no tidy means of segregating subjective opinion from objective facts.

Sooner or later any test which provides less than blanket protection to beliefs and associations will be twisted and relaxed so as to provide virtually no protection at all. As Justice Holmes noted in *Abrams* v. *United States*, 250 U.S. 616, such was the fate of the "clear and present danger" test which he had coined in *Schenck* v. *United States*, 249 U.S. 47. Eventually, that formula was so watered down that the danger had to be neither clear nor present but merely "not improbable." *Dennis* v. *United States*, 341 U.S. 494, 510. See my concurring opinion in *Brandenburg* v. *Ohio*, 395 U.S. 444, 447. A compelling

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peace statute). But insofar as penalizing the *content* of thought and opinion is concerned, the Court has not in recent Terms permitted any interest to override the absolute privacy of one's philosophy. To be sure, opinions have often adverted to the absence of a compelling justification for attempted intrusions into philosophical or associational privacy. *E.g., Bates* v. *Little Rock*, 361 U.S. 516, 523 (disclosure of NAACP membership lists to city officials); *Gibson* v. *Florida Legislative Investigating Committee*, 372 U.S. 539, 546 (disclosure of NAACP membership list to state legislature); *DeGregory* v. *Attorney General of New Hampshire*, 383 U.S. 825, 829 (witness' refusal to state whether he had been a member of the Communist Party three years earlier); *Baird* v. *State Bar of Arizona*, 401 U.S. 1, 6–7 (refusal of bar applicant to state whether she had been a member of the Communist Party), *In re Stolar*, 401 U.S. 23 (refusal of bar applicant to state whether he was "loyal" to the government); see also *Street* v. *New York*, 394 U.S. 576 (expression of digust for flag). Yet, while the rhetoric of these opinions did not expressly embrace an absolute privilege for the privacy of opinions and philosophy, the trend of those results was not inconsistent with and in their totality appeared to be approaching such a doctrine. Moreover, in another group of opinions invalidating for overbreadth intrusions into the realm of belief and association, there was no specification of whether a danger test, a balancing process, an absolute doctrine, or a compelling justification inquiry had been used to detect invalid applications comprehended by the challenged measures. *E.g., Wieman* v. *Updegraff*, 344 U.S. 183 (loyalty test which condemned mere unknowing membership in a suspect group); *Shelton* v. *Tucker*, 364 U.S. 479 (requirement that public teachers disclose all affiliations); *Gremillion* v. *NAACP*, 366 U.S. 293, 296 (disclosure of NAACP membership lists); *Whitehall* v. *Elkins*, 389 U.S. 54, 59 (nonactive membership in a suspect group a predicate for refusing employment as a public teacher); *United States* v. *Robel*, 389 U.S. 258 (mere membership in Communist Party a sole ground for exclusion from employment in defense facility). Regrettably, the vitality of the overdue trend toward a complete privilege in this area has been drawn into question by quite recent decisions of the Court, *Law Students Research Council* v. *Wadmond*, 401 U.S. 154, holding that bar applicants may be turned away for refusing to disclose their opinions on the soundness of the Constitution; *Cole* v. *Richardson*, 405 U.S. ——, sustaining an oath required of public employees that they will "oppose" a violent overthrow; and, of course, by today's decision.

[8] Where no more than economic interests were affected this Court has upheld legislation only upon a showing that it was "rationally connected" to some permissible state objective, only upon a showing that it was "rationally connected" to some permissible state objective. *E.g., United States* v. *Carolene Products Co.*, 304 U.S. 144, 152; *Goesaert* v. *Cleary*, 335 U.S. 464; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483; *McGowan* v. *Maryland*, 366 U.S. 420; *McDonald* v. *Board of Election Comm'rs.*, 394 U.S. 802; *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4; *Richardson* v. *Belcher*, 404 U.S. 78; *Schilb* v. *Keubel*, 404 U.S. 357.

[9] The majority cites several cases which held that certain burdens on the press were permissible despite incidental burdens on its newsgathering ability. For example, see *Sheppard* v. *Maxwell*, 384 U.S. 333, 358. Even assuming that those cases were rigidly decided, the fact remains that in none of them was the Government attempting to extract personal belief from a witness and the privacy of a citizen's personal intellectual viewpoint was not implicated.

interest test may prove as pliable as did the clear and present danger test. Perceptions of the worth of state objectives will change with the composition of the Court and with the intensity of the politics of the times. For example, in *Uphaus* v. *Wyman*, 360 U.S. 72, sustaining an attempt to compel a witness to divulge the names of participants in a summer political camp, JUSTICE BRENNAN dissented on the ground that "it is patent that there is really no subordinating interest . . . demonstrated on the part of the State." *Id.*, 106. The majority, however, found that "the governmental interest in self-preservation is sufficiently compelling to subordinate the interest in associational privacy . . . ." *Id.*, 81. That is to enter the world of "make believe," for New Hampshire, the State involved in *Uphaus*, was never in fear of being overthrown.

II

Today's decision will impede the wide open and robust dissemination of ideas and counterthought which a free press both fosters and protects and which is essential to the success of intelligent self-government. Forcing a reporter before a grand jury will have two retarding effects upon the ear and the pen of the press. Fear of exposure will cause dissidents to communicate less openly to trusted reporters. And, fear of accountability will cause editors and critics to write with more restrained pens.

I see no way of making mandatory the disclosure of a reporter's confidential source of the information on which he bases his news story.

The press has a preferred position in our constitutional scheme not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people, to paraphrase Alexander Meiklejohn. Knowledge is essential to informed decisions.

As Mr. Justice Black said in *New York Times Co.* v. *United States*, 403 U.S. 713, 717 (concurring opinion), "The press was to serve the governed, not the governors. . . . The press was protected so that it could bare the secrets of government and inform the people."

Government has an interest in law and order; and history shows that the trend of rulers—the bureaucracy and the police—is to suppress the radical and his ideas and to arrest him rather than the hostile audience. See *Feiner* v. *New York*, 340 U.S. 315. Yet as held in *Terminiello* v. *Chicago*, 337 U.S. 1, 4, one "function of free speech under our system of government is to invite dispute." We went on to say, "It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."

The people who govern are often far removed from the cabals that threaten the regime; the people are often remote from the sources of truth even though they live in the city where the forces that would undermine society operate. The function of the press is to explore and investigate events, inform the people what is going on, and to expose the harmful as well as the good influences at work. There is no higher function performed under our constitutional regime. Its performance means that the press is often engaged in projects that bring anxiety or even fear to the bureaucracies or departments or officials of government. The whole weight of government is therefore often brought to bear against a paper or a reporter.

A reporter is no better than his source of information. Unless he has a privilege to withhold the identity of his source, he will be the victim of governmental intrigue or aggression. If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended. If what the Court sanctions today becomes settled law, then the reporter's main function in American society will be to pass on to the public the press releases which the various departments of government issue.

It is no answer to reply that the risk that a newsman will divulge one's secrets to the grand jury is no greater than the threat that he will in any event inform to the police. Even the most trustworthy reporter may not be able to withstand relentless badgering before a grand jury.[10]

The record in this case is replete with weighty affidavits from responsible newsmen, telling how important are the sanctity of their sources of information.[11] When we deny newsmen that protection, we deprive the people of the information needed to run the affairs of the Nation in an intelligent way.

Madison said:

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And, a people who mean to be their own Governors, must arm themselves with the power which knowledge gives (to W. T. Barry, August 4, 1822)." The Complete Madison 337 (1953).

Today's decision is more than a clog upon news gathering. It is a signal to publishers and editors that they should exercise caution in how they use whatever information they can obtain. Without immunity they may be summoned to account for their criticism. Entrenched officers have been quick to crash their powers down upon unfriendly commentators.[12] *E.g., New York Times Co.* v. *Sullivan*, 376 U.S. 254; *Garrison* v. *Louisiana*, 379 U.S. 64; *Pickering* v. *Board of Education*, 391 U.S. 563; *Gravel* v. *United States, ante.*

The intrusion of government into this domain is symptomatic of the disease of this society. As the years pass the power of government becomes more and more pervasive. It is a power to suffocate both people and causes. Those in power, whatever their politics, want only to perpetuate it. Now that the fences of the law and the tradition that has protected the press are broken down, the people are the victims. The First Amendment, as I read it, was designed precisely to prevent that tragedy.

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[10] "The secrecy of the [grand jury's] proceedings and the possibility of a jail sentence for contempt so intimidate the witness that he may be led into answering questions which pry into his personal life and associations and which, in the bargain, are frequently immaterial and vague. Alone and faced by either hostile or apathetic grand juries, the witness is frequently undone by his experience. Life in a relatively open society makes him especially vulnerable to a secret appearance before a body that is considering criminal charges. And the very body toward which he could once look for protection has become a weapon of the prosecution. When he seeks protective guidance from his lawyer, he learns that the judicial broadening of the due process which has occurred in the past two decades has largely ignored grand jury matters, precisely because it was assumed that the grand jury still functioned as a guardian of the rights of potential defendants." Donnor & Cerruti, The Grand Jury Network: How the Nixon Administration Has Secretly Perverted A Traditional Safeguard of Individual Rights, 214 The Nation 5, 6 (1972).

[11] It is said that "we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury." But the majority need look no further than its holdings that prosecutors need not disclose informers' names because disclosure would (a) terminate the usefulness of an exposed informant inasmuch as others would no longer confide in him, and (b) it would generally inhibit persons from becoming confidential informers. *McCray* v. *Illinois*, 386 U.S. 300; *Scher* v. *United States*, 305 U.S. 251; cf. *Roviaro* v. *United States*, 353 U.S. 53.

[12] For a summary of early reprisals against the press, such as the John Peter Zenger trial, the Alien and Sedition Acts prosecutions, and Civil War suppression of newspapers, see Press Freedoms Under Pressure, Repor tof the Twentieth Century Fund Task Force on the Government and the Press 3–5 (1972). We have not outlived the tendency of officials' to retaliate against critics. For recent examples see J. Wiggins, Freedom or Secrecy 87 (1956) ("New Mexico, in 1954, furnished a striking example of government reprisal against . . . a teacher in the state reform school [who] wrote a letter to the New Mexican, confirming stories it had printed about mistreatment of inmates by guards. . . . [Two days later he] was notified of his termination."); Note, the Right of Government Employees to Furnish Information to Congress: Statutory and Constitutional Aspects, 57 Va. L. Rev. 885–886 (1971) (dismissal of an Air Force employee who testified before a Senate committee with respect to C–5A cargo plane cost overruns and firing of an FBI agent who wrote Senators complaining of the Bureau's personnel practices; N.Y. Times, Nov. 8, 1967, at 1, col. 2; *ibid.*, Nov 9, 1967, at 2, col. 4 (Selective Service directive to local draft boards requiring conscription of those who protested war; N.Y. Times, Nov. 11, 1971, at 95, col. 4; *ibid.*, Nov. 12, 1971, at 13, col. 1; *ibid.*, Nov. 14, 1971, at 13, col. 1 (FBI investigation of a television commentator who criticized administration policies); *ibid.*, Nov. 14, 1971, at 75, col. 3 (denial of White House press pass to underground journalist).

SUPREME COURT OF THE UNITED STATES

Nos. 70–85, 70–94, and 70–57

(70–85)

PAUL M. BRANZBURG, PETITIONER *v.* JOHN P. HAYES, JUDGE, ETC., ET AL

On Writ of Certiorari to the Court of Appeals of Kentucky

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(70–94)

IN THE MATTER OF PAUL PAPPAS, PETITIONER

On Writ of Certiorari to the Supreme Court of Massachusetts

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(70–57)

UNITED STATES, PETITIONER, *v.* EARL CALDWELL

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

[June 29, 1972]

MR. JUSTICE POWELL, concurring in the opinion of the Court.

I add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding. The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. Certainly, we do not hold, as suggested in the dissenting opinion, that state and federal authorities are free to "annex" the news media as "an investigative arm of government." The solicitude repeatedly shown by this Court for First Amendment freedoms should be sufficient assurance against any such effort, even if one seriously believed that the media—properly free and untrammeled in the fullest sense of these terms—were not able to protect themselves.

As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered. The asserted claim of privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.*

In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

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*It is to be remembered that Caldwell asserts a constitutional privilege not even to appear before the grand jury unless a court decides that the government has made a showing that meets the three preconditions specified in the dissenting opinion of MR. JUSTICE STEWART. To be sure, this would require a "balancing" of interests by the Court, but under circumstances and constraints significantly different from the balancing that will be appropriate under the Court's decision. The newsman witness, like all other witnesses, will have to appear; he will not be in a position to litigate at the threshold the State's very authority to subpoena him. Moreover, absent the constitutional preconditions that Caldwell and the dissenting opinion would impose as heavy burdens of proof to be carried by the State, the court—when called upon to protect a newsman from improper or prejudicial questioning—would be free to balance the competing interests on their merits in the particular case. The new constitutional rule endorsed by the dissenting opinion would, as a practical matter, defeat such a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN THE MATTER OF THE APPLICATION OF EARL CALDWELL AND NEW YORK TIMES COMPANY FOR AN ORDER QUASHING GRAND JURY SUBPOENAS, EARL CALDWELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

(No. 26,025)

[November 16, 1970]

On Appeal from the United States District Court for the Northern District of California

Before: MERRILL and ELY, Circuit Judges, and JAMESON, District Judge[*]

MERRILL, Circuit Judge:

Earl Caldwell appeals from an order holding him in contempt of court for disregard of an order directing him to appear before the Grand Jury of the United States District Court for the Northern District of California pursuant to a subpoena issued by the Grand Jury.

Appellant is a black news reporter for the New York Times. He has become a specialist in the reporting of news concerning the Black Panther Party. The Grand Jury is engaged in a general investigation of the Black Panthers and the possibility that they are engaged in criminal activities contrary to federal law.

In order to protect First Amendment interests asserted by appellant, the District Court order of attendance, which appellant disregarded, expressly granted appellant the privilege of silence as to certain matters until such time as the Government should demonstrate "a compelling and over-riding national interest in requiring Mr. Caldwell's testimony which cannot be served by any alternative means." This protective order provided:

> "(1) That * * * he shall not be required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination, to the public through the press or other news media.
>
> "(2) That specifically, without limiting paragraph (1), Mr. Caldwell shall not be required to answer questions concerning statements made to him or information given to him by members of the Black Panther Party unless such statements or information were given him for publication or public disclosure.
>
> "(3) That, to assure the effectuation of this order, Mr. Caldwell shall be permitted to consult with his counsel at any time he wishes during the course of his appearance before the grand jury * * *."

Appellant contends that the privilege granted by the District Court will not suffice to protect the First Amendment interests at stake; that unless a specific need for his testimony can be shown by the United States he should be excused from attendance before the Grand Jury altogether. Thus it is not the scope of the interrogation to which he must submit that is here at issue; it is whether he need attend at all.

The case is one of first impression and one in which news media have shown great interest and have accordingly favored us with briefs as amici curiae. As is true with many problems recently confronted by the courts, the case presents vital questions of public policy; questions as to how competing public interests shall be balanced. The issues require us to turn out attention to the underlying conflict between public interests and the nature of such competing interests.[1]

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[*] Honorable William J. Jameson, United States District Judge for the District of Montana, sitting by designation.

[1] Where, as here, the alleged abridgement of First Amendment interests occurs as a by-product of otherwise permissible governmental action not directed at the regulation of speech or press, "resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." *Barenblatt* v. *United States*, 360 U.S. 109, 126 (1959); see, e.g., *Konisberg* v. *State Bar*, 366 U.S. 36, 50–51 (1961); *Bates* v. *Little Rock*, 361 U.S. 516 (1960); *NAACP* v. *Alabama*, 357 U.S. 449, 460–67 (1958); Kalven, "The New York Times Case: A Note on 'The Central Meaning of the First Amendment,' " 1964, Sup.Ct.Rev. 191, 214–16 (1964).

While the United States has not appealed from the grant of privilege by the District Court (which it opposed below) and the propriety of that grant is thus not directly involved here, appellant's contentions here rest upon the same First Amendment foundation as did the protective order granted below. Thus, before we can decide whether the First Amendment requires more than a protective order delimiting the scope of interrogation, we must first decide whether it requires any privilege at all.

THE PROTECTIVE ORDER

The proceeding below were initiated by a motion by appellant to quash subpoenas issued by the Grand Jury.[2] In his moving papers appellant's position was that the "inevitable effect of the subpoenas will be to suppress vital First Amendment freedoms of Mr. Caldwell, of the New York Times, of the news media, and of militant political groups by driving a wedge of distrust and silence between the news media and the militants, and that this Court should not countenance a use of its process entailing so drastic an incursion upon First Amendment freedoms in the absence of compelling governmental interest—not shown here—in requiring Mr. Caldwell's appearance before the Grand Jury."

Amici curiae solidly supported appellant in this position. The fact that the subpoenas would have a "chilling effect" on First Amendment freedoms was impressively asserted in affidavits of newsmen of recognized stature, to a considerable extent based upon recited experience. Appellant's own history is related in his moving papers:

> "Earl Caldwell has been covering the Panthers almost since the Party's beginnings. Initially received hesitatingly and with caution, he has gradually won the confidence and trust of Party leaders and rank-and-file members. As a result, Panthers will now discuss Party views and activities freely with Mr. Caldwell. * * * Their confidences have enabled him to write informed and balanced stories concerning the Black Panther Party which are unavailable to most other newsmen.
>
> * * * * * * *
>
> If Mr. Caldwell were to disclose Black Panther confidences to governmental officials, the grand jury, or any other person, he would thereby destroy the relationship of trust which he presently enjoys with the Panthers and other militant groups. They would refuse to speak to him; they would become even more reluctant than they are now to speak to any newsmen; and the news media would thereby be vitally hampered in their ability to cover the views and activities of the militants."

The response of the United States disputed the contention that First Amendment freedoms were endangered.

> "Newsmen filing affidavits herein allege that they fear, in effect, that the Black Panthers will refrain from furnishing them with news. This contention is specious. Despite some assertions by Black Panther leaders to the contrary, the Black Panthers in fact depend on the mass media for their constant endeavor to maintain themselves in the public eye and thus gain adherents and continued support. They have continued unceasingly to exploit the facilities of the mass media for their own purposes."

Assuming, arguendo, that this statement is correct, it is not fully responsive to the claim that First Amendment freedoms are endangered. The premise underlying the Government's statement is that First Amendment interests in this area are adequately safeguarded as long as potential news makers do not cease using the media as vehicles for their communication with the public. But the First Amendment means more than that. It exists to preserve an "untrammeled press as a vital source of public information," *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936). Its objective is the maximization of the "spectrum of available knowledge," *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965). Thus, it is not enough that Black Panther press releases and public addresses by Panther leaders may continue unabated in the wake of subpoenas such as the one here in question. It is not enough that the public's knowledge of groups such as the Black Panthers should be confined to their deliberate public pronouncements or distant news accounts of their occasional dramatic forays into the public view.

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[2] The first subpoena was served February 2, 1970. It directed appellant to appear and testify and to bring with him notes and tape recordings of interviews reflecting statements made for publication by officers and spokesmen for the Black Panther Party concerning the aims, purposes and activities of the organization. On March 16, after appellant had protested the scope of the subpoena, a second subpoena was served. It simply required appellant's attendance. Appellant's motion to quash was directed to both subpoenas. The court denied the motion and directed compliance with the March 16 subpoena subject to the protective order. Appellant appealed that decision; but the appeal was dismissed, apparently on the ground that the District Court order was not appealable. By then the term of the Grand Jury had expired, and a new Jury was sworn. A new subpoena ad testificandum was served on May 22, 1970. All proceedings had in connection with the earlier subpoenas were made a part of the record of the proceedings concerning this last subpoena. A new order directing attendance was issued; this order also contained the protective provisions or privilege. It is appellant's disregard of that order which resulted in the judgment of contempt now before us.

The need for an untrammeled press takes on special urgency in times of widespread protest and dissent. In such times the First Amendment protections exist to maintain communication with dissenting groups and to provide the public with a wide range of information about the nature of protest and heterodoxy. See, e.g., *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); *Thornhill* v. *Alabama*. 310 U.S. 88, 102 (1940).

The affidavits contained in this record required the conclusion of the District Court that "compelled disclosure of information received by a journalist within the scope of such confidential relationships jeopardizes those relationships and thereby impairs the journalist's ability to gather, analyse, and publish the news."

Accordingly we agree with the District Court that First Amendment freedoms are here in jeopardy.

On the other side of the balance is the scope of the Grand Jury's investigative power.

In his moving papers appellant complained that the Government had not disclosed the subject, direction or scope of the Grand Jury inquiry and that efforts of counsel to obtain some specification had been unavailing.

> "Government counsel has said only that the grand jury has 'broad investigative powers,' that he cannot 'limit the inquiry of the grand jury in advance,' and that the subject and scope of the grand jury's investigation is 'no concern of a subpoenaed witness,' "

The Government in opposing appellant's motion to quash, stated position in these terms:

> "On the basis of what he has written, directly quoting statements made to him for publication by spokesmen for the Black Panther Party, Earl Caldwell obviously can give and should come forward with evidence which will be helpful to the Grand Jury in its inquiry."

Thus, as is true in innumerable instances, the Grand Jury does not know what it wants from this witness. It wants to find out what he knows that might shed light on the general problem it is investigating. This type of wideranging, open-ended inquiry is, of course, typical of many Grand Jury proceedings. See Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906); Note, "The Grand Jury as an Investigatory Body," 74 Har.L.Rev. 590, 591–92 (1961). If the privilege of silence as defined by the District Court is made available to news gatherers, the Grand Jury will be deprived of their assistance as witnesses in such general investigations.

The question posed below was whether, as a matter of law, this loss to the Grand Jury, this impediment to its traditionally broad scope of inquiry, outweighs the injury to First Amendment freedoms.

The Government stresses the historic traditions of the Grand Jury with its extensive powers of investigation, see, e.g., Hale v. Henkel, *supra*, and the corresponding duty of the citizenry to come before the Grand Jury to give testimony. United States v. Bryan, 339 U.S. 323, 70 S.Ct. 724, 94 L.Ed. 884 (1950); Blair v. United States, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979 (1919). But these general propositions of Government authority necessarily are tempered by constitutional prohibitions and other exceptional circumstances. See United States v. Bryan, *supra*, 339 U.S. at 331, 70 S.Ct. 724, 94 L.Ed. 884; Blair v. United States, *supra*, 250 U.S. at 281–282, 39 S.Ct. 468, 63 L.Ed. 979. In this respect we find guidance in the Supreme Court decisions regarding conflicts between First Amendment interests and legislative investigatory needs;[3] the Court has required the sacrifice of First Amendment freedoms only where a compelling need for the particular testimony in question is demonstrated.[4]

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[3] Like the Grand Jury, legislative committees have long been viewed as invaluable instruments of goverance. *See, e.g., Barenblatt* v. *United States*, 360 U.S. 109, 111, 79 S. Ct. 1081, 3 L.Ed. 2d 1115 (1959); *United States* v. *Rumely*, 345 U.S. 41, 43, 73 S. Ct. 543, 97 L. Ed.

[4] *DeGregory* v. *Attorney General of New Hampshire*, 383 U.S. 825 (1966); *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *NAACP* v. *Alabama*,

If the Grand Jury may require appellant to make available to it information obtained by him in his capacity as news gatherer, then the Grand Jury and the Department of Justice have the power to appropriate appellant's investigative efforts to their own behalf—to convert him after the fact into an investigative agent of the Government. The very concept of a free press requires that the news media be accorded a measure of autonomy; that they should be free to pursue their own investigations to their own ends without fear of governmental interference; and that they should be able to protect their investigative processes. To convert news gatherers into Department of Justice investigators is to invade the autonomy of the press by imposing a governmental function upon them. To do so where the result is to diminish their future capacity as news gatherers is destructive of their public function.[5] To accomplish this where it has not been shown to be essential to the Grand Jury inquiry simply cannot be justified in the public interest.

Further it is not unreasonable to expect journalists everywhere to temper their reporting so as to reduce the probability that they will be required to submit to interrogation. The First Amendment guards against governmental action that induces such self-censorship. See *New York Times* v. *Sullivan*, 376 U.S. 254, 279 (1964); *Smith* v. *California*, 361 U.S. 147 (1959).

It was on such considerations as these that the balance was struck by the District Court. It ruled:

> "When the exercise of the grand jury power of testimonial compulsion so necessary to the effective functioning of the court may impinge upon or repress First Amendment rights or freedom of speech, press and association, which centuries of experience have found to be indispensable to the survival of a free society, such power shall not be exercised in a manner likely to do so until there has been a clear showing of a compelling and overriding national interest that cannot be served by any alternative means."

Finding that the Government had shown no compelling or overriding national interest for testimony of the sort specified, the District Court imposed the limits we have set forth earlier in this opinion. It reserved jurisdiction to modify its order on a showing of such governmental interest which cannot be served by means other than by appellant's testimony.

We agree with the District Court that the First Amendment requires this qualified privilege, and we find nothing unreasonable in the terms in which it was there defined.[6]

ATTENDANCE

We have noted, the issue upon this appeal goes beyond the question of a privilege to decline to respond to interrogation in certain areas. The District Court ruled that, although protected by its limited privilege, Caldwell was required to respond to the subpoena by appearing before the Grand Jury to answer questions not privileged. Appellant contends that his mere appearance before the Grand Jury will result in loss of his news sources. The Government questions this result.

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357 U.S. 449, 460–67 (1958); *Sweezy* v. *New Hampshire*, 354 U.S. 235 (1957); *Watkins* v. *United States*, 354 U.S. 178 (1957); *United States* v. *Rumely*, 345 U.S. 41 (1953). It is necessary that, as the investigation proceeds, step-by-step, "an adequate foundation for inquiry must be laid." *Gibson* v. *Florida Legislative Investigation Committee*, *supra*, at 557.

[5] It is a paradox of the Government's position that, if groups like the Black Panthers cease taking reporters like appellant into their confidence, these journalists will, in the future, be unable to serve a public function either as news gatherers or as prosecution witnesses.

[6] *Garland* v. *Torre*, 259 F.2d 545 (2d Cir.) cert. denied, 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed.2d 231 (1958), is not to the contrary. That case involved a libel suit in which an author attributed alleged defamatory remarks reported by her to a "network executive." The author, when called as a witness in the libel action against the network, claimed a First Amendment privilege not to disclose the informant's identity and was held in contempt for her refusal to divulge the source.

The Second Circuit (per Judge, now Mr. Justice, Stewart) affirmed the judgment of contempt. But, in doing so, it accepted the proposition "that compulsory disclosure of confidential sources of information may entail an abridgement of press freedom * * *" Id., at 548. The test was "whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom." Id. In that case the court noted that it was "not dealing here with the use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news nor with a case where the identity of the news source is of doubtful relevance or materiality." Id., at 549–550. There the information was essential for the trial of plaintiff's case; "the question asked of appellant went to the heart of plaintiff's claim." Id. Thus an over-riding need for the specific testimony was shown.

The affidavits on file cast considerable light on the process of gathering news about militant organizations.[7] It is apparent that the relationship which an effective privilelge in this area must protect is a very tenuous and unstable one. Unlike the relation between an attorney and his client or a physician and his patient, relationships between journalists and news sources like the Panthers are not rooted in any service the journalist can provide his informant apart from the publication of the information obtained. Goldstein, "Newsmen and their Confidential Sources," New Republic 13 (March 21, 1970). The relationship depends on trust and confidence that is constantly subject to reexamination and that depends in turn on actual knowledge of how news information imparted have been handled and on continuing reassurance that the handling has been discreet.[8]

This reassurance disappears when the reporter is called to testify behind closed doors. The secrecy that surrounds Grand Jury testimony necessarily introduces uncertainty in the minds of those who fear a betrayal of their confidences. These uncertainties are compounded by the subtle nature of the journalist-informer relation. The demarcation between what is confidential and what is for publication is not sharply drawn and often depends upon the particular context or timing of the use of the information. Militant groups might very understandably fear that, under the pressure of examination before a Grand Jury, the witness may fail to protect their confidence with quite the same sure judgment he invokes in the normal course of his professional work.

The Government characterizes this anticipated loss of communication as Black Panther reprisal; as manifesting a Black Panther demand that, "if you subpoena Caldwell, we will never speak to you again." It argues, that it is unthinkable that the American people would capitulate to such extortion.

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[7] One reporter for the New York Times states: "[O]n every story there is a much subtler and much more important form of communication at work between a reporter and his sources. It is built up over a period of time working with and writing about an organization, a person, or a group of persons. The reporter and the source each develops a feeling for what the other will do. The reporter senses how far he can go in writing before the source will stop communicating with him. The source, on the other hand, senses how much he can talk and act freely before he has to close off his presence and his information from the reporter. It is often through such subtle communication that the best and truest stories are written and printed in The Times, or any other newspaper."

Appellant relates his own experiences as follows:

"I began covering and writing articles about the Black Panthers almost from the time of their inception, and I myself found that in those first months that they were very brief and reluctant to discuss any substantive matter with me. However, as they realized I could be trusted and that my sole purpose was to collect my information and present it objectively in the newspaper and that I had no other motive, I found that not only were the party leaders available for in-depth interviews but also the rank and file members were cooperative in aiding me in the newspaper stories that I wanted to do. During the time that I have been covering the party, I have noticed other newspapermen representing legitimate organizations in the news media being turned away because they were not known and trusted by the party leadership.

"As a result of the relationship that I have developed, I have been able to write lengthy stories about the Panthers that have appeared in The New York Times and have been of such a nature that other reporters who have not known the Panthers have not been able to write. Many of these stories have appeared in up to 50 or 60 other newspapers around the country.

"The Black Panther Party's method of operation with regard to members of the press is significantly different from that of other organizations. For instance, press credentials are not recognized as being of any significance. In addition, interviews are not normally designated as being 'backgrounders' or 'off the record' or 'for publication' or 'on the record.' Because no substantive interviews are given until a relationship of trust and confidence is developed between the Black Panther Party members and reporter, statements are rarely made to such reporters on an expressed 'on' or 'off' the record basis. Instead, an understanding is developed over a period of time between the Black Panther Party members and the reporter as to matters which the Black Panther Party wishes to disclose for publication and those matters which are given in confidence."

He concludes:

"* * * if I am forced to appear in secret grand jury proceedings, my appearance alone would be interpreted by the Black Panthers and other dissident groups as a possible disclosure of confidences and trusts and would similarly destroy my effectiveness as a newspaperman."

A fellow black reporter, on leave of absence from The New York Times, states:

"From my experience, I am certain that a black reporter called upon to testify about black activist groups will lose his credibility in the black community generally. His testifying will also make it more difficult for other reporters to cover that community. The net result, therefore, will be to diminish seriously the meaningful news available about an important segment of our population."

[8] This is not necessarily true of every news source. In political and diplomatic areas where the source is an undercover tipster the relationship may well be sufficiently protected by a privilege not to disclose the source.

But it is not an extortionate threat we face. It is human reaction as reasonable to expect as that a client will leave his lawyer when his confidence is shaken. The news source has placed no price tag or exaction on enjoyment of First Amendment freedoms save its continuing confidence in the discretion of the reporter.[9]

As the Government points out, loss of such a sensitive news source can also result from its reaction to indiscreet or unfavorable reporting or from a reporter's association with Government agents or persons disapproved of by the news source. Loss in such a case, however, results from an exercise of the choice and prerogative of a free press. It is not the result of Government compulsion.

We conclude that the privilege not to answer certain questions does not, by itself, adequately protect the First Amendment freedoms at stake in this area; that without implementation in the manner sought by appellant the privilege would fail in its very purpose.

On the other side of the balance is the Grand Jury's right to summon this witness before it and in secrecy compel him to answer questions or to resort to his privilege. It is not the right to secure appearance and testimony that is itself in issue; the District Court's protective order alone would suffice were that all. It is the right to compel presence at a secret interrogation with which we are concerned.

Throughout history secret interrogation has posed problems and caused unease. See, e.g., Note, "An Historical Argument for the Right to Counsel During Police Interrogation," 73 Yale L.J. 1000, 1034–45 (1964). We do not doubt that secret interrogation is in general essential to the integrity and effectiveness of the Grand Jury process. However, implicit in the extraordinary nature of secret interrogations, is the possibility of conflict with basic rights. When this is shown to occur it is appropriate to inquire into the need in the particular case for the specific incursion. Since compulsion to attend and testify entails the exercise of judicial process, it is appropriate that the inquiry be judicially entertained.

The question, then, is whether the injury to First Amendment liberties which mere attendance threatens can be justified by the demonstrated need of the Government for appellant's testimony as to those subjects not already protected by the privilege.

Appellant asserted in affidavit that there is nothing to which he could testify (beyond that which he has already made public and for which, therefore, his appearance is unnecessary) that is not protected by the District Court's order. If this is true—and the Government apparently has not believed it necessary to dispute it—appellant's response to the subpoena would be a barren performance—one of no benefit to the Grand Jury. To destroy appellant's capacity as news gatherer for such a return hardly makes sense. Since the cost to the public of excusing his attendance is so slight, it may be said that there is here no public interest of real substance in competition with the First Amendment freedoms that are jeopardized.

If any competing public interest is ever to arise in a case such as this (where First Amendment liberties are threatened by mere appearance at a Grand Jury investigation) it will be an occasion in which the witness, armed with his privilege, can still serve a useful purpose before the Grand Jury. Considering the scope of the privilege embodied in the protective order, these occasions would seem to be unusual. It is not asking too much of the Government to show that such an occasion is presented here.

In light of these considerations we hold that where it has been shown that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand Jury interrogation, the Government must respond by demonstrating a compelling need for the witness's presence before judicial process properly can issue to require attendance.

We go no further than to announce this general rule. As we noted at the outset, this is a case of first impression. The courts can learn much about the problems in this area as they gain more experience in dealing with them. For the present, we lack the omniscience to spell out the details of the Government's burden[10] or the type of proceeding that would accommodate efforts to meet that

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[9] Quite a different situation would be presented were the demand unrelated to the privileged relationship: E.g. "The police must free our leader."

[10] Appellant, in his brief to this court, has carefully spelled out what he feels would be required:

"Specifically, we contend that, before it may compel a newsman to appear in grand jury proceedings under circumstances that would seriously damage the news-gathering and reporting abilities of the press, the Government must show at least: (1) that there are burden.[11] The fashioning of specific rules and procedures appropriate to the particular case can better be left to the District Court under its retained jurisdiction. Cf., *White Motor Co.* v. *United States*, 372 U.S. 253 (1963).

Finally we wish to emphasize what must already be clear: the rule of this case is a narrow one. It is not every news source that is as sensitive as the Black Panther Party has been shown to be respecting the performance of the "establishment" press or the extent to which that performance is open to view. It is not every reporter who so uniquely enjoys the trust and confidence of his sensitive news source.

THE FOURTH AMENDMENT ISSUE

Appellant also moved to quash the Grand Jury subpoenas on the ground that they were based upon information obtained by unconstitutional surveillance of his interviews with Black Panther members. He sought a hearing to determine whether the subpoenas were so obtained. *Alderman* v. *United States*, 394 U.S. 165 (1969). The District Court denied the motion solely on the ground that appellant lacked standing to raise the Fourth Amendment contention. This is assigned as error.

In light of our disposition of the First Amendment question in this case, we need not reach this issue. The United States might never meet the First Amendment burden imposed upon it by the District Court order as here implemented. Even if the Government does meet that burden, the court may not have to reach this Fourth Amendment claim; the Government's showing of need for appellant's testimony may disclose a basis for the Government's information which would present no Fourth Amendment problem. If such a problem is presented it could then be discussed in light of the specific facts.

Accordingly, we regard decision upon this question as unnecessary to the present disposition of the case. We reserve the issue and decline to reach it here.

Reversed and remanded with instructions that the judgment of contempt and the order directing attendance before the Grand Jury be vacated. The District Court under its retained jurisdiction may entertain such further proceedings as may be initiated by the United States.

JAMESON, *District Judge* (concurring):

This case presents narrow issues in the "delicate and difficult" task of reconciling the First Amendment guarantee of freedom of the press with the fair administration of justice, including the broad investigatory power of a grand jury and the obligation of a witness to testify. While perhaps unnecessary for a determination of this appeal, it is helpful, in my opinion, to note the guidelines for resolving conflicts in this sensitive area, as summarized by Judge, now Mr. Justice, Stewart, in Garland v. Torre, 259 F. 2d 545, 548–549 (2d Cir.) cert. denied 358 U.S. 910, 79 S. Ct. 237, 3 L. Ed. 2d 231 (1958):

"But freedom of the press, precious and vital though it is to a free society, is not an absolute. What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom. That kind of determination often presents a 'delicate and difficult' task. (Citing cases). * * *

"* * * Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press.

"It would be a needless exercise in pedantry to review here the historic development of that duty. Suffice it to state that at the foundation of the Republic the obligation of a witness to testify and the correlative right of a litigant to enlist

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reasonable grounds to believe the journalist has information, (2) specifically relevant to an identified episode that the grand jury has some factual basis for investigating as a possible violation of designated criminal statutes within its jurisdiction, and (3) that the Government has no alternative sources of the same or equivalent information whose use would not entail an equal degree of incursion upon First Amendment freedoms. Once this minimal showing has been made, it remains for the courts to weigh the precise degree of investigative need that thus appears against the demonstrated degree of harm to First Amendment interests involved in compelling the journalist's testimony." While there is much to commend this suggestion, we are not certain that it represents the best or most satisfactory formulation of the requirement. See, for example, *People* v. *Dohrn, et al.*, Circuit Court of Cook County, Criminal Division, No. 69–3808, May 20, 1970.

[11] Appellant suggests that the Government's specification of need could be presented *in camera* to the District Court with appellant or his counsel present.

judicial compulsion of testimony were recognized as incidents of the judicial power of the United States. (Citing cases). * * *

"Without question, the exaction of this duty impinges sometimes, if not always, upon the First Amendment freedoms of the witness. Material sacrifice and the invasion of personal privacy are implicit in its performance. The freedom to choose whether to speak or be silent disappears. * * *

"If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice. * * * ."

As stated in the court's opinion (note 6) Garland v. Torre was a civil action for libel.[1] The obligation to appear and testify is even stronger and the scope of inquiry is broader in grand jury investigations.[2]

The First Amendment rights of appellant were recognized fully by Judge Zirpoli in providing for the protective order discussed in the court's opinion. While not conceding the validity or propriety of the qualified privilege granted appellant, the Government did not seek review of that order on this appeal.[3]

The order entered by the district court is adequate to protect any unnecessary impingement of First Amendment rights *after* the appearance of the witness before the grand jury. Accordingly we are concerned with the narrow question of whether the Government's showing of a "compelling and overriding national interest that cannot be served by any alternative means" may be required in advance of the issuance of a subpoena.

Appellant did not have any express constitutional right to decline to appear before the grand jury. This is a duty required of all citizens. Nor has Congress enacted legislation to accord any type of privilege to a news reporter.[4] In my opinion the order of the district court could properly be affirmed, and this would accord with the customary procedure of requiring a witness to seek a protective order after appearing before the grand jury. I have concluded, however, that Judge Merrill's opinion properly holds that the same result may be achieved by requiring the Government to demonstrate the compelling need for the witness's presence prior to the issuance of a subpoena and in this manner avoid any unnecessary impingement of First Amendment rights.

As Judge Merrill has suggested, this is a case of first impression. It would seem that the district court could develop procedures which would not unduly hamper or interfere with the investigatory powers of the grand jury. The Government would have the same burden, except that it would make its showing at a hearing in advance of the issuance of subpoenas rather than after the witness appears and seeks a protective order.

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[1] As Judge Merrill's opinion notes, *Garland* v. *Torre* did not involve the "use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news nor with a case where the identity of the news source is of doubtful relevance or materiality."

[2] In distinguishing between investigations by a grand jury and those conducted by commissions created by Congress, Mr. Justice Douglas noted that the grand jury is the "only accusatory body in the Federal Government that is recognized by the Constitution," and that "[I]t has broad investigational powers to look into what may be offensive against federal criminal law." Dissenting opinion in *Hannah* v. *Larche,* 363 U.S. 420, 499, 80 S. Ct. 1502, 1549, 4 L. Ed. 2d 1307 (1960).

[3] At oral argument counsel for the Government submitted a press release from the Attorney General setting forth new Department of Justice guidelines for subpoenas to the news media, in which it is expressly recognized that the "Department does not approve of utilizing the press as a spring board for investigations", and which provide, inter alia, that, "[T]here should be sufficient reason to believe that the information sought is essential to a successful investigation—particularly with reference to directly establishing guilt or innocence"; that "[T]he government should have unsuccessfully attempted to obtain the information from alternative non-press sources"; that subpoenas "should normally be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information"; and that "subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material." John N. Mitchell, "Free Press and Fair Trial: The Subpoena Controvery," an address before House of Delegates, American Bar Association. (August 10, 1970).

[4] Several states have enacted legislation granting qualified privileges to newsmen.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

APPLICATION OF EARL CALDWELL AND THE NEW YORK TIMES COMPANY FOR AN ORDER QUASHING SUBPOENAS

Misc. No. 10426

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ORDER OF THE COURT

This matter comes before the Court on the motion of Earl Caldwell and The New York Times Company to quash or modify a subpoena served upon Mr. Caldwell on March 16, 1970, summoning him to appear and testify before the grand jury sitting in this District. The motion as originally filed also sought the quashing of a grand jury subpoena served upon Mr. Caldwell on February 2, 1970; but at oral argument of the matter on April 3, 1970 the Government withdrew the February 2 subpoena, and the parties have agreed that the motion to quash that subpoena is now moot.

With regard to the March 16 subpoena, the Court has read and considered the memoranda, supplementary memoranda and affidavits filed by the movants and by the Government, and the briefs and annexed affidavits filed by the following amicae curiae: The American Civil Liberties Union (together with its affiliates of Northern and Southern California), The Associated Press, Columbia Broadcasting System, Inc., Newsweek, Inc., and the Reporters' Committee on Freedom of the Press.

The Court has also judicially noticed, read and considered a series of articles authored by Earl Caldwell and published in The New York Times. Copies of these articles were furnished to the Court and the Government by the movants, and will be filed by the Court together with its order, for the convenience of the Court of Appeals in the event of an appeal. Finally, the Court has read and considered the memorandum and exhibits filed by the Government in Miscellaneous No. 10410, in support of its Application for Immunity for Sherrie Bursey and Brenda Joyce Presley. At oral argument in the present matter, counsel for movants was granted leave to make this memorandum and its exhibits part of the record herein, and a copy of it will also be filed herewith.

On April 3, 1970, the Court heard and considered oral argument on behalf of the parties and of Columbia Broadcasting System, Inc. as amicus curiae. At the conclusion of the argument, the Court announced its opinion, which was filed on April 6, 1970. For the reasons stated in that opinion, the Court is satisfied that The New York Times Company has standing to join with Earl Caldwell in the motion to quash the subpoena of March 16.

Upon the record herein, it appears:

(1) That the testimony of Earl Caldwell sought to be compelled by the subpoena of March 16 will relate to activities of members of the Black Panther Party;

(2) That Mr. Caldwell's knowledge of those activities derived in substantial part from statements and information given to him, as a professional journalist, by members of the Black Panther Party, within the scope of a relationship of trust and confidence;

(3) That confidential relationships of this sort are commonly developed and maintained by professional journalists, and are indispensable to their work of gathering, analyzing and publishing the news;

(4) That compelled disclosure of information received by a journalist within the scope of such confidential relationships jeopardizes those relationships and thereby impairs the journalist's ability to gather, analyze and publish the news;

(5) Specifically, that in the absence of a protective order by this Court delimiting the scope of interrogation of Earl Caldwell by the grand jury, his appearance and examination before the jury will severely impair and damage his confidential relationships with members of the Black Panther

Party and other militants, and thereby severely impair and damage his ability to gather, analyze and publish news concerning them; and that it will also damage and impair the abilities of other reporters for The New York Times Company and others to gather, analyze and publish news concerning them; and

(6) That the Government has shown no compelling and overriding national interest in requiring Mr. Caldwell to give testimony before the grand jury that would invade and jeopardize his confidential relationships with members of the Black Panther Party.

Accordingly, pursuant to the Court's opinion of April 6, 1970, it is hereby *ORDERED:*

(1) That if and when Earl Caldwell is directed to appear before the grand jury pursuant to the subpoena of March 16, 1970, he shall not be required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination to the public through the press or other news media.

(2) That specifically without limiting paragraph (1), Mr. Caldwell shall not be required to answer questions concerning statements made to him or information given to him by members of the Black Panther Party unless such statements or information were given to him for publication or public disclosure;

(3) That, to assure the effectuation of this order, Mr. Caldwell shall be permitted to consult with his counsel at any time he wishes during the course of his appearance before the grand jury;

(4) That, except to the extent set forth in paragraphs (1) through (3), the motion to quash or modify the subpoena of March 16, 1970, is denied;

(5) That the Court will entertain a motion for modification of this order at any time upon a showing by the Government of a compelling and overriding national interest in requiring Mr. Caldwell's testimony which cannot be served by any alternative means; and that the Court retains jurisdiction of this matter for the purposes of entertaining such a motion or other motions by any party for the implementation or modification of this order; and

(6) That this order and the return date of the subpoena of March 16, 1970, are stayed until April 26, 1970; and in the event that any party hereby files a notice of appeal of this order on or before April 26, 1970, then this order and the return date of the subpoena are further stayed until final disposition of the appeal, or until further order of this Court.

Dated: April 7, 1970.

ALFONSO J. ZIRPOLI,
Judge of the United States District Court.

Submitted by Attorneys for Movants, April 7, 1970
By John B. Bates

Service of a copy of the above is hereby acknowledged this 7th day of April, 1970.

By James L. Browning (U.S. Attorney),
United States Department of Justice.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois, Eastern Division

CHICAGO JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL–CIO, PLAINTIFF v. CHICAGO TRIBUNE COMPANY, CHICAGO AMERICAN PUBLISHING COMPANY AND FIELD ENTERPRISES, INC., DEFENDANTS

(No. 69 C 1898)

MEMORANDUM OPINION

Defendant's Motions for Summary Judgment

Plaintiff's Motion for Preliminary Injunction

This action arises from the refusal of the defendants, the Chicago Tribune Co. (Tribune), the Chicago American Publishing Co. (American), and Field Enterprises, Inc. (Field), to publish in their respective newspapers an advertisement submitted by the plaintiff, Chicago Joint Board, Amalgamated Clothing Workers of America, AFL–CIO (Union). The plaintiff is seeking both injunctive relief and compensatory and exemplary damages.

Plaintiff is a national labor union with numerous local unions in the Chicagoland area. Defendant Tribune is the owner and publisher of a major Chicago newspaper, the Chicago Tribune. Defendant American, which owns and publishes another major Chicago newspaper, Chicago Today, is a wholly owned subsidiary of defendant Tribune. Field is the owner and publisher of the Chicago Sun-Times and the Chicago Daily News, two other major metropolitan dailies.

Union is currently involved in a dispute with Marshall Field & Co., the owner and operator of Chicago's largest retail department store, regarding the sale of imported men's and boys' clothing. Marshall Field & Co. is a leading Chicagoland outlet for imported clothing. It is Union's position that the unrestricted sale of imported men's and boys' clothing will eliminate jobs for American workers manufacturing such clothing, that such a result would impose a hardship on those workers specifically and the American public generally, and that, consequently, retail outlets of foreign made clothing should refrain from the purchase and resale of such goods and the public should not buy them until such time as the exporting nations voluntarily agree to quotas on the amount of clothing to be sent into the United States.

During the course of this dispute, which continues at this time, Union prepared and submitted to defendants an advertisement for publication in their respective newspapers. The ad explained why plaintiff was picketing Marshall Field & Co. and set forth Union's position on the sale of imported men's and boys' clothing. All four major metropolitan newspapers refused to publish the ad.

In Count I of its complaint, Union contends that defendants are quasi-public entities whose refusal to publish is a violation of plaintiff's constitutional rights to free speech and equal protection. Count II alleges that defendants' refusal to publish Union's ad constitutes a breach of contract, which contract arises from plaintiff's acceptance of an alleged standing offer by the defendants to print any lawful advertisement. Count III alleges that plaintiff justifiably relied to their detriment on representations by the defendants to the effect that they would publish any lawful advertisement. In its prayer for relief, Union asks that the defendants be permanently enjoined from refusing to publish the submitted ad, that during the pendancy of this action similar equitable relief be afforded, or that defendants be enjoined from publishing any advertisement of Marshall Field & Co. for or including imported men's or boys' clothing. Union also seeks $1,000 in compensatory damages and $5,000 in exemplary damages.

Presently before the court are plaintiff's motion for a preliminary injunction and defendants' motions for summary judgment. The motion for preliminary injunction seeks the equitable relief found in the prayer of plaintiff's complaint. Field's motion for summary judgment contends that the complaint fails to state a claim upon which relief may be granted. In addition to this contention, the other defendants, in their motion for summary judgment, contend that this court lacks federal jurisdiction and that the granting of requested relief would violate defendants' rights of freedom of the press and free speech under the federal and state constitutions.

Initially, we note that summary judgment is appropriate where, as here, there are no material factual issues in dispute and only legal issues need be resolved. *Silverstein* v. *United States*, 293 F. Supp. 1106, 1110 (N.D. Ill. 1968).

Counts II and III, which are based on contractual or quasi-contractual theories, have not been supported by any discussion in plaintiff's brief and may be dismissed easily. Under general contract theory, the presumption is that general advertising aimed at the public is not an offer to enter a contract.

> "Neither the advertiser nor the reader of his notice understands that the latter is empowered to close the deal without further expression by the former. Such advertisements are understood to be mere requests to consider and examine and negotiate; and no one can reasonably regard them otherwise unless the circumstances are exceptional and the words used are very plain and clear." 1 Corbin, *Contracts* § 25, at 75 (1963).

Cf. Wall v. *World Publishing Co.*, 263 P. 2d 1010, 1012 (Okla. 1953) (absent express promise, invitation by newspaper to readers to write letters on matters of public interest is not offer to publish all letters received in response).

None of the defendants have explicitly extended an offer to the general public to publish any lawful advertisement which is submitted for publication by a party who is willing and able to pay the standard advertising rate, nor has any defendant so represented that such a policy exists. In plain and clear words each have reserved the right to reject any advertisement. See The Chicago Tribune Advertising Acceptability Guide, p. 3, submitted as Exhibit B to Complaint; "General Advertising Rates: Chicago Tribune, Chicago Today." (p. 12) submitted as Exhibit A to Affidavit, ¶ 3, of Mr. Charles B. Jordan; Affidavit of Mr. Howell Jones, p. 2. Parenthetically, the Tribune guidelines discuss the newspapers concern with honesty, taste and effectiveness, and indicate that the newspaper will exclude material which, for instance, it feels is misleading, unfair, indecent or illegal. At this time, we need make no evaluation as to the reasonableness of this policy. It is sufficient for the purposes of ruling on the motion for summary judgment to find that the policy of reserving the right to reject advertisement exists and is apparent from a review of the newspapers various pamphlets concerning advertising.

Defendants' motions for summary judgment is granted as to Counts II and III.

We turn now to a consideration of the issues presented in the first count of the Complaint. As summarized previously, it is plaintiff's thesis that the defendants are quasi-public entities whose refusal to publish an advertisement setting forth plaintiff's position on a public issue is a violation of the plaintiff's constitutional rights to free speech and equal protection. Defendants' position is that their acts are private in nature and not subject to the asserted constitutional restrictions.

The first amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech or of the press . . ." While by its language, this amendment is binding only on the national government, it has been extended through the due process clause of the Fourteenth Amendment to prohibit the impairment of fundamental rights by the various states, *Fiske* v. *Kansas*, 274 U.S. 380, 387 (1927); *Gitlow* v. *New York*, 268 U.S. 652, 666 (1925). Yet, while the Fourteenth Amendment affords protection from state action as well as that from the national government, it does not protect against wrongs done by private persons. *United States* v. *Guest*, 383 U.S. 745, 755 (1966); *Motley* v. *Virginia Hardware and Manufacturing Co.*, 287 F. Supp. 790 793 (W.D. Va. 1968). As the "distinction between purely private discrimination and discrimination pursuant to 'state action'" persists, *Huey* v. *Barloga*, 277 F. Supp. 864, 869 (N.D. Ill. 1967), "(i)t is elementary that in order to establish a violation of the Fourteenth Amendment, there must be 'state action' which results in deprivation of a right, privilege or immunity protected by that Amendment." *Rogers* v. *Provident Hospital*, 241 F. Supp. 633, 636–37 (N.D. Ill. 1965).

The state action requirement has, of course, been applied to numerous situations besides those involving official governmental entities. In each case, the private or non-governmental conduct has related to an area of vital public concern. One group of such cases involves private ownership and control of the physical premises on which people live or work. Thus, in *Marsh* v. *Alabama*, 328 U.S. 501 (1946) the Supreme Court held that a company town's refusal to permit use of its streets for the distribution of religious literature violated the Fourteenth Amendment. The Court reasoned:

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . .
>
> "Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free."
>
> *Id.* at 506–507.

The *Marsh* rationale was recently adopted in *Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968), where the Court held that pickets' constitutional rights were violated when a shopping center and supermarket refused to permit picketing on their premises.

Other cases relied on by plaintiff and holding private conduct to be state action for certain constitutional purposes do not concern ownership of property or territorial control. See, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (refusal of private restaurant located in a publicly owned and operated automobile parking facility to serve a person solely because of his color violated the Equal Protection Clause of the Fourteenth Amendment); *Terry* v.

Adams, 345 U.S. 461 (1953) (refusal of private political association to permit otherwise qualified Negroes to participate in private elections deprived petitioners effective participation in public election contrary to Fifteenth Amendment); *Marjorie Webster Junior College, Inc., v. Middle States Association of Colleges and Secondary School, Inc.*,—F. Supp.—, (D.D.C. July 23, 1969) (refusal of regional educational association to consider plaintiff for accreditation and membership solely because it was not a non-profit organization violated the Fourteenth Amendment).

Of course, none of these cases, on their face, factually resembles the instant action. Plainly, not one case concerns privately owned newspapers. Only two of the cases, *Marsh* and *Logan Valley*, directly involves the First Amendment freedoms at issue here.

Moreover, the differences between the defendants in this case and those in the cases cited by plaintiff go far beyond the obvious fact that defendants here are newspapers while the defendants in the other cases were different kinds of private concerns. First and foremost, the press is treated with special Constitutional regard. No other private industry or organization has been afforded any protection similar to that granted to the press under the First Amendment. The only other industry that was ever treated specially in the Constitution was the liquor industry, but the Eighteenth Amendment was short lived, being repealed within fourteen years by the Twenty-First Amendment. Consequently, any attempted regulation of the press' freedom stands in a different Constitutional light and must be viewed differently than regulations of other forms of private commerce and association.

Second, the relation of the press to the government is functionally distinguishable from that relationship which exists between other private entities and the state. For instance, the restaurant in the *Burton* case was the lessee of an agency created pursuant to Delaware law. While it was considered an " 'impossible task' " "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause," state participation was apparent in the management of the property. *Burton* v. *Wilmington Park Authority*, 365 U.S. 715, 722 (1961). Moreover, Delaware, through its agency, had "elected to place its power, property and prestige behind the admitted discrimination," and thereby became recognizable as a "joint participant in the challenged activity." *Id.* at 725. In *Terry*, the Jaybird Democratic Association or Jaybird Party was the dominant political group in a Texas county for over sixty years. Winning candidates in the Jaybird primary invariably won in subsequent Democratic primaries and in the general election. *Terry* v. *Adams*, 345 U.S. 461, 463 (1953). Essentially, the Court found that as the Jaybird election was a critical part of the general elective process, state involvement in permitting an abuse of its electoral processes was obvious. *Id.* at 469. The District Court, in *Marjorie Webster*, held that the educational association's performance of its accreditation function was action in a quasi-governmental capacity. (The opinion noted that selection of educational institutions for federal funds "is frequently dependent upon the accredited status of the applicant," and found that the association's quasi-governmental capacity resulted "by virtue of its role in the distribution of Federal funds under the 'aid to education statutes.' " *Marjorie Webster Junior College, Inc.* v. *Middle States Association of Colleges and Secondary Schools, Inc.*, F. Supp. (D.D.C., Memorandum Opinion, p. 23, 1969). Essentially, the court agreed that the accreditating function practiced by defendant was inherently governmental, and that the association was exercising delegated powers of a governmental nature. Finally, the *Marsh* and *Logan Valley* decisions rested on the finding that the privately owned territory was indistinguishable, in terms of public access and use, from non-privately owned towns, business districts, and shopping centers. *Food Employees* v. *Logan Plaza*, 391 U.S. 308, 316–19 (1969).

A similar interdependence of the government and the defendant newspapers is lacking. Quite simply, the business of newspapers is not inherently governmental. Even if we eliminated from our consideration the non-political and non-news aspects of today's major metropolitan papers, the reporting of the day's events and related commentary is not a governmental function. Indeed, the opposite is true. While the government and its officials make news, they do not publish it. Significantly, while a company town may be likened to a municipal corporation and a private shopping center to a public business district, there is no state press, no American equivalent to Izvestia or Pravda.

Surely officials and agencies supply the press with information, but the function of reporting this information rests with the members of the media who may report as they wish or not at all. Then, too, public buildings often have special facilities for members of the press and statutes require publication of various items in the newspapers, e.g., Ill. Rev. Stat. Ch. 24, § 1–2–4 (1967). However, none of these facts compels a conclusion that the press and the government are significantly intertwined or that the role of the press is an inherently governmental one.

Rather than regarded as an extension of the state exercising delegated powers of a governmental nature, the press has long and consistently been recognized as an independent check on governmental power. "The right of free public discussion of the stewardship of public officials was . . ., in Madison's view, a fundamental principle of the American form of government." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 275 (1964). So it is that the national policy favoring full and frank exercise of the press' freedom "may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270. See Chafee, Free Speech in the United States 19, 21–22, 29 (1954).

In sum, the function of the press from the days the Constitution was written to the present time has never been conceived as anything but a private enterprise, free and independent of government control and supervision. Rather than state power and participation pervading the operation of the press, the news media and the government have had a history of disassociation.

Not surprisingly, then, plaintiff's position that newspapers are quasi-public bodies has clearly been rejected by the judiciary.

> "In the absence of any statutory provision to the contrary, the law seems to be uniformly settled by the great weight of authority throughout the United States that the newspaper publishing business is a private enterprise and is neither a public utility nor affected with the public interest. The decisions appear to hold that even though a particular newspaper may enjoy a virtual monopoly in the area of its publication, this fact is neither unusual nor of important significance. The courts have consistently held that in the absence of statutory regulation on the subject, a newspaper may publish or reject commercial advertising tendered to it as its judgment best dictates without incurring liability for advertisements rejected by it." *Approved Personnel, Inc.* v. *Tribune Co.*, 177 So.2d 704, 706 (Fla. App. 1965).

Accord, *Bloss* v. *Federated Publications, Inc.*, 145 N.W.2d 800, 804, (Mich. App. 1966), *aff'd* 157 N.W.2d 241 (Mich. 1968); *J.J. Gordon, Inc.* v. *Worcester Telegram Publishing Co.*, 177 N.E.2d 586, 587–88 (Mass. 1961); see generally Annot., Right of Publisher of Newspaper or Magazine in Absence of Contractual Obligation to Refuse Publication of Advertisement, 18 A.L.R. 3d 1286 (1965).

Nor do *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367 (1969), or *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), require a finding that a Constitutional right of access to the printed news media exists. *Red Lion* upheld the Federal Communications Commission's fairness doctrine imposed on radio and television broadcasters. The Supreme Court's opinion specifically rejected the broadcaster's argument that all communications media be treated equally under the First Amendment. 395 U.S. at 386. Special restrictions on electronic broadcasters were justified on technological grounds which are obviously not applicable to newspapers. *Id.* at 375–77, 86–87. As then Judge Burger said:

> "A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot." *Office of Communication of United Church of Christ* v. *F.C.C.*, 359 F.2d 994, 1003 (D.C. Cir. 1966).

If a right of access existed with regard to newspapers, compliance with the rule would be considerably simpler than it is for broadcasters, for a newspaper is a relatively flexible and expandable commodity. The defect in plaintiff's action is that no such rule exists.

In *New York Times*, the Supreme Court held that a state court cannot award damages to a public official for defamatory falsehood relating to his official conduct unless plaintiff proves actual malice. In the course of its opinion, the Court recognized the importance of editorial or political as opposed to commercial advertisements. 376 U.S. at 265–66. It found, as we could find in the instant case, that "as an expression of grievance and protest on one of the major issues of our time, (the advertisement) would seem to qualify for the constitutional protection." *Id.* at 271. That protection does not mean that a newspaper can be forced to publish the ad. See *Mid-West Electric Cooperative, Inc.* v. *West Texas Chamber of Commerce*, 369 S.W.2d 842 (Tex. Ct. Civ. App. 1963). It means, rather, that an expression may not be afforded different treatment by the state merely because it appears in the form of an advertisement and not, for instance, orally or on a picket sign or a handbill. 376 U.S. at 266. Consequently, political advertisements are constitutionally protected to no greater and no lesser extent than other forms of speech, and interference by state action with such expression is prohibited. The *New York Times* case decidely does not stand for the proposition that those who can pay for political advertisements are constitutionally entitled to have them published by private businesses.

We are not insensitive to the problems that have developed or may arise because of a lack of access to the market place of ideas. One of the tragedies of our age is that the failure to communicate effectively through conventional means has led some to attempt to persuade unconventionally and often violently. To the extent that the market mechanism is impaired, to the extent that discussion is not effectively full as well as legally free, we think that the public is done a disservice. Yet, if, in many respects private censorship is no better than public censorship, the fact remains that the right to free speech was never intended to include the right to use the other fellow's presses, that the Constitution relates only to government and not private action.

Even those who chide the press' aversion to "novel" and "heretical" ideas recognize that "the daily press cannot be placed at the mercy of the collective vanity of the public." Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1629, 1646, 1677 (1967). In attempting to resolve this dilemma, access would be restricted to "representative groups" or at least not denied unless on "rational grounds." *Id.* at 1666, 1670, but see 1677. Under a doctrine of open access, the problems inherent in such line-drawing are obvious. Why limit space to representative groups? Do not non-representative groups or individuals need greater assistance? Are there two sides to every issue or three or an indefinite number? Why limit access to the issue-oriented and not to the amateur sports writer or cartoonist? Most important, why limit access to those who can pay, for surely the poor are just as entitled to comment? The mere raising of these questions indicates why such extensive freedom is given to the press. There is scant, if any, middle ground between minor meddling and full abridgment. "(L)iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." 2 Chaffe, Government and Mass Communications 633 (1947) (See generally at 624–650). Thus even though some abuse was considered inevitable, the alternative cure was thought by Madison to be worse than the disease, *Near v. Minnesota*, 283 U.S. 691, 716 (1931), and newspapers were and are left free to be impartial or biased, foolish or wise.

If, in fact, concentrations of private media power are stultifying, the appropriate approach to secure a right of access would be by "experimental, innovative legislation" or Constitutional amendments. Barron, *supra*, at 1670, 1676. However, this court does not sit as a creative legislative body, nor do we accept the admittedly "rather rabid conception of 'state action,'" *Id.* at 1669, that would compel private newspapers to print political advertisements.

With respect to Count I, the absence of state action relieves the court of civil rights jurisdiction and no other claim is stated upon which relief might be granted. Defendants' motions for summary judgment are granted. Plaintiff's motion for injunctive relief is denied. The cause is dismissed.

ENTER:

ABRAHAM L. MAROVITZ.

Date: December 19, 1969.

395 U.S. 369 (1969)

SUPREME COURT OF THE UNITED STATES

(Nos. 2 and 717.—October Term, 1968)

(2)

Red Lion Broadcasting Co., Inc., etc., et al., petitioners *v.* Federal Communications Commission et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

(717)

United States et al., petitioners, *v.* Radio Television News Directors Association, et al.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

[June 9, 1969]

Mr. Justice White delivered the opinion of the Court.

The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine, which originated very early in the history of broadcasting and has maintained its present outlines for some time. It is an obligation whose content has been defined in a long series of FCC rulings in particular cases, and which is distinct from the statutory requirement of § 315 of the Communications Act[1] that equal time be allotted all qualified candidates for public office. Two aspects of the fairness doctrine, relating to personal attacks in the context of controversial public issues and to political editorializing were codified more precisely in the form of FCC regulations in 1967. The two cases before us now, which were decided separately below, challenge the constitutional and statutory bases of the doctrine and component rules. *Red Lion* involves the application of the fairness doctrine to a particular broadcast, and *RTNDA* arises as an action to review the FCC's 1967 promulgation of the personal attack and political editorializing regulations, which were laid down after the *Red Lion* litigation had begun.

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[1] Communications Act of 1934, Tit. III, c. 652, 48 Stat. 1081, as amended, 47 U.S.C. § 301 *et seq.* Section 315 now reads:

"315. Candidates for public office; facilities; rules.

"(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

"(1) bona fide newscast,

"(2) bona fide news interview,

"(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

"(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), "shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

"(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

"(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section."

I.

A.

The Red Lion Broadcasting Company is licensed to operate a Pennsylvania radio station, WGCB. On November 27, 1964, WGCB carried a 15-minute broadcast by Reverend Billy James Hargis as part of a "Christian Crusade" series. A book by Fred J. Cook entitled "Goldwater—Extremist on the Right" was discussed by Hargis, who said that Cook had been fired by a newspaper for fabricating false charges against city officials; that Cook had then worked for a Communist-affiliated publication; that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency; and that he had now written a "book to smear and destroy Barry Goldwater."[2] When Cook heard of the broadcast he concluded that he had been personally attacked and demanded free reply time, which the station refused. After an exchange of letters among Cook, Red Lion, and the FCC, the FCC declared that the Hargis broadcast constituted a personal attack on Cook; that Red Lion had failed to meet its obligation under the fairness doctrine as expressed in *Times-Mirror Broadcasting Co.*, 24 P & F Radio Reg. 404 (1962), to send a tape, transcript, or summary of the broadcast to Cook and offer him reply time; and that the station must provide reply time whether or not Cook would pay for it. On review in the Court of Appeals for the District of Columbia,[3] the FCC's position was upheld as constitutional and otherwise proper. 381 F. 2d 908 (1967).

B.

Not long after the *Red Lion* litigation was begun, the FCC issued a Notice of Proposed Rule Making, 31 Fed. Reg. 5710, with an eye to making the personal attack aspect of the fairness doctrine more precise and more readily enforceable, and also to specify its rules relating to political editorials. After considering written comments supporting and opposing the rules, the FCC adopted them substantially as proposed, 32 Fed. Reg. 10303. Twice amended, 32 Fed. Reg. 11531, 33 Fed. Reg. 5362, the rules were held unconstitutional in the *RTNDA* litigation by the Court of Appeals for the Seventh Circuit on review of the rule-making proceeding as abridging the freedoms of speech and press. 400 F. 2d 1002 (1968).

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[2] According to the record, Hargis asserted that his broadcast included the following statement:

"Now, this paperback book by Fred J. Cook is entitled, 'GOLDWATER—EXTREMIST ON THE RIGHT'. Who is Cook? Cook was fired from the New York World Telegram after he made a false charge publicly on television against an un-named official of the New York City government. New York publishers and NEWSWEEK Magazine for December 7, 1959, showed that Fred Cook and his pal, Eugene Gleason, had made up the whole story and this confession was made to New York District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, THE NATION, one of the most scurrilous publications of the left which has championed many communist causes over many years. Its editor, Carry McWilliams, has been affiliated with many communist enterprises, scores of which have been cited as subversive by the Attorney General of the U.S. or by other government agencies . . . Now, among other things Fred Cook wrote for THE NATION, was an article absolving Alger Hiss of any wrong doing . . . there was a 208 page attack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence Agency . . . now this is the man who wrote the book to smear and destroy Barry Goldwater called 'Barry Goldwater—Extremist Of The Right!' "

[3] The Court of Appeals initially dismissed the petition for want of a reviewable order, later reversing itself en banc upon argument by the Government that the FCC rule used here, which permits it to issue "a declaratory ruling terminating a controversy or removing uncertainty," 47 CFR § 1.2, was in fact justified by the Administrative Procedure Act. That Act permits an adjudicating agency, "in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty." § 5, 60 Stat. 239, 5 U.S.C. § 1004(d). In this case, the FCC could have determined the question of Red Lion's liability to a cease-and-desist order or license revocation, 47 U.S.C. § 312, for failure to comply with the license's condition that the station be operated "in the public interest," or for failure to obey a requirement of operation in the public interest implicit in the ability of the FCC to revoke licenses for conditions justifying the denial of an initial license, 47 U.S.C. § 312 (a)(2), and the statutory requirement that the public interest be served in granting and renewing licenses, 47 U.S.C. §§ 307(a), (d). Since the FCC could have adjudicated these questions it could, under the Administrative Procedure Act, have issued a declaratory order in the course of its adjudication which would have been subject to judicial review. Although the FCC did not comply with all of the formalities for an adjudicative proceeding in this case, the petitioner itself adopted as its own the Government's position that this was a reviewable order, waiving any objection it might have had to the procedure of the adjudication.

As they now stand amended, the regulations read as follows:

"Personal attacks; political editorials.

"(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

"(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs. but the provisions of paragraph (a) shall be applicable to editorials of the licensee).

"NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415. The categories listed in (iii) are the same as those specified in Section 315(a) of the Act.

"(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion." 47 CFR §§ 73.123, 73.300, 73.598, 73.679 (all identical).

C.

Believing that the specific application of the fairness doctrine in *Red Lion*, and the promulgation of the regulations in *RTNDA*, are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment, we hold them valid and constitutional, reversing the judgment below in *RTNDA*, and affirming the judgment below in *Red Lion*.

II.

The history of the emergence of the fairness doctrine and of the related legislation shows that the Commission's action in the *Red Lion* case did not exceed its authority, and that in adopting the new regulations the Commission was implementing congressional policy rather than embarking on a frolic of its own.

A.

Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos.[4] It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacaphony of competing voices, none of which could be clearly and predictably heard.[5] Consequently, the Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity."[6]

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[4] Because of this chaos, a series of National Radio Conferences was held between 1922 and 1925, at which it was resolved that regulation of the radio spectrum by the Federal Government was essential and that regulatory power should be utilized to ensure that allocation of this limited resource would be made only to those who would serve the public interest. The 1923 Conference expressed the opinion that the Radio Act of 1912, c. 287, 37 Stat. 302, con-

Very shortly thereafter the Commission expressed its views that the "public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies . . . to all discussions of issues of importance to the public." *Great Lakes Broadcasting Co.*, 3 F. R. C. Ann. Rep. 32, 33 (1929). rev'd on other grounds, 37 F. 2d 993, cert. dismissed, 281 U.S. 706 (1930). This doctrine was applied through denial of license renewals or construction permits, both by the FRC, *Trinity Methodist Church, South* v. *FRC*, 62 F. 2d 850 (C. A. D. C. Cir. 1932), cert. denied, 288 U.S. 599 (1933), and its successor FCC, *Young People's Association for the Propagation of the Gospel*, 6 F. C. C. 178 (1938). After an extended period during which the licensee was obliged not only to cover and to cover fairly the views of others, but also to refrain from expressing his own personal views, *Mayflower Broadcasting Corp.*, 8 F. C. C. 333 (1941), the latter limitation on the licensee was abandoned and the doctrine developed into its present form.

There is a twofold duty laid down by the FCC's decisions and described by the 1949 Report on Editorializing by Broadcast Licensees, 13 F. C. C. 1246 (1949). The broadcaster must give adequate coverage to public issues, *United Broadcasting Co.*, 10 F. C. C. 515 (1945), and coverage must be fair in that it accurately reflects the opposing views. *New Broadcasting Co.*, 6 P & F Radio Reg. 258 (1950). This must be done at the broadcaster's own expense if sponsorship is unavailable. *Cullman Broadcasting Co.*, 25 P & F Radio Reg. 895 (1963). Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source. *John J. Dempsey*, 6 P & F Radio Reg. 615 (1950); see *Metropolitan Broadcasting Corp.*, 19 P & F Radio Reg. 602 (1959); *The Evening News Assn.*, 6 P & F Radio Reg. 283 (1950). The Federal Radio Commission had imposed these two basic duties on broadcasters since the outset. *Great Lakes Broadcasting Co.*, 3 F. R. C. Ann Reg. 32 (1929), rev'd on other grounds, 37 F. 2d 993, cert. denied, 281 U.S. 706 (1930); *Chicago Federation of Labor* v. *FRC*, 3 F. R. C. Ann. Rep. 36 (1929), aff'd 41 F. 2d 422 (C. A. D. C. Cir. 1930); *KFKB Broadcasting Assn. v. FRC*, 47 F. 2d 670 (C. A. D. C. Cir. 1931), and in particular respects the personal attack rules and regulations at issue here have spelled them out in greater detail.

When a personal attack has been made on a figure involved in a public issue, both the doctrine of cases such as *Red Lion* and *Times-Mirror Broadcasting Co.*, 24 P & F Radio Reg. 404 (1962), and also the 1967 regulations at issue in *RTNDA* require that the individual attacked himself be offered an opportunity to respond. Likewise, where one candidate is endorsed in a political editorial, the other candidates must themselves be offered reply time to use personally or

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ferred upon the Secretary of Commerce the power to regulate frequencies and hourse of operation, but when Secretary Hoover sought to implement this claimed power by penalizing the Zenith Radio Corporation for operating on an unauthorized frequency, the 1912 Act was held not to permit enforcement. *United States* v. *Zenith Radio Corporation*, 12 F. 2d 614 (D. C. N. D. Ill 1926). Compare *Hoover* v. *Intercity Radio Co.*, 286 F. 1003 (C. A. D. C. Cir. 1923) (Secretary had no power to deny licenses, but was empowered to assign frequencies). An opinion issued by the Attorney General at Hoover's request confirmed the impotence of the Secretary under the 1912 Act. 35 Op. Atty. Gen. 126 (1926). Hoover thereafter appealed to the radio industry to regulate itself, but his appeal went largely unheeled. See generally L. Schmeckebier, The Federal Radio Commission 1–14 (1932).

[5] Congressman White, a sponsor of the bill enacted as the Radio Act of 1927, commented upon the need for new legislation:

"We have reached the definite conclusion that the right of all our people to enjoy this means of communication can be preserved only by the repudiation of the idea underlying the 1912 law that anyone who will may transmit and by the assertion in its stead of the doctrine that the right of the public to service is superior to the right of any individual. . . . The recent radio conference met this issue squarely. It recognized that in the present state of scientific development there must be a limitation upon the number of broadcasting stations and it recommended that licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art. This principle was approved by every witness before your committee. We have written it into the bill. If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served." 67 Cong. Rec. 5479.

[6] Radio Act of 1927, c. 1969, § 4, 44 Stat. 1162, 1163. See generally, Davis, The Radio Act of 1927, 13 Va. L. Rev. 611 (1927).

through a spokesman. These obligations differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party's side himself or choosing a third party to represent that side. But insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ from preceding fairness doctrine. The simple fact that the attacked men or unendorsed candidates may respond themselves or through agents is not a critical distinction, and indeed, it is not unreasonable for the FCC to conclude that the objective of adequate presentation of all sides may best be served by allowing those most closely affected to make the response, rather than leaving the response in the hands of the station which has attacked their candidacies, endorsed their opponents, or carried a personal attack upon them.

B.

The statutory authority of the FCC to promulgate these regulations derives from the mandate to the "Commission from time to time, as public convenience, interest, or necessity requires" to promulgate "such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this chapter. . . ." 47 U.S.C. § 303 and § 303(r).[7] The Commission is specifically directed to consider the demands of the public interest in the course of granting licenses, 47 U.S.C. §§ 307(a), 309(a); renewing them, 47 U.S.C. § 307; and modifying them. *Ibid.* Moreover, the FCC has included among the conditions of the Red Lion license itself the requirement that operation of the station be carried out in the public interest, 47 U.S.C. § 309(h). This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power "not niggardly but expansive," *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219 (1943), whose validity we have long upheld. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 90 (1953); *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933). It is broad enough to encompass these regulations.

The fairness doctrine finds specific recognition in statutory form, is in part modeled on explicit statutory provisions relating to political candidates, and is approvingly reflected in legislative history.

In 1959 the Congress amended the statutory requirement of § 315 that equal time be accorded each political candidate to except certain appearances on news programs, but added that this constituted no exception "*from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.*" Act of September 14, 1959, § 1, 73 Stat. 557, amending 47 U.S.C. § 315(a) (emphasis added). This language makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard. Subsequent legislation enacted into law and declaring the intent of an earlier statute is entitled to great weight in statutory construction.[8] And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong,[9] especially when Congress has refused to alter the administrative construction.[10] Here, the Congress has not just kept its silence by refusing to overturn the administrative construction,[11] but has ratified it with positive legislation. Thirty years of consistent administrative construction left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce the natural conclusion that the public interest language of the Act authorized the Commission to require licensees to use their stations for discussion of public issues, and that the FCC is free to implement this requirement by reasonable rules and regulations which fall short of abridgment of the freedom of speech and press, and of the censorship prescribed by § 326 of the Act.[12]

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[7] As early as 1930, Senator Dill expressed the view that the Federal Radio Commission had the power to make regulations requiring a licensee to afford an opportunity for presentation of the other side on "public questions." Hearings before the Senate Committee on Interstate Commerce on S. 6, 71st Cong., 2d Sess., at 1616 (1930):

"Senator Dill. Then you are suggesting that the provision of the statute that now requires a station to give equal opportunity to candidates for office shall be applied to all public questions?

"Commissioner Robinson. Of course, I think in the legal concept the law requires it now. I do not see that there is any need to legislate about it. It will evolve one of these days. Somebody will go into court and say, 'I am entitled to this opportunity,' and he will get it.

"Senator Dill. Has the Commission considered the question of making regulations requiring the stations to do that?

"Commissioner Robinson. Oh, no.

"Senator Dill. It would be within the power of the commission, I think, to make regulations on that subject."

[8] *Federal Housing Administration* v. *Darlington, Inc.*, 358 U.S. 84, 90 (1958); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 541 (1962) (separate opinion of Mr. Justice Harlan, joined by Mr. Justice Brennan and Mr. Justice Stewart). This principle is a venerable one. *Alexander* v. *Alexandria*, 5 Cranch 1 (1809); *United States* v. *Freeman*, 3 How. 556 (1845); *Stockdale* v. *The Insurance Companies*, 20 Wall. 323 (1873).

The objectives of § 315 themselves could readily be circumvented but for the complementary fairness doctrine ratified by § 315. The section applies only to campaign appearances by candidates, and not by family, friends, campaign managers, or other supporters. Without the fairness doctrine, then, a licensee could ban all campaign appearances by candidates themselves from the air [13] and proceed to deliver over his station entirely to the supporters of one slate of candidates, to the exclusion of all others. In this way the broadcaster could have a far greater impact on the favored candidacy than he could by simply allowing a spot appearance by the candidate himself. It is the fairness doctrine as an aspect of the obligation to operate in the public interest, rather than § 315, which prohibits the broadcaster from taking such a step.

The legislative history reinforces this view of the effect of the 1959 amendment. Even before the language relevant here was added, the Senate report on amending § 315 noted that "broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust. Every licensee who is fortunate in obtaining a license is mandated to operate in the public interest and has assumed the obligation of presenting important public questions fairly and without bias." S. Rep. No. 562, 86th Cong., 1st Sess., 8–9 (1959) .See also, specifically adverting to Federal Communications Commission doctrine, *id.*, at 13.

Rather than leave this approval solely in the legislative history, Senator Proxmire suggested an amendment to make it part of the Act. 105 Cong. Rec. 14457. This amendment, which Senator Pastore, a manager of the bill and Chairman of the Senate Committee considered "rather surplusage," 105 Cong. Rec. 14462, constituted a positive statement of doctrine [14] and was altered to the present merely approving language in the conference committee. In explaining the language to the Senate after the committee changes, Senator Pastore said: "We insisted that the provision remain in the bill, to be a continuing reminder and admonition to the Federal Communications Commission and to the broadcasters alike, that we were not abandoning the philosophy that gave birth to section 315, in giving the people the right to have a full and complete discosure of conflicting views on news of interest to the people of the country." 105 Cong. Rec. 17830. Senator Scott, another Senate manager, added that "It is intended to encompass all legitimate areas of public importance which are controversial," not just politics. 105 Cong. Rec. 17831.

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[9] *Zemel* v. *Rusk*, 381 U.S. 1, 11–12 (1965) ; *Udall* v. *Tallman*, 380 U.S. 1, 16–18 (1965) ; *Commissioner* v. *Sternberger's Estate*, 348 U.S. 187, 199 (1955) ; *Hastings & D. R. Co.* v. *Whitney*, 132 U.S. 357, 366 (1889) ; *United States* v. *Burlington & M. River R. Co.*, 98 U.S. 334, 341 (1878) ; *United States* v. *Alexander*, 12 Wall. 177, 179–181 (1871) ; *Surgett* v. *Lapice*, 8 How. 48, 68 (1850).

[10] *Zemel* v. *Rusk*, 381 U.S. 1, 11–12 (1965) ; *United States* v. *Bergh*, 352 U.S. 40, 46–47 (1956) ; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 16–17 (1953) ; *Costanzo* v. *Tillinghast*, 287 U.S. 341, 345 (1932).

[11] An attempt to limit sharply the FCC's power to interfere with programming practices failed to emerge from Committee in 1943. S. 814, 87th Cong., 1st Sess., 4 (1943). See Hearings on S. 814 before the Senate Committee on Interstate Commerce, 78th Cong., 1st Sess. (1943). Also, attempts specifically to enact the doctrine failed in the Radio Act of 1927, 67 Cong., Rec. 12505 (1926) (agreeing to amendment proposed by Senator Dill eliminating coverage of "question affecting the public"), and a similar proposal in the Communications Act of 1934 was accepted by the Senate, 78 Cong. Rec. 8854 (1939) ; see S. Rep. No. 781, 73d Cong., 2d Sess., 8 (1934), but was not included in the bill reported by the House Committee, see H.R. Rep. No. 1850, 73d Cong., 2d Sess. (1934). The attempt which came nearest success was a bill, H.R. 7716, 72d Cong., 1st Sess. (1932), passed by Congress but pocket vetoed by the President in 1933, which would have extended "equal opportunities" whenever a public question was to be voted on at an election or by a government agency. H.R. Rep. No. 2106, 72d Cong., 2d Sess., 6 (1933). In any event, unsuccessful attempts at legislation are not the best of guides to legislative intent. *Fogarty* v. *United States*, 340 U.S. 8, 13–14 (1950) ; *United States* v. *United Mine Workers*, 330 U.S. 258, 281–282 (1947). A review of some of the legislative history over the years, drawing a somewhat different conclusion, is found in Staff of the House Committee on Interstate and Foreign Commerce, Legislative History of the Fairness Doctrine, 90th Cong., 2d Sess. (Comm. Print. 1968). This inconclusive history was, of course. superseded by the specific statutory language added in 1959.

[12] "§ 326. Censorship.

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

[13] John P. Crommelin, 19 P & F Radio Reg. 1392 (1960).

[14] The Proxmire amendment read : "[B]ut nothing in this sentence shall be construed as changing the basic intent of Congress with respect to the provisions of this act, which recognizes that television and radio frequencies are in the public domain, that the license to operate in such frequencies requires operation ih the public interest, and that in newscasts, news interviews, news documentaries, on-the-spot coverage of news events, and panel discussions, all sides of public controversies shall be given as equal an opportunity to be heard as is practically possible." 105 Cong. Rec. 14457.

It is true that the personal attack aspect of the fairness doctrine was not actually adjudicated until after 1959, so that Congress then did not have those rules specifically before it. However, the obligation to offer time to reply to a personal attack presaged by the FCC's 1949 Report on Editorializing, which the FCC views as the principal summary of its *ratio decidendi* in cases in this area:

> "In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as . . . whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist." 13 F. C. C., at 1251–1252.

When the Congress ratified the FCC's implication of a fairness doctrine in 1959 it did not, of course, approve every past decision or pronouncement by the Commission on this subject, or give it a completely free hand for the future. The statutory authority does not go so far. But we cannot say that when a station publishes a personal attack or endorses a political candidate, it is misconstruction of the public interest standard to require the station to offer time for a response rather than to leave the response entirely within the control of the station which has attacked either the candidacies or the men who wish to reply in their own defense. When a broadcaster grants time to a political candidate, Congress itself requires that equal time be offered to his opponents. It would exceed our competence to hold that the Commission is unauthorized by the statute to employ a similar device where personal attacks or political editorials are broadcast by a radio or television station.

In light of the fact that the "public interest" in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public; the fact that the FCC has rested upon that language from its very inception a doctrine that these issues must be discussed, and fairly; and the fact that Congress has acknowledged that the analogous provisions of § 315 are not preclusive in this area, and knowingly preserved the FCC's complementary efforts, we think the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority. The Communications Act is not notable for the precision of its substantive standards and in this respect the explicit provisions of § 315, and the doctrine and rules at issue here which are closely modeled upon that section, are far more explicit than the generalized "public interest" standard in which the Commission ordinarily finds its sole guidance, and which we have held a broad but adequate standard before. *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 90 (1953); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 216–217 (1943); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933). We cannot say that the FCC's declaratory ruling in *Red Lion*, or the regulations at issue in *RTNDA*, are beyond the scope of the congressionally conferred power to assure that stations are operated by those whose possession of a license serves "the public interest."

III.

The broadcasters challenge the fairness doctrine and its specific manifestations in the personal attack and political editorial rules on conventional First Amendment grounds, alleging that the rules abridge their freedom of speech and press. Their contention is that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency. No man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents. This right, they say, applies equally to broadcasters.

A.

Although broadcasting is clearly a medium affected by a First Amendment interest, *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948), differences in the characteristics of new media justify differences in the First Amendment standards applied to them.[15] *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 503 (1952). For example, the ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions on the sound level, and on the hours and places of use, of sound trucks so long as the restrictions are reasonable and applied without discrimination. *Kovacs* v. *Cooper*, 336 U. S. 77 (1949).

Just as the Government may limit the use of sound amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free-speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others. *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.

It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communications Act of 1934,[16] as the Court has noted at length before. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 210–214 (1943). It was this reality which at the very least necessitated first the division of the radio spectrum into portions reserved respectively for public broadcasting and for other important radio uses such as amateur operation, aircraft, police, defense, and navigation; and then the subdivision of each portion, and assignment of specific frequencies to individual users or groups of users. Beyond this, however, because the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few.

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airways. It would be strange if the

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[15] The general problems raised by a technology which supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news were discussed at considerable length by Zechariah Chafee in Government and Mass Communications (1947). Debate on the particular implications of this view for the broadcasting industry has continued unabated. A compendium of views appears in Freedom and Responsibility in Broadcasting (Coons ed.) (1961). See also Kalven, Broadcasting, Public Policy, and the First Amendment, 10 J. of Law and Econ. 15 (1967); Ernst, The First Freedom 125–180 (1946); Robinson, Radio Networks and the Federal Government, especially at 75–87 (1943). The considerations which the newest technology brings to bear on the particular problem of this litigation are concisely explored by Louis Jaffe in The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation; Implications of Technological Change (U.S. Government Printing Office, 1968).

[16] The range of controls which have in fact been imposed over the last 40 years, without giving rise to successful constitutional challenge in this Court, is discussed in Emery, Broadcasting and Government: Responsibilities and Regulations (1961); Note, Regulation of Program Content by the FCC, 77 Harv. L. Rev. 701 (1964).

First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.

This has been the consistent view of the Court. Congress unquestionably has the power to grant and deny licenses and to delete existing stations. *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933). No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because "the public interest" requires it "is not a denial of free speech." *National Broadcasting Co.* v. *U.S.*, 319 U.S. 190, 227 (1943).

By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with "the right of free speech by means of radio communications." Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. See *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 361–362 (1955); Z. Chafee, Government and Mass Communications 546 (1947). It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74–75 (1964). See Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965). It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

B.

Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on his station. The expression of a political endorsement, or of a personal attack while dealing with a controversial public issue, simply triggers this time-sharing. As we have said, the First Amendment confers no right on licensees to prevent others from broadcating on "their" frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use.

In terms of constitutional principle, and as enforced sharing of a scarce resource, the personal attack and political editorial rules are indistinguishable from the equal-time provision of § 315, a specific enactment of Congress requiring stations to set aside reply time under specified circumstances and to which the fairness doctrine and these constituent regulations are important complements. That provision, which has been part of the law since 1927, Radio Act of 1927, c. 169, § 18, 44 Stat. 1162, 1170, has been held valid by this Court as an obligation of the licensee relieving him of any power in anyway to prevent or censor the broadcast, and thus insulating him from liability for defamation. The constitutionality of the statute under the First Amendment was unquestioned.[17] *Farmers Educ. & Coop. Union* v. *WDAY*, 360 U. S. 525 (1959).

Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public.[18] Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press* v. *U. S.*, 326 U. S. 1, 20 (1944).

C.

It is strenuously argued, however, that if political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective. Such a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be stifled.

At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative. The communications industry, and in particular the networks, have taken pains to present controversial issues in the past, and even now they do not assert that they intend to abandon their efforts in this regard.[19] It would be better if the FCC's encouragement were never necessary to induce the broadcasters to meet their responsibility. And if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. The fairness doctrine in the past has had no such overall effect.

That this will occur now seems unlikely, however, since if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues. It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect.

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[17] This has not prevented vigorous argument from developing on the constitutionality of the ancillary FCC doctrines. Compare Barrow, The Equal Opportunities and Fairness Doctrine in Broadcasting: Pillars in the Forum of Democracy, 37 U. Cin. L. Rev. 447 (1968), with Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation, 52 Minn. L. Rev. 67 (1967), and Sullivan, Editorials and Controversy: The Broadcaster's Dilemma, 32 Geo. Wash. L. Rev. 719 (1964).

[18] The expression of views opposing those which broadcasters permit to be aired in the first place need not be confined solely to the broadcasters themselves as proxies. "Nor is it enough that he should hear the arguments of his adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them." J. S. Mill, On Liberty 32 (R. McCallum ed. 1947).

[19] The President of the Columbia Broadcasting System has recently declared that despite the Government, "we are determined to continue covering controversial issues as a public service, and exercising our own independent news judgment and enterprise. I, for one, refuse to allow that judgment and enterprise to be affected by official intimidation." Stanton, Keynote Address, Sigma Delta Chi National Convention, Atlanta, Georgia, November 21, 1968. Problems of news coverage from the broadcaster's viewpoint are surveyed in Wood, Electronic Journalism (1967).

Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them. 47 U.S.C. § 301. Unless renewed, they expire within three years. 47 U.S.C. § 307(d). The statute mandates the issuance of licenses of the "public convenience, interest, or necessity will be served thereby." 47 U.S.C. § 307(a). In applying this standard the Commission for 40 years has been choosing licensees based in part on their program proposals. In *F.R.C.* v. *Nelson Bros. Bond and Mortgage Co.*, 289 U.S. 266, 279 (1933), the Court noted that in "view of the limited number of available broadcasting frequencies, the Congress has authorized allocation and licenses." In determining how best to allocate frequencies, the Federal Radio Commission considered the needs of competing communities and the programs offered by competing stations to meet the needs; moreover, if needs or programs shifted, the Commission could alter its allocations to reflect those shifts. *Id.*, at 285. In the same vein, in *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137–138 (1940), the Court noted that the statutory standards was a supple instrument to effect congressional desires "to maintain . . . a grip on the dynamic aspects of radio transmission" and to allay fears that "in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." Three years later the Court considered the validity of the Commission's chain broadcasting regulations, which among other things forbade stations from devoting too much time to network programs in order that there be suitable opportunity for local programs serving local needs. The Court upheld the regulations, unequivocally recognizing that the Commission was more than a traffic policeman concerned with the technical aspects of broadcasting and that it neither exceeded its power under the statute nor transgressed the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees. *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).

The litigants embellish their first amendment arguments with the contention that the regulations are so vague that their duties are impossible to discern. Of this point it is enough to say that, judging the validity of the regulations on their face as they are presented here, we cannot conclude that the FCC has been left a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free-speech. Past adjudications by the FCC give added precision to the regulations; there was nothing vague about the FCC's specific ruling in *Red Lion* that Fred Cook should be provided an opportunity to reply. The regulations at issue in *RTNDA* could be employed in precisely the same way as the fairness doctrine was in *Red Lion*. Moreover, the FCC itself has recognized that the applicability of its regulations to situations beyond the scope of past cases may be questionable, 32 Fed. Reg. 10303, 10304 and n. 6, and will not impose sanctions in such cases without warning. We need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, *United States* v. *Sullivan*, 332 U.S. 689, 694 (1948), but will deal with those problems if and when they arise.

We need not and do not now ratify every past and future decision by the FCC with regard to programming. There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airways; of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious first amendment issues. But we do hold that the Congress and the Commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and political editorials.

E.

It is argued that even if at one time the lack of available frequencies for all who wished to use them justified the Government's choice of those who would best serve the public interest by acting as proxy for those who would present differing views, or by giving the latter access directly to broadcast facilities, this condition no longer prevails so that continuing control is not justified. To this there are several answers.

Scarcity is not entirely a thing of the past. Advances in technology, such as microwave transmission, have led to more efficient utilization of the frequency spectrum, but uses for that spectrum have also grown apace.[20] Portions of the spectrum must be reserved for vital uses unconnected with human communication, such as radio-navigational aids used by aircraft and vessels. Conflicts have even emerged between such vital functions as defense preparedness and experimentation in methods of averting midair collisions through radio warning devices.[21] "Land mobile services" such as police, ambulance, fire department, public utility, and other communications systems have been occupying an increasingly crowded portion of the frequency spectrum[22] and there are, apart from licensed amateur radio operators' equipment, 5,000,000 transmitters operated on the "citizens' band" which is also increasingly congested.[23] Among the various uses for radio frequency space, including marine, aviation, amateur, military, and common carrier users, there are easily enough claimants to permit use of the whole with an even smaller allocation to broadcast radio and television uses than now exists.

Comparative hearings between competing applicants for broadcast spectrum space are by no means a thing of the past. The radio spectrum has become so congested that at times it has been necessary to suspend new applications.[24] The very high frequency television spectrum is, in the country's major markets, almost entirely occupied, although space reserved for ultra high frequency television transmission, which is a relatively recent development as a commercially viable alternative, has not yet been completely filled.[25]

COMMERCIAL

	Channels allocated		Channels on the air, authorized, or applied for		Available channels	
Market areas	VHF	UHF	VHF	UHF	VHF	UHF
Top 10	40	45	40	44	0	1
Top 50	157	163	157	136	0	27
Top 100	264	297	264	213	0	84

NONCOMMERCIAL

	Channels reserved		Channels on the air, authorized, or applied for		Available channels	
Market areas	VHF	UHF	VHF	UHF	VHF	UHF
Top 10	7	17	7	16	0	0
Top 50	21	79	20	47	1	32
Top 100	35	138	34	69	1	69

1968 FCC Annual Report, 132-135.

The rapidity with which technological advances succeed one another to create more efficient use of spectrum space on the one hand, and to create new uses for that space by ever growing numbers of people on the other, make it unwise to speculate on the future allocation of that space. It is enough to say that the resource is one of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress. Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential.[26] This does not mean, of course, that every possible wavelength must be occupied at every hour by some vital use in order to sustain the congressional judgment. The substantial capital investment required for many uses, in addition to the potentiality for confusion and interference inherent in any scheme for continuous kaleidoscopic reallocation of all available space may make this unfeasible. The allocation need not be made at such a breakneck pace that the objectives of the allocation are themselves imperiled.[27]

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[20] Current discussions of the frequency allocation problem appear in Telecommunication Science Panel, Commerce Technical Advisory Board, U.S. Department of Commerce, Electromagnetic Spectrum Utilization—The Silent Crisis (1966); Joint Technical Advisory Comm., Institute of Electrical and Electronics Engineers & Electronic Industries Assn., Radio Spectrum Utilization (1964); Note, The Crisis in Electromagnetic Frequency Spectrum Allocation, 53 Iowa L. Rev. 437 (1967). A recently released study is the Final Report of the President's Task Force on Communications Policy (1968).

[21] *Bendix Aviation Corp.* v. *FCC*, 272 F. 2d 533 (C. A. D. C. Cir. 1959), cert. denied, 361 U.S. 965 (1960).

[22] 1968 FCC Annual Report 65–69.

[23] New limitations on these users, who can also lay claim to First Amendment protection, were sustained against First Amendment attack with the comment, "Here is truly a situation where if everybody could say anything, many could say nothing." *Lafayette Radio Electronic Corp.* v. *United States*, 345 F. 2d 278, 281 (1965). Accord, *California Citizens Band Assn.* v. *United States*, 375 F. 2d 43 (C. A. 9th Cir. 1967), cert. denied, 389 U.S. 844 (1967).

[24] *Kessler* v. *FCC*, 326 F. 2d 673 (C. A. D. C. Cir. 1963).

[25] In a table prepared by the FCC on the basis of statistics current as of August 31, 1968, VHF and UHF channels allocated to and those available in the top 100 market areas for television are set forth:

Even where there are gaps in spectrum utilization, the fact remains that existing broadcasts have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. Some present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest.

In view of the prevalence of scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.[28] The judgment of the Court of Appeals in *Red Lion* is affirmed and that in *RTNDA* reversed and the causes remanded for proceedings consistent with this opinion.

It is so ordered.

Not having heard oral argument in these cases, Mr. Justice Douglas took no part in the Court's decision.

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[26] RTNDA argues that these regulations should be held invalid for failure of the FCC to make specific findings in the rule-making proceeding relating to these factual questions. Presumably the fairness doctrine and the personal attack decisions themselves, such as *Red Lion*, should fall for the same reason. But this argument ignores the fact that these regulations are no more than the detailed specification of certain consequences of long-standing rules, the need for which was recognized by the Congress on the factual predicate of scarcity made plain in 1927, recognized by this Court in the 1943 *National Broadcasting Co.* case, and reaffirmed by the Congress as recently as 1959. "If the number of radio and television stations were not limited by available frequencies, the committee would have no hesitation in removing completely the present provision regarding equal time and urge the right of each broadcaster to follow his own conscience. . . . However, broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust." S. Rep. No. 562, 86th Cong., 1st Sess., 8–9 (1959). In light of this history, the opportunity which the broadcasters have had to address the FCC and show that somehow the situation had radically changed, undercutting the validity of the congressional, and their failure to adduce any convincing evidence of that in the record here, we cannot consider the absence of more detailed findings below to be determinative.

[27] The "airwaves [need not] be filled at the earliest possible moment in all circumstances without due regard for these important factors." *Community Broadcasting Co.* v. *FCC*, 274 F. 2d 753, 763 (C. A. D. C. Cir. 1960). Accord, enforcing the fairness doctrine, *Office of Communication of the United Church of Christ* v. *FCC*, 359 F. 2d 994, 1009 (C. A. D. C. Cir. 1966).

[28] We need not deal with the argument that even if there is no longer a technological scarcity of frequencies limiting the number of broadcasters, there nevertheless is an economic scarcity in the sense that the Commission could or does limit entry to the broadcasting market on economic grounds and license no more stations than the market will support. Hence, it is said, the fairness doctrine or its equivalent is essential to satisfy the claims of those excluded and of the public generally. A related argument, which we also put aside, is that quite apart from scarcity of frequencies, technological or economic, Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public. Cf. *Citizens Publishing Co.* v. *United States*, 393 U.S. —— (1969).

334 U.S. 131 (1948)

United States *v.* Paramount Pictures, Inc. et al

(No. 79. Appeal from the District Court of the United States for the Southern District of New York*)

Argued February 9–11, 1948.—Decided May 3, 1948

COUNSEL FOR PARTIES

In a suit by the United States to restrain violations of §§ 1 and 2 of the Sherman Act by major motion pictue producers, distributors and exhibitors, the District Court granted an injunction and other relief. 66 F. Supp. 323; 70 F. Supp. 53. On appeal to this Court, *affirmed in part, reversed in part and remanded,* p. 178.

Attorney General Clark and Assistant Attorney General Sonnett argued the cause for the United States in No. 79, and *Robert L. Wright* for the United States in Nos. 80–86. *Solicitor General Perlman, Mr. Sonnett, Mr. Wright, Kenneth L. Kimble, Stanley M. Silverberg and Philip Marcus* were on the briefs.

John W. Davis argued the cause for Loew's Incorporated, appellant in No. 80. With him on the brief were *J. Robert Rubin, S. Hazard Gillespie, Jr.*, and *Benjamin Melniker.*

William J. Donovan argued the cause for the Radio-Keith-Orpheum Corp. et al., appellants in No. 80. With him on the brief were *George S. Leisure, Ralstone R. Irvine, Gordon E. Youngman and Roy W. McDonald.*

Joseph M. Proskauer argued the cause for Warner Bros. Pictures, Inc., et al., appellants in No. 80. With him on the brief were *Robert W. Perkins* and *Harold Berkowitz.*

James F. Byrnes argued the cause for the Twentieth Century-Fox Film Corp. et al., appellants in No. 80. With him on the brief were *Otto E. Koegel, John F. Caskey* and *Frederick W. R. Pride.*

Whitney North Seymour argued the cause for Paramount Pictures, Inc. et al., appellants in No. 81. With him on the brief were *Louis Phillips and Albert C. Bickford.*

Louis D. Frohlich argued the cause for Columbia Pictures Corp. et al., appellants in No. 82. With him on the brief was *Arthur H. Schwartz.*

George A. Raftery argued the cause for the United Artists Corp., appellant in No. 83. With him on the brief were *Edward C. Raftery and Arthur F. Driscoll. T. Newman Lawler* was also of counsel.

Thomas Turner Cooke argued the cause for Universal Pictures Co., Inc. et al appellants in No. 84. With him on the brief were *Adolph Schimel* and *Frank W. Ford.*

Thurman Arnold argued the cause for the American Theatres Association, Inc. et al., appellants in No. 85. With him on the brief were *Paul Williams and Milton W. Freeman.*

John G. Jackson and *Robert T. Barton, Jr.* argued the cause for Allred et al., appellants in No. 86. With them on the brief was *George B. Brooks.*

Briefs of *amici curiae* supporting the United States in No. 79 were filed by *Abram F. Myers* for the Conference of Independent Exhibitors' Associations; *Morris I. Ernst, Loyd Wright* and *James M. Barnes* for the Society of Independent Motion Picture Producers; *Herman M. Levy* for independent members of the Motion Picture Theatre Owners of America; and *Harold J. Sherman, Wendell Berge, James Lawrence Fly* and *C. Dickerman Williams* for the American Civil Liberties Union.

OPINION OF THE COURT

Mr. Justice Douglas delivered the opinion of the Court.

These cases are here on appeal[1] from a judgment of a three-judge District Court[2] holding that the defendants had violated § 1 and § 2 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 15 U. S. C. §§ 1, 2, and granting an injunction and other relief. 66 F. Supp. 323; 70 F. Supp. 53.

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[1] Sec. 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. § 29, and § 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U.S.C. § 345.

[2] The court was convened pursuant to [illegible] ions of the Act of April 6, 1942, 56 Stat. 198, 199, 15 U.S.C. § 28.

The suit was instituted by the United States under § 4 of the Sherman Act to prevent and restrain violations of it. The defendants fall into three groups: (1) Paramount Pictures, Inc., Loew's, Incorporated, Radio-Keith-Orpheum Corporation, Warner Bros. Pictures, Inc., Twentieth Century-Fox Film Corporation, which produce motion pictures, and their respective subsidiaries or affiliates which distribute and exhibit films. These are known as the five major defendants or exhibitor-defendants. (2) Columbia Pictures Corporation and Universal Corporation, which produce motion pictures, and their subsidiaries which distribute films. (3) United Artists Corporation, which is engaged only in the distribution of motion pictures. The five majors, through their subsidiaries or affiliates, own or control theatres; the other defendants do not.

The complaint charged that the producer defendants had attempted to monopolize and had monopolized the production of motion pictures. The District Court found to the contrary and that finding is not challenged here. The complaint charged that all the defendants, as distributors, had conspired to restrain and monopolize and had restrained and monopolized interstate trade in the distribution and exhibition of films by specific practices which we will shortly relate It also charged that the five major defendants had engaged in a conspiracy to restrain and monopolize, and had restrained and monopolized, interstate trade in the exhibition of motion pictures in most of the larger cities of the country. It charged that the vertical combination of producing, distributing, and exhibiting motion pictures by each of the five major defendants volated § 1 and § 2 of the Act. It charged that each distributor-defendant had entered into various contracts with exhibitors which unreasonably restrained trade. Issue was joined; and a trial was had.[3]

First. Restraint of Trade—(1) *Price Fixing*

No film is sold to an exhibitor in the distribution of motion pictures. The right to exhibit under copyright is licensed. The District Court found that the defendants in the licenses they issued fixed minimum admission prices which the exhibitors agreed to charge, whether the rental of the film was a flat amount or a percentage of the receipts. It found that substantially uniform minimum prices had been established in the licenses of all defendants. Minimum prices were established in master agreements or franchises which were made between various defendants as distributors and various defendants as exhibitors and in joint operating agreements made by the five majors with each other and with independent theatre owners covering the operation of certain theatres.[4] By these later contracts minimum admission prices were often fixed for dozens of theatres owned by a particular defendant in a given area of the United States. Minimum prices were fixed in licenses of each of the five major defendants. The other three defendants made the same requirement in licenses granted to the exhibitor-defendants. We do not stop to elaborate on these findings. They are adequately detailed by the District Court in its opinion. See 66 F. Supp. 334–339.

The District Court found that two price-fixing conspiracies existed—a horizontal one between all the defendants; a vertical one between each distributor-defendant and its licensees. The latter was based on express agreements and was plainly established. The former was inferred from the pattern of price-fixing disclosed in the record. We think there was adequate foundation for it too. It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement. *Interstate Circuit* v. *United States*, 306 U.S. 208, 226–227; *United States* v. *Masonite Corp.*, 316 U.S. 265, 275. That was shown here.

On this phase of the case the main attack is on the decree which enjoins the defendants and their affiliates from granting any license, except to their own theatres, in which minimum prices for admission to a theatre are fixed in any manner or by any means. The argument runs as follows: *United States* v. *General Electric Co.*, 272 U.S. 476, held that an owner of a patent could, without violating the Sherman Act, grant a license to manufacture and vend, and could fix the price at which the licensee could sell the patented article. It is pointed out that defendants do not sell the films to exhibitors, but only license them and that the Copright Act (35 Stat. 1075, 1088. 17 U.S.C. § 1), like the patent statutes, grants the owner exclusive rights.[5] And it is argued that if the patentee can fix the price at which his licensee may sell the patented article, the owner of the copyright should be allowed the same privilege. It is maintained that such a privilege is essential to protect the value of the copyrighted films.

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[3] Before trial, negotiations for a settlement were undertaken. As a result, a consent decree against the five major defendants was entered November 20, 1940. The consent decree contained no admission of violation of law and adjudicated no issue of fact or law, except that the complaint stated a cause of action. The decree reserved to the United States the right at the end of a three-year trial period to seek the relief prayed for in the amended complaint. After the end of the three-year period he United States moved for trial against all the defendants.

[4] A master agreement is a licensing agreement or "blanket deal" covering the exhibition of features in a number of theatres, usually comprising a circuit.

A franchise is a licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of features released by one distributor during the entire period of the agreement.

An independent as used in these cases means a producer, distributor, or exhibitor, [illegible] the context requires, which is not a defendant in the action, or a subsidiary or [illegible] of a defendant.

We start, of course, from the premise that so far as the Sherman Act is concerned, a price-fixing combination is illegal *per se. United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150; *United States* v. *Masonite Corporation, supra.* We recently held in *United States* v. *Gypsum Co.*, 333 U.S. 364, 400, that even patentees could not regiment an entire industry by licenses containing price-fixing agreements. What was said there is adequate to bar defendants, through their horizontal conspiracy, from fixing prices for the exhibition of films in the movie industry. Certainly the rights of the copyright owner are no greater than those of the patentee.

Nor can the result be different when we come to the vertical conspiracy between each distributor-defendant and his licensees. The District Court stated in its findings:

> "In agreeing to maintain a stipulated minimum admission price, each exhibitor thereby consents to the minimum price level at which it will compete against other licensees of the same distributor whether they exhibit on the same run or not. The total effect is that through the separate contracts between the distributor and its licensees a price structure is erected which regulates the licensees' ability to compete against one another in admission prices."

That consequence seems to us to be incontestable. We stated in *United States* v. *Gypsum Co., supra*, p. 401, that "The rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry are not reasonably and normally adapted to secure pecuniary reward for the patentee's monopoly." The same is true of the rewards of the copyright owners and their licensees in the present case. For here too the licenses are but a part of the general plan to suppress competition. The case where a distributor fixes admission prices to be charged by a single independent exhibitor, no other licensees or exhibitors being in contemplation, seems to be wholly academic, as the District Court pointed out. It is, therefore, plain that *United States* v. *General Electric Co., supra*, as applied in the patent cases, affords no haven to the defendants in this case. For a copyright may no more be used than a patent to deter competition between rivals in the exploitation of their licenses. See *Interstate Circuit* v. *United States, supra*, p. 230.

(2) *Clearances and Runs*

Clearances are designed to protect a particular run of a film against a subsequent run.[6] The District Court found that all of the distributor-defendants used clearance provisions and that they were stated in several different ways or in combinations: in terms of a given period between designated runs; in terms of admission prices charged by competing theatres; in terms of a given period of clearance over specifically named theatres; in terms of so many days' clearance over specified areas or towns; or in terms of clearances as fixed by other distributors.

The Department of Justice maintained below that clearances are unlawful *per se* under the Sherman Act. But that is a question we need not consider, for the District Court ruled otherwise and that conclusion is not challenged here. In its view their justification was found in the assurance they give the exhibitor that the distributor will not license a competitor to show the film either at the same time or so soon thereafter that the exhibitor's expected income from the run will be greatly diminished. A clearance when used to protect that interest of the exhibitor was reasonable, in the view of the court, when not unduly extended as to area or duration. Thus the court concluded that although clearances might indirectly affect admission prices, they do not fix them and that they may be reasonable restraints of trade under the Sherman Act.

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[5] See note 12, *infra.*

[6] A clearance is the period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres.

Runs are successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on, and include successive exhibitions in different theatres, even though such theatres may be under a common ownership or management.

The District Court held that in determining whether a clearance is unreasonable, the following factors are relevant:

(1) The admission prices of the theatres involved, as set by the exhibitors;

(2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.;

(4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;

(5) The extent to which the theatres involved compete with each other for patronage;

(6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and

(7) There should be no clearance between theatres not in substantial competition.

It reviewed the evidence in light of these standards and concluded that many of the clearances granted by the defendants were unreasonable. We do not stop to retrace those steps. The evidence is ample to show, as the District Court plainly demonstrated, see 66 F. Supp. pp. 343–346, that many clearances had no relation to the competitive factors which alone could justify them.[7] The clearances which were in vogue had, indeed, acquired a fixed and uniform character and were made applicable to situations without regard to the special circumstances which are necessary to sustain them as reasonable restraints of trade. The evidence is ample to support the finding of the District Court that the defendants either participated in evolving this uniform system of clearances or acquiesced in it and so furthered its existence. That evidence, like the evidence on the price-fixing phase of the case, is therefore adequate to support the finding of a conspiracy to restrain trade by imposing unreasonable clearances.

The District Court enjoined defendants and their affiliates from agreeing with each other or with any exhibitors or distributors to maintain a system of clearances, or from granting any clearance between theatres not in substantial competition, or from granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. In view of the findings this relief was plainly warranted.

Some of the defendants ask that this provision be construed (or, if necessary, modified) to allow licensors in granting clearances to take into consideration what is reasonably necessary for a fair return to the licensor. We reject that suggestion. If that were allowed, then the exhibitor-defendants would have an easy method of keeping alive at least some of the consequences of the effective conspiracy which they launched. For they could then justify clearances granted by other distributors in favor of their theatres in terms of the competitive requirements of those theatres, and at the same time justify the restrictions they impose upon independents in terms of the necessity of protecting their film rental as licensor. That is too potent a weapon to leave in the hands of those whose proclivity to unlawful conduct has been so marked. It plainly should not be allowed so long as the exhibitor-defendants own theatres. For in its baldest terms it is in the hands of the defendants no less than a power to restrict the competition of others in the way deemed most desirable by them. In the setting of this case the only measure of reasonableness of a clearance by Sherman Act standards is the special needs of the licensee for the competitive advantages it affords.

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[7] Thus the District Court found:

"Some licenses granted clearance to sell to all theatres which the exhibitor party to the contract might thereafter own, lease, control, manage, or operate against all theatres in the immediate vicinity of the exhibitor's theatre thereafter erected or opened. The purpose of this type of clearance agreements was to fix the run and clearance status of any theatre thereafter opened not on the basis of its appointments, size, location, and other competitive features normally entering into such determination, but rather upon the sole basis of whether it were operated by the exhibitor party to the agreement."

Whether the same restrictions would be applicable to a producer who had not been a party to such a conspiracy is a question we do not reach.

Objection is made to a further provision of this part of the decree stating that "Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof." We think that provision was justified. Clearances have been used along with price fixing to suppress competition with the theatres of the exhibitor-defendants and with other favored exhibitors. The District Court could therefore have eliminated clearances completely for a substantial period of time, even though, as it thought, they were not illegal *per se*. For equity has the power to uproot all parts of an illegal scheme—the valid as well as the invalid—in order to rid the trade or commerce of all taint of the conspiracy. *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 724. The court certainly then could take the lesser step of making them *prima facie* invalid. But we do not rest on that alone. As we have said, the only justification for clearances in the setting of this case is in terms of the special needs of the licensee for the competitive advantages they afford. To place on the distributor the burden of showing their reasonableness is to place it on the one party in the best position to evaluate their competitive effects. Those who have shown such a marked proclivity for unlawful conduct are in no position to complain that they carry the burden of showing that their future clearances come within the law. Cf. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 188.

(3) *Pooling Agreements; Joint Ownership*

The District Court found the exhibitor-defendants had agreements with each other and their affiliates by which theatres of two or more of them, normally competitive, were operated as a unit, or managed by a joint committee or by one of the exhibitors, the profits being shared according to prearranged percentages. Some of these agreements provided that the parties might not acquire other competitive theatres without first offering them for inclusion in the pool. The court concluded that the result of these agreements was to eliminate competition *pro tanto* both in exhibition and in distribution of features,[8] since the parties would naturally direct the films to the theatres in whose earnings they were interested.

The District Court also found that the exhibitor-defendants had like agreements with certain independent exhibitors. Those alliances had, in its view, the effect of nullifying competition between the allied theatres and of making more effective the competition of the group against theatres not members of the pool. The court found that in some cases the operating agreements were achieved through leases of theatres, the rentals being measured by a percentage of profits earned by the theatres in the pool. The District Court required the dissolution of existing pooling agreements and enjoined any future arrangement of that character.

These provisions of the decree will stand. The practices were bald efforts to substitute monopoly for competition and to strengthen the hold of the exhibitor-defendants on the industry by alignment of competitors on their side. Clearer restraints of trade are difficult to imagine.

There was another type of business arrangement that the District Court found to have the same effect as the pooling agreements just mentioned. Many theatres are owned jointly by two or more exhibitor-defendants or by an exhibitor-defendant and an independent.[9] The result is, according to the District Court, that the

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[8] A feature is any motion picture, regardless of topic, the length of film of which is in excess of 4,000 feet.

[9] *Theatres jointly owned with independents:*

Paramount	993
Warner	20
Fox	66
RKO	187
Loew's	21
Total	1287

Theatres jointly owned by two defendants:

Paramount-Fox	6
Paramount-Loew's	14
Paramount-Warner	25
Paramount-RKO	150
Loew's-RKO	3
Loew's-Warner	5
Fox-RKO	1
Warner-RKO	10
Total	214

theatres are operated "collectively, rather than competitively." And where the joint owners are an exhibitor-defendant and an independent the effect is, according to the District Court, the elimination by the exhibitor-defendant of "putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently." The District Court found these joint ownerships of theatres to be unreasonable restraints of trade within the meaning of the Sherman Act.

The District Court ordered the exhibitor-defendants to disaffiliate by terminating their joint ownership of theatres; and it enjoined future acquisitions of such interests. One is authorized to buy out the other if it shows to the satisfaction of the District Court and that court first finds that such acquisition "will not unduly restrain competition in the exhibition of feature motion pictures. This dissolution and prohibition of joint ownership as between exhibitor-defendants was plainly warranted. To the extent that they have joint interests in the outlets for their films each in practical effect grants the other a priority for the exhibition of its films. For in this situation, as in the case where theatres are jointly managed, the natural gravitation of films is to the theatres in whose earnings the distributors have an interest. Joint ownership between exhibitor-defendants then becomes a device for strengthening their competitive position as exhibitors by forming an alliance as distributors. An express agreement to grant each other the preference would be a most effective weapon to stifle competition. A working arrangement or business device that has that necessary consequence gathers no immunity because of its subtlety. Each is a restraint of trade condemned by the Sherman Act.

The District Court also ordered disaffiliation in those instances where theatres were jointly owned by an exhibitor-defendant and an independent, and where the interest of the exhibitor-defendant was "greater than five per cent unless such interest shall be ninety-five per cent or more," an independent being defined for this part of the decree as "any former, present or putative motion picture theatre operator which is not owned or controlled by the defendant holding the interest in question." The exhibitor-defendants are authorized to acquire existing interests of the independents in these theatres if they establish, and if the District Court first finds, that the acquisition "will not unduly restrain competition in the exhibition of feature motion pictures." All other acquisitions of such joint interests were enjoined.

This phase of the decree is strenuously attacked. We are asked to eliminate it for lack of findings to support it. The argument is that the findings show no more than the existence of joint ownership of theatres by exhibitor-defendants and independents. The statement by the District Court that the joint ownership eliminates "putative competition" is said to be a mere conclusion without evidentiary support. For it is said that the facts of the record show that many of the instances of joint ownership with an independent interest are cases wholly devoid of any history of or relationship to restraints of trade or monopolistic practices. Some are said to be rather fortuitous results of bankruptcies; others are said to be the results of investments by outside interests who have no desire or capacity to operate theatres, and so on.

It is conceded that the District Court made no inquiry into the circumstances under which a particular interest had been acquired. It treated all relationships alike, insofar as the disaffiliation provision of the decree is concerned. In this we think it erred.

We have gone into the record far enough to be confident that at least some of these acquisitions by the exhibitor-defendants were the products of the unlawful practices which the defendants have inflicted on the industry. To the extent that these acquisitions were the fruits of monopolistic practices or restraints of trade, they should be divested. And no permission to buy out the other owner should be given a defendant. *United States* v. *Crescent Amusement Co., supra*, p. 189; *Schine Chain Theatres, Inc.* v. *United States, ante*, p. 110. Moreover, even if lawfully acquired, they may have been utilized as part of the conspiracy to eliminate or suppress competition in furtherance of the ends of the conspiracy. In that event divestiture would likewise be justified. *United States* v. *Crescent Amusement Co., supra*, pp. 189–190. In that situation permission to acquire the interest of the independent would have the unlawful effect of permitting the defendants to complete their plan to eliminate him.

Of the 1287 jointly owned with independents, 209 would not be affected by the decree since one of the ownership interests is less than 5 percent, an amount which the District Court treated as *de minimis*.

Furthermore, if the joint ownership is an alliance with one who is or would be an operator but for the joint ownership, divorce should be decreed even though the affiliation was innocently acquired. For that joint ownership would afford opportunity to perpetuate the effects of the restraints of trade which the exhibitor-defendants have inflicted on the industry.

It seems, however, that some of the cases of joint ownership do not fall into any of the categories we have listed. Some apparently involve no more than innocent investments by those who are not actual or potential operators. If in such cases the acquisition was not improperly used in furtherance of the conspiracy, its retention by defendants would be justified absent a finding that no monopoly resulted. And in those instances permission might be given the defendants to acquire the interests of the independents on a showing by them and a finding by the court that neither monopoly nor unreasonable restraint of trade in the exhibition of films would result. In short, we see no reason to place a ban on this type of ownership, at least so long as theatre ownership by the five majors is not prohibited. The results of inquiry along the lines we have indicated must await further findings of the District Court on remand of the cause.

(4) *Formula Deals, Master Agreements, and Franchises*

A formula deal is a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured, for the theatres covered by the agreement, by a specified percentage of the feature's national gross. The District Court found that Paramount and RKO had made formula deals with independent and affiliated circuits. The circuit was allowed to allocate playing time and film rentals among the various theatres as it saw fit. The inclusion of theatres of a circuit into a single agreement gives no opportunity for other theatre owners to bid for the feature in their respective areas and, in the view of the District Court, is therefore an unreasonable restraint of trade. The District Court found some master agreements[10] open to the same objection. Those are the master agreements that cover exhibition in two or more theatres in a particular circuit and allow the exhibitor to allocate the film rental paid among the theatres as it sees fit and to exhibit the features upon such playing time as it deems best, and leaves other terms to the discretion of the circuit. The District Court enjoined the making or further performance of any formula deal of the type described above. It also enjoined the making or further performance of any master agreement covering the exhibition of features in a number of theatres.

The findings of the District Court in these respects are supported by facts, its conclusion that the formula deals and master agreements constitute restraint of trade is valid, and the relief is proper. The formula deals and master agreements are unlawful restraints of trade in two respects. In that way they eliminate the possibility of bidding for films theatre by theatre. In that way they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators. In the second place, the pooling of the purchasing power of an entire circuit in bidding for films is a misuse of monopoly power insofar as it combines the theatres in closed towns with competitive situations. The reasons have been stated in *United States* v. *Griffith, ante,* p. 100, and *Schine Chain Theatres, Inc.* v. *United States, ante,* p. 110, and need not be repeated here. It is hardly necessary to add that distributors who join in such arrangements by exhibitors are active participants in effectuating a restraint of trade and a monopolistic practice. See *United States* v. *Crescent Amusement Co., supra,* p. 183.

The District Court also enjoined the making or further performance of any franchise. A franchise is a contract with an exhibitor which extends over a period of more than a motion picture season and covers the exhibition of features released by the distributor during the period of the agreement. The District Court held that a franchise constituted a restraint of trade because a period of more than one season was too long and the inclusion of all features was disadvantageous to competitors. At least that is the way we read its findings.

Universal and United Artists object to the outlawry of franchise agreements. Universal points out that the charge of illegality of franchises in these cases was restricted to franchises with theatres owned by the major defendants and to franchises with circuits or theatres in a circuit, a circuit being defined in the complaint as a group of more than five theatres controlled by the same person or a group of more than five theatres which combine through a common agent in licensing films. It seems, therefore, that the legality of franchises to other exhibitors (except as to block-booking, a practice to which we will later advert) was not in issue in the litigation. Moreover, the findings on franchises are clouded by the statement of the District Court in the opinion that franchises "necessarily contravene the plan of licensing each picture, theatre by theatre, to the highest bidder." As will be seen hereafter, we eliminate from the decree the provision for competitive bidding. But for its inclusion of competitive bidding the District Court might well have treated the problem of franchises differently.

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[10] See note 4, *supra*.

We can see how if franchises were allowed to be used between the exhibitor-defendants each might be able to strengthen its strategic position in the exhibition field and continue the ill effects of the conspiracy which the decree is designed to dissipate. Franchise agreements may have been employed as devices to discriminate against some independants in favor of others. We know from the record that franchise agreements often contained discriminatory clauses operating in favor not only of theatres owned by the defendants but also of the large circuits. But we cannot say on this record that franchises are illegal *per se* when extended to any theatre or circuit no matter how small. The findings do not deal with the issue doubtlessly due to the fact that any system of franchises would necessarily conflict with the system of competitive bidding adopted by the District Court. Hence we set aside the findings on franchises so that the court may examine the problem in the light of the elimination from the decree of competitive bidding.

We do not take that course in the case of formula deals and master agreements, for the findings in these instances seem to stand on their own bottom and apparently have no necessary dependency on the provision for competitive bidding.

(5) *Block-Booking*

Block-booking is the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period. The films are licensed in blocks before they are actually produced. All the defendants, except United Artists, have engaged in the practice. Block-booking prevents competitors from bidding for single features on their individual merits. The District Court held it illegal for that reason and for the reason that it "adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first." That enlargement of the monopoly of the copyright was condemned below in reliance on the principle which forbids the owner of a patent to condition its use on the purchase or use of patented or unpatented materials. See *Ethyl Gasoline Corporation* v. *United States*, 309 U.S. 436, 459; *Morton Salt Co.* v. *Suppiger Co.*, 314 U.S. 488, 491: *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U.S. 661, 665. The court enjoined defendants from performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features.[11]

We approve that restriction. The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. In *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127, Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress, "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius. But the reward does not serve its public purpose if it is not related to the quality of the copyright. Where a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other. The practice tends to equalize rather than differentiate the reward for the individual copyrights. Even where all the films included in the package are of equal quality, the requirement that all be taken if one is desired increases the market for some. Each stands not on its own footing but in whole or in part on the appeal which another film may have. As the District Court said, the result is to add to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses.[12]

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[11] Blind-selling is a practice whereby a distributor licenses a feature before the exhibitor is afforded an opportunity to view it. To remedy the problems created by that practice the District Court included the following provision in its decree:

"To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty per cent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature."

The court advanced the following as its reason for inclusion of this provision:

"Blind-selling does not appear to be as inherently restrictive of competition as block-booking, although it is capable of some abuse. By this practice a distributor could promise a picture of good quality or of a certain type which when produced might prove to be of poor quality or of another type—a competing distributor meanwhile being unable to market its product and in the end losing its outlets for future pictures. The evidence indicates that trade-shows, which are designed to prevent such blind-selling, are poorly attended by exhibitors. Accordingly, exhibitors who choose to obtain their films for exhibition in quantities, need to be protected against burdensome agreements by being given an option to reject a certain percentage of their blind-licensed pictures within a reasonable time after they shall have become available for inspection."

We approve this provision of the decree.

It is argued that *Transparent-Wrap Machine Corp.* v. *Stokes & Smith Co.*, 329 U.S. 637, points to a contrary result. That case held that the inclusion in a patent license of a condition requiring the licensee to assign improvement patents was not *per se* illegal. But that decision, confined to improvement patents, was greatly influenced by the federal statute governing assignments of patents. It therefore has no controlling significance here.

Columbia Pictures makes an earnest argument that enforcement of the restriction as to block-booking will be very disadvantageous to it and will greatly impair its ability to operate profitably. But the policy of the antitrust laws is not qualified or conditioned by the convenience of those whose conduct is regulated. Nor can a vested interest in a practice which contravenes the policy of the antitrust laws receive judicial sanction.

We do not suggest that films may not be sold in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film. All we hold to be illegal is a refusal to license one or more copyrights unless another copyright is accepted.

(6) *Discrimination*

The District Court found that defendants had discriminated against small independent exhibitors and in favor of large affiliated and unaffiliated circuits through various kinds of contract provisions. These included suspension of the terms of a contract if a circuit theatre remained closed for more than eight weeks with reinstatement without liability on reopening; allowing large privileges in the selection and elimination of films; allowing deductions in film rentals if double bills are played; granting moveovers[12] and extended runs; granting road show privileges;[14] allowing overage and underage;[15] granting unlimited playing time; excluding foreign pictures and those of independent producers; and granting rights to question the classification of features for rental purposes. The District Court found that the competitive advantages of these provisions were so great that their inclusion in contracts with the larger circuis and their exclusion from contracts with the small independents constituted an unreasonable discrimination against the latter. Each discriminatory contract constituted a conspiracy between licensor and licensee. Hence the District Court deemed it unnecessary to decide whether the defendants had conspired among themselves to make these discriminations. No provision of the decree specifically enjoins these discriminatory practices because they were thought to be impossible under the system of competitive bidding adopted by the District Court.

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[12] The exclusive right granted by the Copyright Act, 35 Stat. 1075, 17 U.S.C. § 1, includes no such privilege. It provides, so far as material here, as follows:

"That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

"(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit perform, represent, produce, or reproduce it in any manner or by any method whatsoever;"

[13] A moreover is the privilege given a licensee to move a picture from one theatre to another as a continuation of the run at the licensee's first theatre.

[14] A road show is a public exhibition of a feature in a limited number of theatres, in advance of its general release, at admission prices higher than those customarily charged in first-run theatres in those areas.

[15] Underage and overage refer to the practice of using excess film rental earned in one circuit theatre to fulfill a rental commitment defaulted by another.

These findings are amply supported by the evidence. We concur in the conclusion that these discriminatory practices are included among the restraints of trade which the Sherman Act condemns. See *Instate Circuit* v. *United States*, *supra*, p. 231; *United States* v. *Crescent Amusement Co.*, *supra*, pp. 182–183. It will be for the District Court on remand of these cases to provide effective relief against their continuance, as our elimination of the provision for competitive bidding leaves this phase of the cases unguarded.

There is some suggestion on this as well as on other phases of the cases that large exhibitors with whom defendants dealt fathered the illegal practices and forced them onto the defendants. But as the District Court observed, that circumstance if true does not help the defendants. For acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one.

Second—Competitive Bidding

The District Court concluded that the only way competition could be introduced into the existing system of fixed prices, clearances and runs was to require that films be licensed on a competitive bidding basis. Films are to be offered to all exhibitors in each competitive area.[16] The license for the desired run is to be granted to the highest responsible bidder, unless the distributor rejects all offers. The licenses are to be offered and taken theatre by theatre and picture by picture. Licenses to show films in theatres in which the licensor owns directly or indirectly an interest of ninety-five per cent or more are excluded from the requirement for competitive bidding.

Paramount is the only one of the five majors who opposes the competitive bidding system. Columbia Pictures, Universal, and United Artists oppose it. And the Department of Justice, which apparently proposed the system originally, speaks strongly against it here.

At first blush there is much to commend the system of competitive bidding. The trade victims of this conspiracy have in large measure been the small independent operators. They are the ones that have felt most keenly the discriminatory practices and predatory activities in which defendants have freely indulged. They have been the victims of the massed purchasing power of the larger units in the industry. It is largely out of the ruins of the small operators that the large empires of exhibitors have been built. Thus it would appear to be a great boon to them to substitute open bidding for the private deals and favors on which the large operators have thrived. But after reflection we have concluded that competitive bidding involves the judiciary so deeply in the daily operation of this nation-wide business and promises such dubious benefits that it should not be undertaken.

Each film is to be licensed on a particular run to "the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor." The bid "shall state what run such exhibitor desires and what he is willing to pay for such feature, which statement may specify a flat rental, or a percentage of gross receipts, or both, or any other form of rental, and shall also specify what clearance such exhibitor is willing to accept, the time and days when such exhibitor desires to exhibit it, and any other offers which such exhibitor may care to make." We do not doubt that if a competitive bidding system is adopted all these provisions are necessary. For the licensing of films at auction is quite obviously a more complicated matter than the like sales for cash or tobacco, wheat, or other produce. Columbia puts these pertinent queries: "No two exhibitors are likely to make the same bids as to dates, clearance, method of fixing rental, etc. May bids containing such diverse factors be readily compared? May a flat rental bid be compared with a percentage bid? May the value of any percentage bid be determined unless the admission price is fixed by the license?"

The question as to who is the highest bidder involves the use of standards incapable of precise definition because the bids being compared contain different ingredients. Determining who is the most responsible bidder likewise cannot be reduced to a formula. The distributor's judgment of the character and integrity of a particular exhibitor might result in acceptance of a lower bid than others offered. Yet to prove that favoritism was shown would be well-nigh impossible, unless perhaps all the exhibitors in the country were given classifications of sponsibility. If, indeed, the choice between bidders is not to be entrusted to the uncontrolled discretion of the distributors, some effort to standardize the factors involved in determining "a reasonable return to the licensor" would seem necessary.

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[16] Competitive bidding is required only in a "competitive area" where it is exhibitors." As the District Court said, "the decree provides an opportu exhibitor in a competitive area who may desire to do so."

The details of the competitive bidding system will be found in 70 F.

We mention these matters merely to indicate the character of the job of supervising such a competitive bidding system. It would involve the judiciary in the administration of intricate and detailed rules governing priorty, perod of clearance, length of run, competitive areas, reasonable return, and the like. The system would be apt to require as close a supervision as a continuous receivership, unless the defendants were to be entrusted with vast discretion. The judiciary is unsuited to affairs of business management; and control through the power of contempt is crude and clumsy and lacking in the flexibility necessary to make continuous and detailed supervision effective. Yet delegation of the management of the system to the discretion of those who had the genius to conceive the present conspiracy and to execute it with the subtlety which this record reveals, could be done only with the greatest reluctance. At least such choices should not be faced unless the need for the system is great and its benefits plain.

The system uproots business arrangements and established relationships with no apparent overall benefit to the small independent exhibitor. If each feature must go to the highest responsible bidder, those with the greatest purchasing power would seem to be in a favored position. Those with the longest purse—the exhibitor-defendants and the large circuits—would seem to stand in a preferred position. If in fact they were enabled through the competitive bidding system to take the cream of the business, eliminate the smaller independents, and thus increase their own strategic hold on the industry, they would have the cloak of the court's decree around them for protection. Hence the natural advantage which the larger and financially stronger exhibitors would seem to have in the bidding gives us pause. If a premium is placed on purchasing power, the court-created system may be a powerful factor toward increasing the concentration of economic power in the industry rather than cleansing the competitive system of unwholesome practices. For where the system in operation promises the advantage to the exhibitor who is in the strongest financial position, the injunction against discrimination[17] is apt to hold an empty promise. In this connection it should be noted that, even though the independents in a given competitive area do not want competitive bidding, the exhibitor-defendants can invoke the system.

Our doubts concerning the competitive bidding system are increased by the fact that defendants who own theatres are allowed to pre-empt their own features. They thus start with an inventory which all other exhibitors lack. The latter have no prospect of assured runs except what they get by competitive bidding. The proposed system does not offset in any way the advantages which the exhibitor-defendants have by way of theatre ownership. It would seem in fact to increase them. For the independents are deprived of the stability which flows from established business relationships. Under the proposed system they can get features only if they are the highest responsible bidder. They can no longer depend on their private sources of supply which their ingenuity has created. Those sources, built perhaps on private relationships and representing important items of good will, are banned, even though they are free of any taint of illegality.

The system was designed, as some of the defendants put it, to remedy the difficulty of any theatre to break into or change the existing system of runs and clearances. But we do not see how, in practical operation, the proposed system of competitive bidding is likely to open up to competition the markets which defendants' unlawful restraints have dominated. Rather real danger seems to us to lie in the opportunities the system affords the exhibitor-defendants and the other large operators to strengthen their hold in the industry. We are reluctant to alter decrees in these cases where there is agreement with the District Court on the nature of the violations. *United States* v. *Crescent Amusement Co., supra*, p. 185; *International Salt Co.* v. *United States*, 332 U.S. 392, 400. But the provisions for competitive bidding in these cases promise little in the way of relief against the real evils of the conspiracy. They implicate the judiciary heavily in the details of business management if supervision is to be effective. They vest powerful control in the exhibitor-defendants over their competitors if close supervision by the court is not undertaken. In light of these considerations we conclude that the competitive bidding provisions of the decree should be eliminated so that a more effective decree may be fashioned.

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[17] The competitive bidding part of the decree provides: "Each license shall be granted upon the merits and without discrimination in favor of affiliates, old customers or others."

We have already indicated in preceding parts of this opinion that this alteration in the decree leaves a hiatus or two which will have to be filled on remand of the cases. We will indicate hereafter another phase of the problem which the District Court should also consider in view of this alteration in the decree. But out of an abundance of caution we add this additional word. The competitive bidding system was perhaps the central arch of the decree designed by the District Court. Its elimination may affect the cases in ways other than those which we expressly mention. Hence on remand of the cases the freedom of the District Court to reconsider the adequacy of decree is not limited to those parts we have specifically indicated.

Third. Monopoly, Expansion of Theatre Holdings, Divestiture

There is a suggestion that the hold the defendants have on the industry is so great that a problem under the First Amendment is raised, Cf. *Associated Press v. United States*, 326 U.S. 1. We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment. That issue would be focused here if we had any question concerning monopoly in the production of moving pictures. But monopoly in production was eliminated as an issue in these cases, as we have noted. The chief argument at the bar is phrased in terms of monopoly of exhibition, restraints on exhibition, and the like. Actually, the issue is even narrower than that. The main contest is over the cream of the exhibition business—that of the first-run theatres. By defining the issue so narrowly we do not intend to belittle its importance. It shows, however, that the question here is not *what* the public will see or *if* the public will be permitted to see certain features. It is clear that under the existing system the public will be denied access to none. If the public cannot see the features on the first-run, it may do so on the second, third, fourth, or later run. The central problem presented by these cases is which exhibitors get the highly profitable first-run business. That problem has important aspects under the Sherman Act. But it bears only remotely, if at all, on any question of freedom of the press, save only as timeliness of release may be a factor of importance in specific situations.

The controversy over monopoly relates to monopoly in exhibition and more particularly monopoly in the first-run phase of the exhibition business.

The five majors in 1945 had interests in somewhat over 17 per cent of the theatres in the United States—3,137 out of 18,076.[18] Those theatres paid 45 per cent of the total domestic film rental received by all eight defendants.

In the 92 cities of the country with populations over 100,000 at least 70 per cent of all the first-run theatres are affiliated with one or more of the five majors. In 4 of those cities the five majors have no theatres. In 38 of those cities there are no independent first-run theatres. In none of the remaining 50 cities did less than three of the distributor-defendants license their product on first run to theatres of the five majors. In 19 of the 50 cities less than three of the distributor-defendants licensed their product on first run to independent theatres. In a majority of the 50 cities the greater share of all the features of defendants were licensed for first-run exhibition in the theatres of the five majors.

In about 60 per cent of the 92 cities having populations of over 100,000, independent theatres compete with those of the five majors in first-run exhibition. In about 91 per cent of the 92 cities there is competition between independent theatres and the theatres of the five majors or between theatres of the five majors themselves for first-run exhibition. In all of the 92 cities there is always competition in some run even where there is no competition in first runs.

In cities between 25,000 and 100,000 populations the five majors have interests in 577 of a total of 978 first-run theatres or about 60 per cent. In about 300 additional towns, mostly under 25,000, an operator affiliated with one of the five majors has all of the theatres in the town.

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[18] The theatres which each of the five majors owned independently of the others were: Paramount 1,395 or 7.72 per cent; Warner 501 or 2.77 per cent; Loew's 135 or .74 per cent; Fox 636 or 3.52 per cent; RKO 109 or .60 per cent. There were in addition 361 theatres or about 2 per cent in which two or more of the five majors had joint interests. These figures exclude connections through film-buying or management contracts or through corporations in which a defendant owns an indirect minority stock interest.

These theatres are located in 922 towns in 48 States and the District of Columbia. For further description of the distribution of theatres see Bertrand, Evans, and Blanchard, The Motion Picture Industry—A Pattern of Control 15–16 (TNEC Monograph 43, 1941).

The District Court held that the five majors could not be treated collectively so as to establish claims of general monopolization in exhibition. It found that none of them was organized or had been maintained "for the purpose of achieving a national monopoly" in exhibition. It found that the five majors by their present theatre holdings "alone" (which aggregate a little more than one-sixth of all the theatres in the United States), "do not and cannot collectively or individually, have a monopoly of exhibition." The District Court also found that where a single defendant owns all of the first-run theatres in a town, there is no sufficient proof that the acquisition was for the purpose of creating a monopoly. It found rather that such consequence resulted from the inertness of competitors, their lack of financial ability to build theatres comparable to those of the five majors, or the preference of the public for the best-equipped theatres. And the percentage of features on the market which any of the five majors could play in its own theatres was found to be relatively small and in nowise to approximate a monopoly of film exhibition.[19]

Even in respect of the theatres jointly owned or jointly operated by the deendants with each other or with independents, the District Court found no monopoly or attempt to monopolize. Those joint agreements or ownership were ound only to be unreasonable restraints of trade. The District Court, indeed, ound no monopoly on any phase of the cases, although it did find an attempt to monopolize in the fixing of prices, the granting of unreasonable clearances, blockooking and the other unlawful restraints of trade we have already discussed. The "root of the difficulties," according to the District Court, lay not in theatre ownership but in those unlawful practices.

The District Court did, however, enjoin the five majors from expanding their present theatre holdings in any manner.[20] It refused to grant the request of the Department of Justice for total divestiture by the five majors of their theatre holdings. It found that total divestiure would be injurious to the five majors and amaging to the public. Its thought on the latter score was that the new set of heatre owners who would take the place of the five majors would be unlikely for some years to give the public as good service as those they supplanted "in view f the latter's demonstrated experience and skill in operating what must be rearded as in general the largest and best equipped theatres." Divestiture was, it hought, too harsh a remedy where there was available the alternative of cometitive bidding. It accordingly concluded that divestiture was unnecessary "at ast until the efficiency of that system has been tried and found wanting."

It is clear, so far as the five majors are concerned, that the aim of the conpiracy was exclusionary, *i.e.* it was designed to strengthen their hold on the xhibition field. In other words, the conspiracy had monopoly in exhibition for ne of its goals, as the District Court held. Price, clearance, and run are inter-

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[19] The number of feature films released during the 1943–44 season by the eleven largest stributors is as follows:

	Number of films	Percentages of total with— Westerns included	Percentages of total with— Westerns excluded
Fox	33	8.31	9.35
Loew's	33	8.31	9.85
Paramount	31	7.31	9.25
RKO	38	9.57	11.34
Warner	19	4.79	5.67
Columbia	41	10.31	12.24
United Artists	16	4.04	4.78
Universal	49	12.34	14.63
Republic:			
Features	−29	14.86	8.66
Westerns	30		
Monogram:			
Features	−26	10.58	7.76
Westerns	16		
PRC:			
Features	−20	9.07	5.97
Westerns	−16		
Total (335 without westerns)	397	100.00	100.0

[20] Excepted from this prohibition was the acquisition of interests in theatres jointly wned, a matter we have discussed in a preceding portion of this opinion.

dependent. The clearance and run provisions of the licenses fixed the relative playing positions of all theatres in a certain area; the minimum price provisions were based on playing position—the first-run theatres being required to charge the highest prices, the second-run theatres the next highest, and so on. As the District Court found, "In effect, the distributor, by the fixing of minimum admission prices, attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible."

It is, therefore, not enough in determining the need for divestiture to conclude with the District Court that none of the defendants was organized or has been maintained for the purpose of achieving a "national monopoly," nor that the five majors through their present theatre holdings "alone" do not and cannot collectively or individually have a monopoly of exhibition. For when the starting point is a conspiracy to effect a monopoly through restraints of trade, it is relevant to determine what the results of the conspiracy were even if they fell short of monopoly.

An example will illustrate the problem. In the popular sense there is a monopoly if one person owns the only theatre in town. That usually does not, however, constitute a violation of the Sherman Act. But as we noted in *United States* v. *Griffith*, *ante*, p. 100, and see *Schine Chain Theatres, Inc.* v. *United States*, *ante*, p. 110, even such an ownership is vulnerable in a suit by the United States under the Sherman Act if the property was acquired, or its strategic position maintained, as a result of practices which constitute unreasonable restraints of trade. Otherwise, there would be reward from the conspiracy through retention of its fruits. Hence the problem of the District Court does not end with enjoining continuance of the unlawful restraints nor with dissolving the combination which launched the conspiracy. Its function includes undoing what the conspiracy achieved. As we have discussed in *Schine Chain Theatres, Inc.* v. *United States*, *ante*, p. 110, the requirement that the defendants restore what they unlawfully obtained is no more punishment than the familiar remedy of restitution. What findings would be warranted after such an inquiry in the present cases, we do not know. For the findings of the District Court do not cover this point beyond stating that monopoly was an objective of the several restraints of trade that stand condemned.

Moreover, the problem under the Sherman Act is not solved merely by measuring monopoly in terms of size or extent of holdings or by concluding that single ownerships were not obtained "for the purpose of achieving a national monopoly." It is the relationship of the unreasonable restraints of trade to the position of the defendants in the exhibition field (and more particularly in the first-run phase of that business) that is of first importance on the divestiture phase of these cases. That is the position we have taken in *Schine Chain Theatres, Inc.* v. *United States*, *ante*, p. 110, in dealing with a projection of the same conspiracy through certain large circuits. Parity of treatment of the unaffiliated and the affiliated circuits requires the same approach here. For the fruits of the conspiracy which are denied the independents must also be denied the five majors. In this connection there is a suggestion that one result of the conspiracy was a geographical division of territory among the five majors. We mention it not to intimate that it is true but only to indicate the appropriate extent of the inquiry concerning the effect of the conspiracy in theatre ownership by the five majors.

The findings of the District Court are deficient on that score and obscure on another. The District Court in its findings speaks of the absence of a "purpose" on the part of any of the five majors to achieve a "national monopoly" in the exhibition of motion pictures. First, there is no finding as to the presence or absence of monopoly on the part of the five majors in the *first-run* field for the entire country, in the *first-run* field in the 92 largest cities of the country, or in the *first-run* field in separate localities. Yet the *first-run* field, which constitutes the cream of the exhibition business, is the core of the present cases. Section 1 of the Sherman Act outlaws unreasonable restraints irrespective of the amount of trade or commerce involved (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, 225, n. 59), and § 2 condemns monopoly of "any part" of trade or commerce. "Any part" is construed to mean an appreciable part of interstate or foreign trade or commerce. *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 225. Second, we pointed out in *United States* v. *Griffith*, *ante*, p. 100, that "specific intent" is not necessary to establish a "purpose or intent" to create a monopoly but that the requisite "purpose or intent" is present if monopoly results as a necessary consequence of what was done. The findings of the District Court on this phase of the cases are not clear, though we take them to mean by the absence of "purpose" the absence of a specific intent. So construed they are inconclusive. In any event they are ambiguous and must be recast on remand of the cases. Third, monopoly power, whether lawfully or unlawfully acquired, may violate § 2 of the Sherman Act though it remains unexercised (*United States* v. *Griffith*, *ante*, p. 100), for as we stated in *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809, 811, the existence of power "to exclude competition when it is desired to do so" is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise that power. The District Court, being primarily concerned with the number and extent of the theatre holdings of defendants, did not address itself to this phase of the monopoly problem. Here also, parity of treatment as between independents and the five majors as theatre owners, who were tied into the same general conspiracy, necessitates consideration of this question.

Exploration of these phases of the cases would not be necessary if, as the Department of Justice argues, vertical integration of producing, distributing and exhibiting motion pictures is illegal *per se*. But the majority of the Court does not take that view. In the opinion of the majority the legality of vertical integration under the Sherman Act turns on (1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent. First, it runs afoul of the Sherman Act if it was a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs. *United States* v. *Reading Co.*, 253 U.S. 26, 57; *United States* v. *Lehigh Valley R. Co.*, 254 U.S. 255, 269–270. Second, a vertically integrated enterprise, like other aggregations of business units (*United States* v. *Aluminum Co. of America*, 148 F. 2d 416), will constitute monopoly which, though unexercised, violates the Sherman Act provided a power to exclude competition is coupled with a purpose or intent to do so. As we pointed out in *United States* v. *Griffith*, *ante*, p. 100, 107, n. 10, size is itself an earmark of monopoly power. For size carries with it an opportunity for abuse. And the fact that the power created by size was utilized in the past to crush or prevent competition is potent evidence that the requisite purpose or intent attends the presence of monopoly power. See *United States* v. *Swift & Co.*, 286 U.S. 106, 116; *United States* v. *Aluminum Co. of America*, *supra*, p. 430. Likewise bearing on the question whether monopoly power is created by the vertical integration, is the nature of the market to be served (*United States* v. *Aluminum Co. of America*, *supra*, p. 430), and the leverage on the market which the particular vertical integration creates or makes possible.

These matters were not considered by the District Court. For that reason, as well as the others we have mentioned, the findings on monopoly and divestiture which we have discussed in this part of the opinion will be set aside. There is an independent reason for doing that. As we have seen, the District Court considered competitive bidding as an alternative to divestiture in the sense that it concluded that further consideration of divestiture should not be had until competitive bidding had been tried and found wanting. Since we eliminate from the decree the provisions for competitive bidding, it is necessary to set aside the findings on divestiture so that a new start on this phase of the cases may be made on their remand.

It follows that the provision of the decree barring the five majors from further theatre expansion should likewise be eliminated. For it too is related to the monopoly question; and the District Court should be allowed to make an entirely fresh start on the whole of the problem. We in no way intimate, however, that the District Court erred in prohibiting further theatre expansion by the five majors.

The Department of Justice maintains that if total divestiture is denied, licensing of films among the five majors should be barred. As a permanent requirement it would seem to be only an indirect way of forcing divestiture. For the findings reveal that the five majors could not operate their theatres full time on their own films.[2] Whether that step would, in absence of competitive bidding, serve as a short-range remedy in certain situations to dissipate the effects of the conspiracy (*United States* v. *Univis Lens Co.*, 316 U.S. 241, 254; *United States* v. *Bausch & Lomb Co.*, *supra*, p. 724; *United States* v. *Crescent Amusement Co.*, *supra*, p. 188) is a question for the District Court.

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[2] The District Court found, "Except for a very limited number of theatres in the very largest cities, the 18,000 and more theatres in the United States exhibit the product of more than one distributor. Such theatres could not be operated on the product of only one distributor."

Fourth

The consent decree created an arbitration system which had, in the view of the District Court, proved useful in its operation. The court indeed thought that the arbitration system had dealt with the problems of clearances and runs "with rare efficiency." But it did not think it had the power to continue an arbitration system which would be binding on the parties, since the consent decree did not bind the defendants who had not consented to it and since the government, acting pursuant to the powers reserved under the consent decree, moved for trial of the issues charged in the complaint. The District Court recommended, however, that some such system be continued. But it included no such provision in its decree.

We agree that the government did not consent to a permanent system of arbitration under the consent decree and that the District Court has no power to force or require parties to submit to arbitration in lieu of the remedies afforded by Congress for enforcing the antitrust laws. But the District Court has the power to authorize the maintenance of such a system by those parties who consent and to provide the rules and procedure under which it is to operate. The use of the system would not, of course, be mandatory. It would be merely an auxiliary enforcement procedure, barring no one from the use of other remedies the law affords for violations either of the Sherman Act or of the decree of the court. Whether such a system of arbitration should be inaugurated is for the discretion of the District Court.

Fifth—Intervention

Certain associations of exhibitors and a number of independent exhibitors, appellant-intervenors in Nos. 85 and 86, were denied leave to intervene in the District Court. They appeal from those orders. They also filed orginal motions for leave to intervene in this Court. We postponed consideration of the original motions and of our jurisdiction to hear the appeals until a hearing on the merits of the cases.

Rule 24(a) of the Rules of Civil Procedure, which provides for intervention as of right, reads in part as follows: "Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

The complaint of the intervenors was directed towards the system of competitive bidding. The Department of Justice is the representative of the public in these antitrust suits. So far as the protection of the public interest in free competition is concerned, the interests of those intervenors was adequately represented. The intervenors, however, claim that the system of competitive bidding would have operated prejudicially to their rights. Cf. *United States* v. *St. Louis Terminal*, 236 U.S. 194, 199. Their argument is that the plan of competitive bidding under the control of the defendants would be a concert of action that would be illegal but for the decree. If pursuant to the decree defendants acted under that plan, they would gain immunity from any liability under the antitrust laws which otherwise they might have to the intervenors. Thus, it is argued, the decree would affect their legal rights and be binding on them. The representation of their interests by the Department of Justice on that score was said to be inadequate since that agency proposed the idea of competitive bidding in the District Court.

We need not consider the merits of that argument. Even if we assume that the intervenors are correct in their position, intervention should be denied here and the orders of the District Court denying leave to intervene must be affirmed. Now that the provisions for competitive bidding have been eliminated from the decree, there is no basis for saying that the decree affects their legal rights. Whatever may have been the situation below, no other reason appears why at this stage their intervention is warranted. Any justification for making them parties has disappeared.

The judgment in these cases is affirmed in part and reversed in part, and the cases are remanded to the District Court for proceedings in conformity with this opinion.

So ordered.

Mr. Justice Jackson took no part in the consideration or decision of these cases.

Mr. Justice Frankfurter, dissenting in part.

"The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case." On this guiding consideration, the Court earlier this Term sustained a Sherman Law decree, which was not the outcome of a long trial involving complicated and contested facts and their significance, but the formulation of a summary judgment on the bare bones of pleadings. *International Salt Co.* v. *United States*, 332 U. S. 392, 400–401. The record in this case bespeaks more compelling respect for the decree fashioned by the District Court of three judges to put an end to violations of the Sherman Law and to prevent the recurrence, than that which led this Court not to find abuse of discretion in the decree by a single district judge in the *International Salt* case.

This Court has both the authority and duty to consider whether a decree is well calculated to undo, as far as is possible, the result of transactions forbidden by the Sherman Law and to guard against their repetition. But it is not the function of this Court, and it would ill discharge it, to displace the district courts and write decrees *de novo*. We are, after all, an appellate tribunal even in Sherman Law cases. It could not be fairly claimed that this Court possesses greater experience, understanding and prophetic insight in relation to the movie industry, and is therefore better equipped to formulate a decree for the movie industry than was the District Court in this case, presided over as it was by one of the wisest of judges.

The terms of the decree in this litigation amount, in effect, to the formulation of a regime for the future conduct of the movie industry. The terms of such a regime, within the scope of judicial oversight, are not to be derived from precedents in the law reports, nor, for that matter, from any other available repository of knowledge. Inescapably the terms must be derived from an assessment of conflicting interests, not quantitatively measurable, and a prophecy regarding the workings of untried remedies for dealing with disclosed evils so as to advance most the comprehensive public interest.

The crucial legal question before us is not whether we would have drawn the decree as the District Court drew it, but whether, on the basis of what came before the District Court, we can say that in fashioning remedies it did not fairly respond to disclosed violations and therefore abused a discretion, the fair exercise of which we should respect and not treat as an abuse. Discretion means a choice of available remedies. As bearing upon this question, it is most relevant to consider whether the District Court showed a sympathetic or mere niggling awareness of the proper scope of the Sherman Law and the range of its condemnation. Adequate remedies are not likely to be fashioned by those who are not hostile to evils to be remedied. The District Court's opinion manifests a stout purpose on the part of that court to enforce its thoroughgoing understanding of the requirements of the Sherman Law as elucidated by this Court. And so we have before us the decree of a district court thoroughly aware of the demands of the Sherman Law and manifestly determined to enforce it in all its rigors.

How did the District Court go about working out the terms of the decree some of which this Court now displaces? The case was before that court from October 8, 1945, to January 22, 1947. A vast body of the evidence which had to be considered below, and must be considered here in overturning the lower court's decree, consisted of documents. A mere enumeration of these documents, not printed in the record before us, required a pamphlet of 42 pages. It took 460 pages for a selection of exhibits deemed appropriate for printing by the Government. The printed record in this Court consists of 3,841 pages. It is on the basis of this vast mass of evidence that the District Court, on June 11, 1946, filed its careful opinion, approved here, as to the substantive issues. Thereafter, it heard argument for three days as to the terms of the judgment. The parties then submitted their proposals for findings of fact and conclusions of law by the District Court. After a long trial, an elaborate opinion on the merits, full discussion as to the terms of the decree, more than two months for the gestation of the decree, the terms were finally promulgated.

I cannot bring myself to conclude that the product of such a painstaking process of adjudication as to a decree appropriate for such a complicated situation as this record discloses was an abuse of discretion, arrived at as it was after due absorption of all the light that could be shed upon remedies appropriate for the future. After all, as to such remedies there is no test, ultimately, except the wisdom of men judged by events.

Accordingly, I would affirm the decree except as to one particular, that regarding an arbitration system for controversies that may arise under the decree. This raises a pure question of law and not a judgment based upon facts and their sig-

nificance, as are those features of the decree which the Court sets aside. The District Court indicated that "in view of its demonstrated usefulness" such an arbitration system was desirable to aid in the enforcement of the decree. The District Court, however, deemed itself powerless to continue an arbitration system without the consent of the parties. I do not find such want of power in the District Court to select this means of enforcing the decree most effectively, with the least friction and by the most fruitful methods. A decree as detailed and as complicated as is necessary to fit a situation like the one before us is bound, even under the best of circumstances, to raise controversies involving conflicting claims as to facts and their meaning. A court could certainly appoint a master to deal with questions arising under the decree. I do not appreciate why a proved system of arbitration, appropriate as experience has found it to be appropriate for adjudicating numberless questions that arise under such a decree, is not to be treated in effect as a standing master for purposes of this decree. See *Ex parte Peterson*, 253 U.S. 300. I would therefore leave it to the discretion of the District Court to determine whether such a system is not available as an instrument of auxiliary enforcement. With this exception I would affirm the decree of the District Court.

319 U.S. 190 (1942)

NATIONAL BROADCASTING CO., INC. ET AL. *v.* UNITED STATES ET AL.*

Appeal from the District Court of the United States for the Southern District of New York

(No. 554. Argued February 10, 11, 1943.—Decided May 10, 1943)

COUNSEL FOR PARTIES

APPEALS from judgments of the District Court dismissing suits to enjoin enforcement of chain broadcasting regulations promulgated by the Federal Communications Commission.

Mr. John T. Cahill, with whom *Messrs. A. L. Ashby, Harold S. Glendening*, and *John W. Nields* were on the brief, for the National Broadcasting Co.; and *Mr. E. Willoughby Middleton*, with whom *Mr. Thomas H. Middleton* was on the brief, for the Stromberg-Carlson Telephone Manufacturing Co. (*Mr. David M. Wood* was on the Statement as to Jurisdiction, for the Woodmen of the World Life Insurance Society),—appellants in No. 554. *Mr. Charles E. Hughes, Jr.*, with whom *Messrs. Allen S. Hubbard, Harold L. Smith*, and *John J. Burns* were on the brief, for appellant in No. 555.

Solicitor General Fahy, with whom *Messrs. Richard S. Salant, Charles R. Denny, Harry M. Plotkin*, and *Max Goldman* were on the brief, for the United States et al.; and *Mr. Louis G. Caldwell*, with whom *Messrs. Leon Lauterstein* and *Percy H. Russell, Jr.*, were on the brief, for the Mutual Broadcasting System, Inc.,—appellees.

Briefs of *amici curiae* were filed by *Mr. Isaac W. Digges* on behalf of the Association of National Advertisers, Inc., and by *Mr. George Link, Jr.*, on behalf of the American Association of Advertising Agencies,—in support of appellants; and by *Messrs. Homer S. Cummings, Morris L. Ernst* and *Benjamin S. Kirsh* on behalf of the American Civil Liberties Union,—in support of appellees.

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*Together with No. 555, *Columbia Broadcasting System, Inc.* v. *United States et al.*, also on appeal from the District Court of the United States for the Southern District of New York, argued February 11, 1943.

OPINION OF THE COURT

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

In view of our dependence upon regulated private enterprise in discharging the far-reaching role which radio plays in our society, a somewhat detailed exposition of the history of the present controversy and the issues which it raises is appropriate.

These suits were brought on October 30, 1941, to enjoin the enforcement of the Chain Broadcasting Regulations promulgated by the Federal Communications Commission on May 2, 1941, and amended on October 11, 1941. We held last Term in *Columbia System* v. *United States*, 316 U.S. 407, and *National Broadcasting Co.* v. *United States*, 316 U.S. 447, that the suits could be maintained under § 402 (a) of the Communications Act of 1934, 48 Stat. 1093, 47 U.S.C. § 402 (a) (incorporating by reference the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, 28 U.S.C. § 47), and that the decrees of the District Court dismissing the suits for want of jurisdiction should therefore be reversed. On remand the District Court granted the Government's motions for summary judgment and dismissed the suits on the merits. 47 F. Supp. 940. The cases are now here on appeal. 28 U.S.C. § 47. Since they raise substantially the same issues and were argued together, we shall deal with both cases in a single opinion.

On March 18, 1938, the Commission undertook a comprehensive investigation to determine whether special regulations applicable to radio stations engaged in chain broadcasting[1] were required in the "public interest, convenience, or necessity." The Commission's order directed that inquiry be made, *inter alia*, in the following specific matters: the number of stations licensed to or affiliated with networks, and the amount of station time used or controlled by networks; the contractual rights and obligations of stations under their agreements with networks; the scope of network agreements containing exclusive affiliation provisions and restricting the network from affiliating with other stations in the same area; the rights and obligations of stations with respect to network advertisers; the nature of the program service rendered by stations licensed to networks; the policies of networks with respect to character of programs, diversification, and accommodation to the particular requirements of the areas served by the affiliated stations; the extent to which affiliated stations exercise control over programs, advertising contracts, and related matters; the nature and extent of network program duplication by stations serving the same area; the extent to which particular networks have exclusive coverage in some areas; the competitive practices of stations engaged in chain broadcasting; the effect of chain broadcasting upon stations not licensed to or affiliated with networks; practices or agreements in restraint of trade, or in furtherance of monopoly, in connection with chain broadcasting; and the scope of concentration of control over stations, locally, regionally, or nationally, through contracts, common ownership, or other means.

On April 6, 1938, a committee of three Commissioners was designated to hold hearings and make recommendations to the full Commission. This committee held public hearings for 73 days over a period of six months, from November 14, 1938, to May 19, 1939. Order No. 37, announcing the investigation and specifying the particular matters which would be explored at the hearings, was published in the Federal Register, 3 Fed. Reg. 637, and copies were sent to every station licensee and network organization. Notices of the hearings were also sent to these parties. Station licensees, national and regional networks, and transcription and recording companies were invited to appear and give evidence. Others persons who sought to appear were afforded an opportunity to testify. 96 witnesses were heard by the committee, 45 of whom were called by the national networks. The evidence covers 27 volumes, including over 8,000 pages of transcript and more than 700 exhibits. The testimony of the witnesses called by the national networks fills more than 6,000 pages, the equivalent of 46 hearing days.

The committee submitted a report to the Commission on June 12, 1940, stating its findings and recommendations. Thereafter, briefs on behalf of the networks and other interested parties were filed before the full Commission, and on

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[1] Chain broadcasting is defined in § 3(p) of the Communications Act of 1934 as the "simultaneous broadcasting of an identical program by two or more connected stations." In actual practice, programs are transmitted by wire, usually leased telephone lines, from their point of origination to each station in the network for simultaneous broadcast over the air.

November 28, 1940, the Commission issued proposed regulations which the parties were requested to consider in the oral arguments held on December 2 and 3, 1940. These proposed regulations dealt with the same matters as those covered by the regulations eventually adopted by the Commission. On January 2, 1941, each of the national networks filed a supplementary brief discussing at length the questions raised by the committee report and the proposed regulations.

On May 2, 1941, the Commission issued its Report on Chain Broadcasting, setting forth its findings and conclusions upon the matters explored in the investigation, together with an order adopting the Regulations here assailed. Two of the seven members of the Commission dissented from this action. The effective date of the Regulations was deferred for 90 days with respect to existing contracts and arrangements of network-operated stations, and subsequently the effective date was thrice again postponed. On August 14, 1941, the Mutual Broadcasting Company petitioned the Commission to amend two of the Regulations. In considering this petition the Commission invited interested parties to submit their views. Briefs were filed on behalf of all of the national networks and oral argument was had before the Commission on September 12, 1941. And on October 11, 1941, the Commission (again with two members dissenting) issued a Supplemental Report, together with an order amending three Regulations. Simultaneously, the effective date of the Regulations was postponed until November 15, 1941, and provision was made for further postponements from time to time if necessary to permit the orderly adjustment of existing arrangements. Since October 30, 1941, when the present suits were filed, the enforcement of the Regulations has been stayed either voluntarily by the Commission or by order of the court.

Such is the history of the Chain Broadcasting Regulations. We turn now to the Regulations themselves, illumined by the practices in the radio industry disclosed by the Commission's investigation. The Regulations, which the Commission characterized in its Report as "the expression of the general policy we will follow in exercising our licensing power," are addressed in terms to station licensees and applicants for station licenses. They provide, in general, that no licenses shall be granted to stations or applicants having specified relationships with networks. Each Regulation is directed at a particular practice found by the Commission to be detrimental to the "public interest," and we shall consider them *seriatim*. In doing so, however, we do not overlook the admonition of the Commission that the Regulations as well as the network practices at which they are aimed are interrelated: "In considering above the network practices which necessitate the regulations we are adopting, we have taken each practice singly, and have shown that even in isolation each warrants the regulation addressed to it. But the various practices we have considered do not operate in isolation; they form a compact bundle or pattern, and the effect of their joint impact upon licensees necessitates the regulations even more urgently than the effect of each taken singly." (Report, p. 75.)

The Commission found that at the end of 1938 there were 660 commercial stations in the United States, and that 341 of these were affiliated with national networks. 135 stations were affiliated exclusively with the National Broadcasting Company, Inc., known in the industry as NBC, which operated two national networks, the "Red" and the "Blue." NBC was also the licensee of 10 stations, including 7 which operated on so-called clear channels with the maximum power available, 50 kilowatts; in addition, NBC operated 5 other stations, 4 of which had power of 50 kilowatts, under management contracts with their licensees. 102 stations were affiliated exclusively with the Columbia Broadcasting System, Inc., which was also the licensee of 8 stations, 7 of which were clear-channel stations operating with power of 50 kilowatts. 75 stations were under exclusive affiliation with the Mutual Broadcasting System, Inc. In addition, 25 stations were affiliated with both NBC and Mutual, and 5 with both CBS and Mutual. These figures, the Commission noted, did not accurately reflect the relative prominence of the three companies, since the stations affiliated with Mutual were, generally speaking, less desirable in frequency, power, and coverage. It pointed out that the stations affiliated with the national networks utilized more than 97% of the total night-time broadcasting power of all the stations in the country. NBC and CBS together controlled more than 85% of the total night-time wattage, and the broadcast business of the three national network companies amounted to almost half of the total business of all stations in the United States.

The Commission recognized that network broadcasting had played and was continuing to play an important part in the development of radio. "The growth and development of chain broadcasting," it stated, "found its impetus in the desire to give widespread coverage to programs which otherwise would not be heard beyond the reception area of a single station. Chain broadcasting makes possible a wider reception for expensive entertainment and cultural programs and also for programs of national or regional significance which would otherwise have coverage only in the locality of origin. Furthermore, the access to greatly enlarged audiences made possible by chain broadcasting has been a strong incentive to advertisers to finance the production of expensive programs.... But the fact that the chain broadcasting method brings benefits and advantages to both the listening public and to broadcast station licensees does not mean that the prevailing practices and policies of the networks and their outlets are sound in all respects, or that they should not be altered. The Commission's duty under the Communications Act of 1934 is not only to see that the public receives the advantages and benefits of chain broadcasting, but also, so far as its powers enable it, to see that practices which adversely affect the ability of licensees to operate in the public interest are eliminated." (Report, p. 4.)

The Commission found that eight network abuses were amenable to correction within the powers granted it by Congress:

Regulation 3.101—Exclusive affiliation of station. The Commission found that the network affiliation agreements of NBC and CBS customarily contained a provision which prevented the station from broadcasting the programs of any other network. The effect of this provision was to hinder the growth of new networks, to deprive the listening public in many areas of service to which they were entitled, and to prevent station licensees from exercising their statutory duty of determining which programs would best serve the needs of their community. The Commission observed that in areas where all the stations were under exclusive contract to either NBC or CBS, the public was deprived of the opportunity to hear programs presented by Mutual. To take a case cited in the Report: In the fall of 1939 Mutual obtained the exclusive right to broadcast the World Series baseball games. It offered this program of outstanding national interest to stations throughout the country, including NBC and CBS affiliates in communities having no other stations. CBS and NBC immediately invoked the "exclusive affiliation" clauses of their agreements with these stations, and as a result thousands of persons in many sections of the country were unable to hear the broadcasts of the games.

"Restraints having this effect," the Commission observed, "are to be condemned as contrary to the public interest irrespective of whether it be assumed that Mutual programs are of equal, superior, or inferior quality. The important consideration is that station licensees are denied freedom to choose the programs which they believe best suited to their needs; in this manner the duty of a station licensee to operate in the public interest is defeated. . . . Our conclusion is that the disadvantages resulting from these exclusive arrangements far outweigh any advantages. A licensee station does not operate in the public interest when it enters into exclusive arrangements which prevent it from giving the public the best service of which it is capable, and which, by closing the door of opportunity in the network field, adversely affects the program structure of the entire industry." (Report, pp. 52, 57.) Accordingly, the Commission adopted Regulation 3.101, providing as follows: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization."

Regulation 3.102—Territorial exclusivity. The Commission found another type of "exclusivity" provision in network affiliation agreements whereby the network bound itself not to sell programs to any other station in the same area. The effect of this provision, designed to protect the affiliate from the competition of other stations serving the same territory, was to deprive the listening public of many programs that might otherwise be available. If an affiliated station rejected a network program, the "territorial exclusivity" clause of its affiliation agreement prevented the network from offering the program to other stations in the area. For example, Mutual presented a popular program, known as "The American Forum of the Air," in which prominent persons discussed topics of general interest. None of the Mutual stations in the Buffalo area decided to carry the program, and a Buffalo station not affiliated with Mutual attempted to obtain the program for its listeners. These efforts failed, however, on account of the "territorial exclusivity" provision in Mutual's agreements with its outlets. The result was that this program was not available to the people of Buffalo.

The Commission concluded that "It is not in the public interest for the listening audience in an area to be deprived of network programs not carried by one station where other stations in that area are ready and willing to broadcast the programs. It is as much against the public interest for a network affiliate to enter into a contractual arrangement which prevents another station from carrying a network program as it would be for it to drown out that program by electrical interference." (Report, p. 59.)

Recognizing that the "territorial exclusivity" clause was unobjectionable in so far as it sought to prevent duplication of programs in the same area, the Commission limited itself to the situations in which the clause impaired the ability of the licensee to broadcast available programs. Regulation 3.102, promulgated to remedy this particular evil, provides as follows: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization."

Regulation 3.103—Term of affiliation. The standard NBC and CBS affiliation contracts bound the station for a period of five years, with the network having the exclusive right to terminate the contracts upon one year's notice. The Commission, relying upon § 307(d) of the Communications Act of 1934, under which no license to operate a broadcast station can be granted for a longer term than three years, found the five-year affiliation term to be contrary to the policy of the Act: "Regardless of any changes that may occur in the economic, political, or social life of the Nation or of the community in which the station is located, CBS and NBC affiliates are bound by contract to continue broadcasting the network programs of only one network for 5 years. The licensee is so bound even though the policy and caliber of programs of the network may deteriorate greatly. The future necessities of the station and of the community are not considered. The station licensee is unable to follow his conception of the public interest until the end of the 5-year contract." (Report, p. 61.) The Commission concluded that under contracts binding the affiliates for five years, "stations become parties to arrangements which deprive the public of the improved service it might otherwise derive from competition in the network field; and that a station is not operating in the public interest when it so limits its freedom of action." (Report, p. 62.) Accordingly, the Commission adopted Regulation 3.103: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years:[2] *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period."

Regulation 3.104—Option time. The Commission found that network affiliation contracts usually contained so-called network optional time clauses. Under these provisions the network could upon 28 days' notice call upon its affiliates to carry a commercial program during any of the hours specified in the agreement as "network optional time." For CBS affiliates "network optional time" meant the entire broadcast day. For 29 outlets of NBC on the Pacific Coast, it also covered the entire broadcast day; for substantially all of the other NBC affiliates, it included 8½ hours on weekdays and 8 hours on Sundays. Mutual's contracts with about half of its affiliates contained such a provision, giving the network optional time for 3 or 4 hours on weekdays and 6 hours on Sundays.

In the Commission's judgment these optional time provisions, in addition to imposing serious obstacles in the path of new networks, hindered stations in developing a local program service. The exercise by the networks of their options over the station's time tended to prevent regular scheduling of local programs at desirable hours. The Commission found that "shifting a local commercial program may seriously interfere with the efforts of a [local] sponsor to build up a regular listening audience at a definite hour, and the long-term advertising contract becomes a highly dubious project. This hampers the efforts of the station to develop local commercial programs and affects adversely its ability to give the public good program service. . . . A station licensee must retain sufficient freedom of action to supply the program and advertising needs of the local community. Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest. We conclude that national network time options have restricted the freedom of station licensees and hampered their efforts to broadcast local commercial programs, the programs of other national networks, and national spot transcriptions. We believe that these considerations far outweigh any supposed advantages from 'stability' of network operations under time options. We find that the optioning of time by licensee stations has operated against the public interest." (Report, pp. 63, 65.)

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[2] Station licenses issued by the Commission normally last two years. Section 3.34 of the Commission's Rules and Regulations governing Standard and High-Frequency Broadcast Stations, as amended October 14, 1941.

The Commission undertook to preserve the advantages of option time, as a device for "stabilizing" the industry, without unduly impairing the ability of local stations to develop local program service. Regulation 3.104 called for the modification of the option-time provision in three respects: the minimum notice period for exercise of the option could not be less than 56 days; the number of hours which could be optioned was limited; and specific restrictions were placed upon exercise of the option to the disadvantaged of other networks. The text of the Regulation follows: "No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8:00 a.m. to 1:00 p.m.; 1:00 p.m. to 6:00 p.m.; 6:00 p.ms to 11:00 p.m.; 11:00 p.m. to 8:00 a.m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations."

Regulation 3.105—Right to reject programs. The Commission found that most network affiliation contracts contained a clause defining the right of the station to reject network commercial programs. The NBC contracts provided simply that the station "may reject a network program the broadcasting of which would not be in the public interest, convenience, and necessity." NBC required a licensee who rejected a program to "be able to support his contention that what he has done has been more in the public interest than had he carried on the network program." Similarly, the CBS contracts provided that if the station had "reasonable objection to any sponsored program or the product advertised thereon as not being in the public interest, the station may, on 3 weeks' prior notice thereof to Columbia, refuse to broadcast such program, unless during such notice period such reasonable objection of the station shall be satisfied."

While seeming in the abstract to be fair, these provisions, according to the Commission's finding, did not sufficiently protect the "public interest." As a practical matter, the licensee could not determine in advance whether the broadcasting of any particular network program would or would not be in the public interest. "It is obvious that from such skeletal information [as the networks submitted to the stations prior to the broadcasts] the station cannot determine in advance whether the program is in the public interest, nor can it ascertain whether or not parts of the program are in one way or another offensive. In practice, if not in theory, stations affiliated with networks have delegated to the networks a large part of their programming functions. In many instances, moreover, the network further delegates the actual production of programs to advertising agencies. These agencies are far more than mere brokers or intermediaries between the network and the advertiser. To an ever-increasing extent, these agencies actually exercise the function of program production. Thus it is frequently neither the station nor the network, but rather the advertising agency, which determines what broadcast programs shall contain. Under such circumstances, it is especially important that individual stations, if they are to operate in the public interest, should have the practical opportunity as well as the contractual right to reject network programs. . . .

"It is the station, not the network, which is licensed to serve the public interest. The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency. He cannot lawfully bind himself to accept programs in every case where he cannot sustain the burden of proof that he has a better program. The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest. We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory." (Report, pp. 39, 66.)

The Commission undertook in Regulation 3.105 to formulate the obligations of licensees with respect to supervision over programs: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance."

Regulation 3.106—Network ownership of stations. The Commission found that NBC, in addition to its network operations, was the licensee of 10 stations, 2 each in New York, Chicago, Washington, and San Francisco, 1 in Denver, and 1 in Cleveland. CBS was the licensee of 8 stations, 1 in each of these cities: New York, Chicago, Washington, Boston, Minneapolis, St. Louis, Charlotte, and Los Angeles. These 18 stations owned by NBC and CBS, the Commission observed, were among the most powerful and desirable in the country, and were permanently inaccessible to competing networks. "Competition among networks for these facilities is nonexistent, as they are completely removed from the network-station market. It gives the network complete control over its policies. This 'bottling-up' of the best facilities has undoubtedly had a discouraging effect upon the creation and growth of new networks. Furthermore, common ownership of network and station places the network in a position where its interest as the owner of certain stations may conflict with its interest as a network organization serving affiliated stations. In dealings with advertisers, the network represents its own stations in a proprietary capacity and the affiliated stations in something akin to an agency capacity. The danger is present that the network organization will give preference to its own stations at the expense of its affiliates." (Report, p. 67.)

The Commission stated that if the question had arisen as an original matter, it might well have concluded that the public interest required severance of the business of station ownership from that of network operation. But since substantial business interests have been formed on the basis of the Commission's continued tolerance of the situation, it was found inadvisable to take such a drastic step. The Commission concluded, however, that "the licensing of two stations in the same area to a single network organization is basically unsound and contrary to the public interest," and that it was also against the "public interest" for network organizations to own stations in areas where the available facilities were so few or of such unequal coverage that competition would thereby be substantially restricted. Recognizing that these considerations called for flexibility in their application to particular situations, the Commission provided that "networks will be given full opportunity, on proper application for new facilities or renewal of existing licenses, to call to our attention any reasons why the principle should be modified or held inapplicable." (Report, p. 68.) Regulation 3.106 reads as follows: "No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing."

Regulation 3.107—Dual network operation. This regulation provides that: "No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided,* That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network." In its Supplemental Report of October 11, 1941, the Commission announced the indefinite suspension of this regulation. There is no occasion here to consider the validity of Regulation 3.107, since there is no immediate threat of its enforcement by the Commission.

Regulation 3.108—Control by networks of station rates. The Commission found that NBC's affiliation contracts contained a provision empowering the network to reduce the station's network rate, and thereby to reduce the compensation received by the station, if the station set a lower rate for non-network national advertising than the rate established by the contract for the network programs. Under this provision the station could not sell time to a national advertiser for less than it would cost the advertiser if he bought the time from NBC. In the words of NBC's vice-president, "This means simply that a national advertiser should pay the same price for the station whether he buys it through one source or another source. It means that we do not believe that our stations should go into competition with ourselves." (Report, p. 73.)

The Commission concluded that "it is against the public interest for a station licensee to enter into a contract with a network which has the effect of decreasing its ability to compete for national business. We believe that the public interest will best be served and listeners supplied with the best programs if stations bargain freely with national advertisers." (Report, p. 75.) Accordingly, the Commission adopted Regulation 3.108, which provides as follows: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs."

The appellants attack the validity of these Regulations along many fronts. They contend that the Commission went beyond the regulatory powers conferred upon it by the Communications Act of 1934; that even if the Commission were authorized by the Act to deal with the matters comprehended by the Regulations, its action is nevertheless invalid because the Commission misconceived the scope of the Act, particularly § 313 which deals with the application of the anti-trust laws to the radio industry; that the Regulations are arbitrary and capricious; that if the Communications Act of 1934 were construed to authorize the promulgation of the Regulations, it would be an unconstitutional delegation of legislative power; and that, in any event, the Regulations abridge the appellants' right of free speech in violation of the First Amendment. We are thus called upon to determine whether Congress has authorized the Commission to exercise the power asserted by the Chain Broadcasting Regulations, and if it has, whether the Constitution forbids the exercise of such authority.

Federal regulations of radio[3] begins with the Wireless Ship Act of June 24, 1910, 36 Stat. 629, which forbade any steamer carrying or licensed to carry fifty or more persons to leave any American port unless equipped with efficient apparatus for radio communication, in charge of a skilled operator. The enforcement of this legislation was entrusted to the Secretary of Commerce and Labor, who was in charge of the administration of the marine navigation laws. But it was not until 1912, when the United States ratified the first international radio treaty, 37 Stat. 1565, that the need for general regulation of radio communication became urgent. In order to fulfill our obligations under the treaty, Congress enacted the Radio Act of August 13, 1912, 37 Stat. 302. This statute forbade the operation of radio apparatus without a license from the Secretary of Commerce and Labor; it also allocated certain frequencies for the use of the Government, and imposed restrictions upon the character of wave emissions, the transmission of distress signals, and the like.

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[3] The history of federal regulation of radio communication is summarized in Herring and Gross, Telecommunications (1936) 239–86; Administrative Procedure in Government Agencies, Monograph of the Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 186, 76th Cong., 3d Sess., Part 3, dealing with the Federal Communications Commission, pp. 82–84; 1 Socolow, Law of Radio Broadcasting (1939) 38–61; Donovan, Origin and Development of Radio Law (1930).

The enforcement of the Radio Act of 1912 presented no serious problems prior to the World War. Questions of interference arose only rarely because there were more than enough frequencies for all the stations then in existence. The war accelerated the development of the art, however, and in 1921 the first standard broadcast stations were established. They grew rapidly in number, and by 1923 there were several hundred such stations throughout the country. The Act of 1912 had not set aside any particular frequencies for the use of private broadcast stations; consequently, the Secretary of Commerce selected two frequencies, 750 and 833 kilocycles, and licensed all stations to operate upon one or the other of these channels. The number of stations increased so rapidly, however, and the situation became so chaotic, that the Secretary, upon the recommendation of the National Radio Conferences which met in Washington in 1923 and 1924, established a policy of assigning specified frequencies to particular stations. The entire radio spectrum was divided into numerous bands, each allocated to a particular kind of service. The frequencies ranging from 550 to 1500 kilocycles (96 channels in all, since the channels were separated from each other by 10 kilocycles) were assigned to the standard broadcast stations. But the problems created by the enormously rapid development of radio were far from solved. The increase in the number of channels was not enough to take care of the constantly growing number of stations. Since there were more stations than available frequencies, the Secretary of Commerce attempted to find room for everybody by limiting the power and hours of operation of stations in order that several stations might use the same channel. The number of stations multiplied so rapidly, however, that by November, 1925, there were almost 600 stations in the country, and there were 175 applications for new stations. Every channel in the standard broadcast band was, by that time, already occupied by at least one station, and many by several. The new stations could be accommodated only by extending the standard broadcast band, at the expense of the other types of services, or by imposing still greater limitations upon time and power. The National Radio Conference which met in November, 1925, opposed both of these methods and called upon Congress to remedy the situation through legislation.

The Secretary of Commerce was powerless to deal with the situation. It had been held that he could not deny a license to an otherwise legally qualified applicant on the ground that the proposed station would interfere with existing private or Government stations. *Hoover* v. *Intercity Radio Co.*, 52 App. D.C. 339, 286 F. 1003. And on April 16, 1926, an Illinois district court held that the Secretary had no power to impose restrictions as to frequency, power, and hours of operation, and that a station's use of a frequency not assigned to it was not a violation of the Radio Act of 1912. *United States* v. *Zenith Radio Corp.*, 12 F. 2d 614. This was followed on July 8, 1926, by an opinion of Acting Attorney General Donovan that the Secretary of Commerce had no power, under the Radio Act of 1912, to regulate the power, frequency or hours of operation of stations. 35 Ops. Atty. Gen. 126. The next day the Secretary of Commerce issued a statement abandoning all his efforts to regulate radio and urging that the stations undertake self-regulation.

But the plea of the Secretary went unheeded. From July, 1926, to February 23, 1927, when Congress enacted the Radio Act of 1927, 44 Stat. 1162, almost 200 new stations went on the air. These new stations used any frequencies they desired, regardless of the interference thereby caused to others. Existing stations changed to other frequencies and increased their power and hours of operation at will. The result was confusion and chaos. With everybody on the air, nobody could be heard. The situation became so intolerable that the President in his message of December 7, 1926, appealed to Congress to enact a comprehensive radio law:

"Due to the decisions of the courts, the authority of the department [of Commerce] under the law of 1912 has broken down; many more stations have been operating than can be accommodated within the limited number of wave lengths available; further stations are in course of construction; many stations have departed from the scheme of allocations set down by the department, and the whole service of this most important public function has drifted into such chaos as seems likely, if not remedied, to destroy its great value. I most urgently recommend that this legislation should be speedily enacted." (H. Doc. 483, 69th Cong., 2d Sess., p. 10.)

The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another.[4] Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile. In enacting the Radio Act of 1927, the first comprehensive scheme of control over radio communication, Congress acted upon the knowledge that if the potentialities of radio were not to be wasted, regulation was essential.

The Radio Act of 1927 created the Federal Radio Commission, composed of five members, and endowed the Commission with wide licensing and regulatory powers. We do not pause here to enumerate the scope of the Radio Act of 1927 and of the authority entrusted to the Radio Commission, for the basic provisions of that Act are incorporated in the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. § 151 *et seq.*, the legislation immediately before us. As we noted in *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137, "In its essentials the Communications Act of 1934 [so far as its provisions relating to radio are concerned] derives from the Federal Radio Act of 1927. . . . By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry. The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation, in the Act of 1934, of the Communications Commission. But the objectives of the legislation have remained substantially unaltered since 1927."

Section 1 of the Communications Act states its "purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." Section 301 particularizes this general purpose with respect to radio: "It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." To that end a Commission composed of seven members was created, with broad licensing and regulatory powers.

Section 303 provides:

"Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

* * * * * * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act . . .;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * * * * * *

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

* * * * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. . . ."

The criterion governing the exercise of the Commission's licensing power is the "public interest, convenience, or necessity." §§ 307(a)(d), 309(a), 310, 312. In addition, § 307(b) directs the Commission that "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

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[4] See Morecroft, Principles of Radio Communication (3d ed. 1933) 355–402; Terman, Radio Engineering (2d ed. 1937) 593–645.

The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the "public interest, convenience, or necessity," a criterion which "is as concrete as the complicated factors for judgment in such a field of delegated authority permit." *Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138. "This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. Compare *New York Central Securities Co.* v. *United States*, 287 U.S. 12, 24. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services . . ." *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U.S. 266, 285.

The "public interest" to be served under the Communications Act is thus the interest of the listening public in "the larger and more effective use of radio." § 303(g). The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." *Federal Communications Comm'n* v. *Sanders Radio Station*, 309 U.S. 470, 475. The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity." See *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 n. 2.

The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio. Section 303(g) provides that the Commission shall 'generally encourage the larger and more effective use of radio in the public interest"; subsection (i) gives the Commission specific "authority to make special regulations applicable to radio stations engaged in chain broadcasting"; and subsection (r) empowers it to adopt "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act."

These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the "larger and more effective use of radio in the public interest." We cannot find in the Act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. The stations might interfere with each other so that neither could be clearly heard. One station might dominate the other with the power of its signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. The language of the Act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses.

In essence, the Chain Broadcasting Regulations represent a particularization of the Commission's conception of the "public interest" sought to be safeguarded by Congress in enacting the Communications Act of 1934. The basic consideration of policy underlying the Regulations is succinctly stated in its Report: "With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest. . . . The net effect [of the practices disclosed by the investigation] has been that broadcasting service has been maintained at a level below that possible under a system of free competition. Having so found, we would be remiss in our statutory duty of encouraging 'the larger and more effective use of radio in the public interest' if we were to grant licenses to persons who persist in these practices." (Report, pp. 81, 82.)

We would be asserting our personal views regarding the effective utilization of radio were we to deny that the Commission was entitled to find that the large public aims of the Communications Act of 1934 comprehend the considerations which moved the Commission in promulgating the Chain Broadcasting Regulations. True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic. "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137. In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers. It was given a comprehensive mandate to "encourage the larger and more effective use of radio in the public interest," if need be, by making "special regulations applicable to radio stations engaged in chain broadcasting." § 303(g)(i).

Generalities unrelated to the living problems of radio communications of course cannot justify exercises of power by the Commission. Equally so, generalities empty of all concrete considerations of the actual bearing of regulations promulgated by the Commission to the subject-matter entrusted to it, cannot strike down exercises of power by the Commission. While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject-matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.

For the cramping construction of the Act pressed upon us, support cannot be found in its legislative history. The principal argument is that § 303(i), empowering the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting," intended to restrict the scope of the Commission's powers to the technical and engineering aspects of chain broadcasting. This provision comes from § 4(h) of the Radio Act of 1927. It was introduced into the legislation as a Senate committee amendment to the House bill (H.R. 9971, 69th Cong., 1st Sess.) This amendment originally read as follows:

"(C) The commission, from time to time, as public convenience, interest, or necessity requires, shall—

* * * * * * *

(j) When stations are connected by wire for chain broadcasting, determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting."

The report of the Senate Committee on Interstate Commerce, which submitted this amendment, stated that under the bill the Commission was given "complete authority . . . to control chain broadcasting." Sen. Rep. No. 772, 69th Cong., 1st Sess., p. 3. The bill as thus amended was passed by the Senate, and then sent to conference. The bill that emerged from the conference committee, and which became the Radio Act of 1927, phrased the amendment in the general terms now contained in § 303(i) of the 1934 Act: the Commission was authorized "to make special regulations applicable to radio stations engaged in chain broadcasting." The conference reports do not give any explanation of this particular change in phrasing, but they do state that the jurisdiction conferred upon the Commission by the conference bill was substantially identical with that conferred by the bill passed by the Senate. See Sen. Doc. No. 200, 69th Cong., 2d Sess., p. 17; H. Rep. 1886, 69th Cong., 2d Sess., p. 17. We agree with the District Court that in view of this legislation history, § 303(i) cannot be construed as no broader than the first clause of the Senate amendment, which limited the Commission's authority to the technical and engineering phases of chain broadcasting. There is no basis for assuming that the conference intended to preserve the first clause, which was of limited scope, and abandon the second clause, which was of general scope, by agreeing upon a provision which was broader and more comprehensive than those it supplanted.[5]

A totally different source of attack upon the Regulations is found in § 311 of the Act, which authorizes the Commission to withhold licenses from persons convicted of having violated the anti-trust laws. Two contentions are made—first, that this provision puts considerations relating to competition outside the Commission's concern before an applicant has been convicted of monopoly or other restraints of trade, and second, that, in any event, the Commission misconceived the scope of its powers under § 311 in issuing the Regulations. Both of these contentions are unfounded. Section 311 derives from § 13 of the Radio Act of 1927, which expressly commanded, rather than merely authorized, the Commission to refuse a license to any person judicially found guilty of having violated the anti-trust laws. The change in the 1934 Act was made, in the words of Senator Dill, the manager of the legislation in the Senate, because "it seemed fair to the committee to do that." 78 Cong. Rec. 8825. The Commission was thus permitted to exercise its judgment as to whether violation of the anti-trust laws disqualified an applicant from operating a station in the "public interest." We agree with the District Court that "The necessary implication from this [amendment in 1934] was that the Commission might infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would continue and that if it did it would make him an unfit licensee." 47 F. Supp. 940, 944.

That the Commission may refuse to grant a license to persons adjudged guilty in a court of law of conduct in violation of the anti-trust laws certainly does not render irrelevant consideration by the Commission of the effect of such conduct upon the "public interest, convenience, or necessity." A licensee charged with practices in contravention of this standard cannot continue to hold his license merely because his conduct is also in violation of the anti-trust laws and he has not yet been proceeded against and convicted. By clarifying in § 311 the scope of the Commission's authority in dealing with persons convicted of violating the anti-trust laws, Congress can hardly be deemed to have limited the concept of "public interest" so as to exclude all considerations relating to monopoly and unreasonable restraints upon commerce. Nothing in the provisions or history of the Act lends support to the inference that the Commission was denied the power to refuse a license to a station not operating in the "public interest," merely because its misconduct happened to be an unconvicted violation of the anti-trust laws.

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[5] In the course of the Senate debates on the conference report upon the bill that became the Radio Act of 1927, Senator Dill, who was in charge of the bill, said, "While the commission would have the power under the general terms of the bill, the bill specifically sets out as one of the special powers of the commission the right to make specific regulations for governing chain broadcasting. As to creating a monopoly of radio in this country, let me say that this bill absolutely protects the public, so far as it can protect them, by giving the commission full power to refuse a license to anyone who it believes will not serve the public interest, convenience, or necessity. It specifically provides that any corporation guilty of monopoly shall not only not receive a license but that its license may be revoked; and if after a corporation has received its license for a period of three years it is then discovered and found to be guilty of monopoly, its license will be revoked. . . . In addition to that, the bill contains a provision that no license may be transferred from one owner to another without the written consent of the commission, and the commission, of course, having the power to protect against a monopoly, must give such protection. I wish to state further that the only way by which monopolies in the radio business can secure control of radio here, even for a limited period of time, will be by the commission becoming servile to them. Power must be lodged somewhere, and I myself am unwilling to assume in advance that the commission proposed to be created will be servile to the desires and demands of great corporations of this country." 68 Cong. Rec. 2881.

Alternatively, it is urged that the Regulations constitute an *ultra vires* attempt by the Commission to enforce the anti-trus laws, and that the enforcement of the anti-trust laws is the province not of the Commission but of the Attorney General and the courts. This contention misconceives the basis of the Commission's action. The Commission's Report indicates plainly enough that the Commission was not attempting to administer the ant-trust laws:

"The prohibitions of the Sherman Act apply to broadcasting. This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve. . . . While many of the network practices raise serious questions under the antitrust laws, our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. It is not our function to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities. This is the standard of public interest, convenience or necessity which we must apply to all applications for licenses and renewals. . . . We do not predicate our jurisdiction to issue the regulations on the ground that the network practices violate the antitrust laws. We are issuing these regulations because we have found that the network practices prevent the maximum utilization of radio facilities in the public interest." (Report, pp. 46, 83, 83 n. 3.)

We conclude, therefore, that the Communications Act of 1934 authorized the Commission to promulgate regulations designed to correct the abuses disclosed by its investigation of chain broadcasting. There remains for consideration the claim that the Commission's exercise of such authority was unlawful.

The Regulations are assailed as "arbitrary and capricious." If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. What was said in *Board of Trade* v. *United States*, 314 U. S. 534, 548, is relevant here: "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission." Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the "public interest" will be furthered or retarded by the Chair Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise.

It would be sheer dogmatism to say that the Commission made out no case for its allowable discretion in formulating these Regulations. Its long investigation disclosed the existences of practices which it regarded as contrary to the "public interest." The Commission knew that the wisdom of any actoon it took would have to be tested by experience: "We are under no illusion that the regulations we are adopting will solve all questions of public interest with respect to the network system of program distribution. * * * The problems in the network field are interdependent, and the steps now taken may perhaps operate as a partial solution of problems not directly dealt with at this time. Such problems may be examined again at some future time after the regulations here adopted have been given a fair trial." (Report, p. 88.) The problems with which the Commission attempted to deal could not be solved at once and for all time by rigid rules-of-thumb. The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the "public interest, convenience, or necessity." If time and changing circumstances reveal that the "public interest" is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.

Since there is no basis for any claim that the Commission failed to observe procedural safeguards required by law, we reach the contention that the Regulations should be denied enforcement on constitutional grounds. Here, as in *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 24–25, the claim is made that the standard of "public interest" governing the exercise of the powers delegated to the Commission by Congress is so vague and indefinite that, if it be construed as comprehensively as the words alone permit, the delegation of legislative authority is unconstitutional. But, as we held in that case, "It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary." *Ibid.* See *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U.S. 266, 285; *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137–38. Compare *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 428; *Intermountain Rate Cases*, 234 U.S. 476, 486–89; *United States* v. *Lowden*, 308 U.S. 225.

We come, finally, to an appeal to the First Amendment. The Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different. The question here is simply whether the Comission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of "public interest"), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

A procedural point calls for just a word. The District Court, by granting the Government's motion for summary judgment, disposed of the case upon the pleadings and upon the record made before the Commission. The court below correctly held that its inquiry was limited to review of the evidence before the Commission. Trial *de novo* of the matters heard by the Commission and dealt with in its Report would have been improper. See *Tagg Bros.* v. *United States*, 280 U.S. 420; *Acker* v. *United States*, 298 U.S. 426.

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these cases.

MURPHY, J., DISSENTING

MR. JUSTICE MURPHY, dissenting:

I do not question the objectives of the proposed regulations, and it is not my desire by narrow statutory interpretation to weaken the authority of government agencies to deal efficiently with matters committed to their jurisdiction by the Congress. Statutes of this kind should be construed so that the agency concerned may be able to cope effectively with problems which the Congress intended to correct, or may otherwise perform the functions given to it. But we exceed our competence when we gratuitously bestow upon an agency power which the Congress has not granted. Since that is what the Court in substance does today, I dissent.

In the present case we are dealing with a subject of extreme importance in the life of the nation. Although radio broadcasting, like the press, is generally conducted on a commercial basis, it is not an ordinary business activity, like the selling of securities or the marketing of electrical power. In the dissemination of information and opinion, radio has assumed a position of commanding importance, rivalling the press and the pulpit. Owing to its physical characteristics radio, unlike the other methods of conveying information, must be regulated and rationed by the government. Otherwise there would be chaos, and radio's usefulness would be largely destroyed. But because of its vast potentialities as a medium of communication, discussion and propaganda, the character and extent of control that should be exercised over it by the government is a matter of deep and vital concern. Events in Europe show that radio may readily be a weapon of authority and misrepresentation, instead of a means of entertainment and enlightenment. It may even be an instrument of oppression. In pointing out these possibilities I do not mean to intimate in the slightest that they are imminent or probable in this country, but they do suggest that the construction of the instant statute should be approached with more than ordinary restraint and caution, to avoid an interpretation that is not clearly justified by the conditions that brought about its enactment, or that would give the Commission greater powers than the Congress intended to confer.

The Communications Act of 1934 does not in terms give the Commission power to regulate the contractual relations between the stations and the networks. *Columbia System* v. *United States*, 316 U.S. 407, 416. It is only as an incident of the power to grant or withhold licenses to individual stations under §§ 307, 308, 309 and 310 that this authority is claimed,[6] except as it may have been provided by subdivisions (g), (i) and (r) of § 303, and by §§ 311 and 313. But nowhere in these sections, taken singly or collectively, is there to be found by reasonable construction or necessary inference, authority to regulate the broadcasting industry as such, or to control the complex operations of the national networks.

In providing for regulation of the radio, the Congress was under the necessity of vesting a considerable amount of discretionary authority in the Commission. The task of choosing between various claimants for the privilege of using the air waves is essentially an administrative one. Nevertheless, in specifying with some degree of particularity the kind of information to be included in an application for a license, the Congress has indicated what general conditions and considerations are to govern the granting and withholding of station licenses. Thus an applicant is required by § 308 (b) to submit information bearing upon his citizenship, character, and technical, financial and other qualifications to operate the proposed station, as well as data relating to the ownership and location of the proposed station, the power and frequencies desired, operating periods, intended use, and such other information as the Commission may require. Licenses, frequencies, hours of operation and power are to be fairly distributed among the several States and communities to provide efficient service to each. § 307 (b). Explicit provision is made for dealing with applicants and licensees who are found guilty, or who are under the control of persons found guilty of violating the federal anti-trust laws. §§ 311 and 313. Subject to the limitations defined in the Act, the Commission is required to grant a station license to any applicant "if public convenience, interest, or necessity will be served thereby." § 307(a). Nothing is said, in any of these sections, about network contracts, affiliations, or business arrangements.

The power to control network contracts and affiliations by means of the Commission's licensing powers cannot be derived from implication out of the standard of "public convenience, interest or necessity." We have held that: "the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel." *Federal Communications Comm'n* v. *Sanders Radio Station*, 309 U.S. 470, 475. The criterion of "public convenience, interest or necessity" is not an indefinite standard, but one to be "interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services, . . ." *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U.S. 266, 285. Nothing in the context of which the standard is a part refers to network contracts. It is evident from the record that the Commission is making its determination of whether the public interest would be served by renewal of an existing license or licenses, not upon an examination of written applications presented to it, as required by §§ 308 and 309, but upon an investigation of the broadcasting industry as a whole, and general findings made in pursuance thereof which relate to the business methods of the network companies rather than the characteristics of the individual stations and the peculiar needs of the areas served by them. If it had been the intention of the Congress to invest the Commission with the responsibility, through its licensing authority, of exercising far-reaching control—as exemplified by the proposed regulations—over the business operations of chain broadcasting and radio networks as they were then or are now organized and established, it is not likely that the Congress would have left it to mere inference or implication from the test of "public convenience, interest or necessity," or that Congress would have neglected to include it among the considerations expressly made relevant to license applications by § 308 (b). The subject is one of such scope and importance as to warrant explicit mention. To construe the licensing sections (§§ 307, 308, 309, 310) as granting authority to require fundamental and revolutionary changes in the business methods of the broadcasting networks—methods which have been in existence for several years and which have not been adjudged unlawful—would inflate and distort their true meaning and extend them beyond the limited purposes which they were intended to serve.

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[6] The regulations as first proposed were not connected with denial of applications for initial or renewal station licenses but provided instead that: "No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization," which contained any of the disapproved provisions. After a short time, however, the regulations were cast in their present form, making station licensing depend upon conformity with the regulations.

It is quite possible, of course, that maximum utilization of the radio as an instrument of culture, entertainment, and the diffusion of ideas is inhibited by existing network arrangements. Some of the conditions imposed by the broadcasting chains are possibly not conducive to a freer use of radio facilities, however essential they may be to the maintenance of sustaining programs and the operation of the chain broadcasting business as it is now conducted. But I am unable to agree that it is within the present authority of the Commission to prescribe the remedy for such conditions. It is evident that a correction of these conditions in the manner proposed by the regulations will involve drastic changes in the business of radio broadcasting which the Congress has not clearly and definitely empowered the Commission to undertake.

If this were a case in which a station license had been withheld from an individual applicant or licensee because of special relations or commitments that would seriously compromise or limit his ability to provide adequate service to the listening public, I should be less inclined to make any objection. As an incident of its authority to determine the eligibility of an individual applicant in an isolated case, the Commission might possibly consider such factors. In the present case, however, the Commission has reversed the order of things. Its real objective is to regulate the business practices of the major networks, thus bringing within the range of its regulatory power the chain broadcasting industry as a whole. By means of these regulations and the enforcement program, the Commission would not only extend its authority over business activities which represent interests and investments of a very substantial character, which have not been put under its jurisdiction by the Act, but would greatly enlarge its control over an institution that has now become a rival of the press and pulpit as a purveyor of news and entertainment and a medium of public discussion. To assume a function and responsibility of such wide reach and importance in the life of the nation, as a mere incident of its duty to pass on individual applications for permission to operate a radio station and use a specific wave length, is an assumption of authority to which I am not willing to lend my assent.

Again I do not question the need for regulation in this field, or the authority of the Congress to enact legislation that would vest in the Commission such power as it requires to deal with the problem, which it has defined and analyzed in its report with admirable lucidity. It is possible that the remedy indicated by the proposed regulations is the appropriate one, whatever its effect may be on the sustaining programs, advertising contracts, and other characteristics of chain broadcasting as it is now conducted in this country. I do not believe, however, that the Commission was justified in claiming the responsibility and authority it has assumed to exercise without a clear mandate from the Congress.

An examination of the history of this legislation convinces me that the Congress did not intend by anything in § 303, or any other provision of the Act, to confer on the Commission the authority it has assumed to exercise by the issuance of these regulations. Section 303 is concerned primarily with technical matters, and the subjects of regulation authorized by most of its subdivisions are exceedingly specific—so specific in fact that it is reasonable to infer that, if Congress had intended to cover the subject of network contracts and affiliations, it would not have left it to dubious implications from general clauses, lifted out of context, in subdivisions (g), (i) and (r). I am unable to agree that in authorizing the Commisison in § 303 (g) to study new uses for radio, provide for experimental use of frequencies, and "generally encourage the larger and more effective use of radio in the public interest," it was the intention or the purpose of the Congress to confer on the Commisison the regulatory powers now being asserted. Manifestly that subdivision dealt with experimental and development work—technical and scientific matters, and the construction of its concluding clause should be accordingly limited to those considerations. Nothing in its legislative history suggests that it had any broader purpose.

It was clearly not the intention of the Congress by the enactment of § 303(i), authorizing the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting," to invest the Commission with the authority now claimed over network contracts. This section is a verbatim re-enactment of § 4(h) of the Radio Act of 1927, and had its origin in a Senate amendment to the bill which became that Act. In its original form it provided that the Commission, from time to time, as public convenience, interest, or necessity required, should:

"When stations are connected by wire for chain broadcasting, [the Commission should] determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting."

It was evidently the purpose of this provision to remedy a situation that was described as follows by Senator Dill (who was in charge of the bill in the Senate) in questioning a witness at the hearings of the Senate Committee on Interstate Commerce:

" * * * During the past few months there has grown up a system of chain broadcasting, extending over the United States a great deal of the time. I say a great deal of the time—many nights a month—and the stations that are connected are of such widely varying meter lengths that the ordinary radio set that reaches out any distance is unable to get anything but that one program, and so, in effect, that one program monopolizes the air. I realize it is somewhat of a technical engineering problem, but it has seemed to many people, at least many who have written to me, that when stations are carrying on chain programs that they might be limited to the use of wave lengths adjoining or near enough to one another that they would not cover the entire dial. I do not know whether legislation ought to restrict that or whether it had better be done by regulations of the department. I want to get your opinion as to the advisability in some way protecting people who want to hear some other program than the one being broadcasted by chain broadcast." (Report of Hearings Before Senate Committee on Interstate Commerce on S. 1 and S. 1754, 69th Cong., 1st Sess. (1926) p. 123.)

In other words, when the same program was simultaneously broadcast by chain stations, the weaker independent stations were drowned out because of the high power of the chain stations. With the receiving sets then commonly in use, listeners were unable to get any program except the chain program. It was essentially an interference problem. In addition to determining power and wave length for chain stations, it would have been the duty of the Commission, under the amendment, to make other regulations necessary for "equitable radio service to the listeners in the communities or areas affected by chain broadcasting." The last clause should not be interpreted out of context and without relation to the problem at which the amendment was aimed. It is reasonably construed as simply authorizing the Commission to remedy other technical problems of interference involved in chain broadcasting in addition to power and wave length by requiring special types of equipment, controlling locations, etc. The statement in the Senate Committee Report that this provision gave the Commission "complete authority * * * to control chain broadcasting" (S. Rep. No. 772, 69th Cong., 1st Sess., p. 3) must be taken as meaning that the provision gave complete authority with respect to the specific problem which the Senate intended to meet, a problem of technical interference.

While the form of the amendment was simplified in the Conference Committee so as to authorize the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting," both Houses were assured in the report of the Conference Committee that "the jurisdiction conferred in this paragraph is substantially the same as the jurisdiction conferred upon the Commission by . . . the Senate amendment." (Sen. Doc. No. 200, 69th Conf., 2d Sess., p. 17; H. Rep. No. 1886, 69th Cong., 2d Sess., p. 17). This is further borne out by a statement of Senator Dill in discussing the conference report on the Senate floor:

"What is happening today is that the National Broadcasting Co., which is a part of the great Radio Trust, to say the least, if not a monopoly, is hooking up stations in every community on their various wave lengths with high powered stations and sending one program out, and they are forcing the little stations off the board so that the people cannot hear anything except the one program.

"There is no power today in the hands of the Department of Commerce to stop that practice. The radio commission will have the power to regulate and prevent it and give the independents a chance." (68 Cong. Rec. 3031.)

Section 303(r) is certainly no basis for inferring that the Commission is empowered to issue the challenged regulations. This subdivision is not an independent grant of power, but only an authorization to: "Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act." There is no provision in the Act for the control of network contractual arrangements by the Commission. and consequently § 303(r) is of no consequence here.

To the extent that existing network practices may have run counter to the anti-trust laws, the Congress has expressly provided the means of dealing with the problem. The enforcement of those laws has been committed to the courts and other law enforcement agencies. In addition to the usual penalties prescribed by statute for their violation, however, the Commission has been expressly authorized by § 311 to refuse a station license to any person "finally adjudged guilty by a Federal court" of attempting unlawfully to monopolize radio communication. Anyone under the control of such a person may also be refused a license. And whenever a court has ordered the revocation of an existing license, as expressly provided in § 313, a new license may not be granted by the Commission to the guilty party or to any person under his control. In my opinion these provisions (§§ 311 and 313) clearly do not and were not intended to confer independent authority on the Commission to supervise network contracts or to enforce competition between radio networks by withholding licenses from stations, and do not justify the Commission in refusing a license to an applicant otherwise qualified, because of business arrangements that may constitute an unlawful restraint of trade, when the applicant has not been finally adjudged guilty of violating the anti-trust laws, and is not controlled by one so adjudged.

The conditions disclosed by the Commission's investigation, if they require correction, should be met, not by the invention of authority where none is available or by diverting existing powers out of their true channels and using them for purposes to which they were not addressed, but by invoking the aid of the Congress or the service of agencies that have been entrusted with the enforcement of the anti-trust laws. In other fields of regulation the Congress has made clear its intentions. It has not left to mere inference and guess-work the existence of authority to order board changes and reforms in the national economy or the structure of business arrangements in the Public Utility Holding Company Act, 49 Stat. 803, the Securities Act of 1933, 48 Stat. 74, the Federal Power Act, 49 Stat. 838, and other measures of similar character. Indeed the Communications Act itself contains cogent internal evidence that Congress did not intend to grant power over network contractual arrangements to the Commission. In § 215 (c) of Title II, dealing with common carriers by wire and radio, Congress provided:

"The Commission shall examine all contracts of common carriers subject to this Act which prevent the other party thereto from dealing with another common carrier subject to this Act, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable."

Congress had no difficulty here in expressing the possible desirability of regulating a type of contract roughly similar to the ones with which we are now concerned, and in reserving to itself the ultimate decision upon the matters of policy involved. Insofar as the Congress deemed it necessary in this legislation to safeguard radio broadcasting against arrangements that are offensive to the antitrust laws or monopolistic in nature, it made specific provision in §§ 311 and 313. If the existing network contracts are deemed objectionable because of monopolistic or other features, and no remedy is presently available under these provisions, the proper course is to seek amendatory legislation from the Congress, not to fabricate authority by ingenious reasoning based upon provisions that have no true relation to the specific problem.

MR. JUSTICE ROBERTS agrees with these views

SUPREME COURT OF THE UNITED STATES

(No. 66.—October Term, 1970)

GEORGE A. ROSENBLOOM, PETITIONER *v.* METROMEDIA, INC.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

[June 7, 1971]

MR. JUSTICE BRENNAN announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join.

In a series of cases beginning with *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), the Court has considered the limitations upon state libel laws imposed by the constitutional guarantees of freedom of speech and of the press. *New York Times* held that in a civil libel action by a public official against a newspaper those guarantees required clear and convincing proof that a defamatory falsehood alleged as libel was uttered with "knowledge that it was false or with reckless disregard of whether it was false or not." *Id.,* at 280. The same requirement was later held to apply to "public figures" who sued in libel on the basis of alleged defamatory falsehoods. The several cases considered since *New York Times* involved actions of "public officials" or "public figures," usually, but not always, against newspapers or magazines.[1] Common to all the cases was a defamatory falsehood in the report of an event of "public or general interest."[2] The instant case presents the question whether the *New York Times'* knowing or reckless falsity standard applies in a state civil libel action brought not by a "public official" or a "public figure" but by a private individual for a defamatory falsehood uttered in a news broadcast by a radio station about the individual's involvement in an event of public or general interest.[3] The District Court for the Eastern District of Pennsylvania held that the *New York Times* standard did not apply and that Pennsylvania law determined respondent's liability in this diversity case, 289 F. Supp. 737 (1968). The Court of Appeals for the Third Circuit held that the *New York Times* standard did apply and reversed the judgment for damages awarded to petitioner by the jury. 415 F. 2d 892 (1969). We granted certiorari, 397 U.S. 904 (1970). We agree with the Court of Appeals and affirm that court's judgment.

I

In 1963, petitioner was a distributor of nudist magazines in the Philadelphia metropolitan area. During the fall of that year, in response to citizen complaints, the Special Investigations Squad of the Philadelphia Police Department initiated a series of enforcement actions under the city's obscenity laws. The police, under the command of Captain Ferguson, purchased various magazines from more than 20 newsstands throughout the city. Based upon Captain Ferguson's determination that the magazines were obscene,[4] police on October 1, 1963, arrested most of the newsstand operators[5] on charges of selling obscene material. While the police were making an arrest at one newsstand, petitioner arrived to deliver some of his nudist magazines and was immediately arrested along with the newsboy.[6] Three days later, on October 4, the police obtained a warrant to search petitioner's home and the rented barn he used as a warehouse, and seized the inventory of magazines and books found at these locations. Upon learning of the seizures, petitioner, who had been released on bail after his first arrest, surrendered to the police and was arrested for a second time.

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[1] See, *e.g., Associated Press* v. *Walker,* 388 U.S. 130 (1967) (retired Army general against a wire service); *Curtis Pub. Co.* v. *Butts,* 388 U.S. 130 (1967) (former football coach against publisher of magazine); *Beckley Newspaper Corp.* v. *Hanks,* 389 U.S. 81 (1967) (court clerk against newspaper); *Greenbelt Pub. Assn.* v. *Bresler,* 398 U.S. 6 (1970) (state representative and real estate developer against publisher of newspaper); *Ocala Star-Banner Company* v. *Damron,* —— U.S. —— (1971) (defeated candidate for tax assessor against publisher of newspaper); *Monitor Patriot Co.* v. *Roy,* —— U.S. —— (1971) (candidate for United States Senate against publisher of newspaper); *Time, Inc.* v. *Pape,* —— U.S. —— (1971) (police official against publisher of magazine). However, *Rosenblatt* v. *Baer,* 383 U.S. 75 (1966), involved an action against a newspaper columnist by a former county recreation area supervisor; *St. Amant* v. *Thompson,* 390 U.S. 727 (1968), involved an action of a deputy sheriff against a defeated candidate for the United States Senate; and *Linn* v. *Plant Guard Workers,* 383 U.S. 53 (1966), involved an action by an official of an employer against a labor union.

Garrison v. *Louisiana,* 379 U.S. 64 (1964), held that the *New York Times* standard measured also the constitutional restriction upon state power to impose criminal sanctions for criticism of the official conduct of public officials. The *Times* standard of proof has also been required to support the dismissal of a public school teacher based on false statements made by the teacher in discussing issues of public importance. *Pickering* v. *Board of Education,* 391 U.S. 563 (1968). The same test was applied to suits for invasion of privacy based on false statements where, again, a matter of public interest was involved. *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967). The opinion in that case expressly reserved the question presented here whether the test applied in a libel action brought by a private individual. *Id.,* at 391.

[2] This term is from Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 214 (1890). Our discussion of matters of "public or general interest" appears in Part IV, *infra,* of this opinion.

[3] Petitioner does not question that the First Amendment guarantees of freedom of speech and freedom of the press apply to respondent's newscasts.

Following the second arrest, Captain Ferguson telephoned respondent's radio station *WIP* and another local radio station, a wire service, and a local newspaper to inform them of the raid on petitioner's home and of his arrest. *WIP* broadcast news reports every half hour to the Philadelphia metropolitan area. These news programs ran either five or ten minutes and generally contained from six to twenty different items that averaged about thirty seconds each. *WIP*'s 6 p. m. broadcast on October 4, 1963, included the following item:

> "City Cracks Down on Smut Merchants
>
> "The Special Investigations Squad raided the home of George Rosenbloom in the 1800 block of Vesta Street this afternoon. Police confiscated 1,000 allegedly obscene books at Rosenbloom's home and arrested him on charges of possession of obscene literature. The Special Investigations Squad also raided a barn in the 20 hundred block of Welsh Road near Bustleton Avenue and confiscated 3,000 obscene books. Capt. Ferguson says he believes they have hit the supply of a main distributor of obscene material in Philadelphia."

This report was re-broadcast in substantially the same form at 6:30 p.m., but at 8 p.m. when the item was broadcast for the third time, *WIP* corrected the third sentence to read "reportedly obscene." News of petitioner's arrest was broadcast five more times in the following twelve hours, but each report described the seized books as "allegedly" or "reportedly" obscene. From October 5 to October 21, *WIP* broadcast no further reports relating to petitioner.

On October 16 petitioner brought an action in Federal District Court against various city and police officials and against several local news media.[7] The suit alleged that the magazines petitioner distributed were not obscene and sought injunctive relief prohibiting further police interference with his business as well as further publicity of the earlier arrests. The second series of allegedly defamatory broadcasts related to *WIP*'s news reports of the law suit. There were ten broadcasts on October 21, two on October 25, and one on November 1. None mentioned petitioner by name. The first at 6:30 a.m. on October 21 was pretty much like those that followed:

> "Federal District Judge Lord, will hear arguments today from two publishers and a distributor all seeking an injunction against Philadelphia Police Commissioner Howard Leary . . . District Attorney James C. Crumlish . . . a local television station and a newspaper . . . ordering them to lay off the smut literature racket.
>
> "The girlie-book peddlers say the police crackdown and continued reference to their borderline literature as smut or filth is hurting their business. Judge Lord refused to issue a temporary injunction when he was first approached. Today he'll decide the issue. It will set a precedent . . . and if the injunction is not granted . . . it could signal an even more intense effort to rid the city of pornography."

On October 27, petitioner went to *WIP*'s studios after hearing from a friend that the station had broadcast news about his lawsuit. Using a lobby telephone to talk with a part-time newscaster, petitioner inquired what stories *WIP* had broadcast about him. The newscaster asked him to be more specific about dates and times. Petitioner then asked for the noon news broadcast on October 21.

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[4] At trial, Captain Ferguson testified that his definition of obscenity was "anytime the private parts is showing of the female or the private parts is shown of males."

[5] Several more newsstand operators were arrested between October 1 and October 4.

[6] The record neither confirms nor refutes petitioner's contention that his arrest was fortuitous. Nor does the record reflect whether or not petitioner's magazines were the subject either of the original citizens' complaints or of the initial police purchases.

[7] The complaint named as defendants the publishers of two newspapers, a television station, the city of Philadelphia, and the district attorney, but not respondent *WIP*. The plaintiffs were petitioner, the partnership of himself and his wife which carried on the business, and the publisher of the nudist magazines which he distributed.

1963, which the newcaster read to him over the phone; it was similar to the above 6:30 a.m. broadcast. According to petitioner, the ensuing interchange was brief. Petitioner told the newscaster that his magazines were "found to be completely legal and legitimate by the United States Supreme Court." When the newscatser replied the district attorney had said the magazines were obscene, petitioner countered that he had a public statement of the district attorney declaring the magazines legal. At that point, petitioner testified, "the telephone conversation was terminated—he just hung up." Petitioner apparently made no request for a retraction or correction, and none was forthcoming. *WIP*'s final report on petitioner's lawsuit—the only one after petitioner's unsatisfactory conversation at the station—occurred on November 1 after the station had checked the story with the judge involved.[8]

II

In May 1964 a jury acquitted petitioner in state court of the criminal obscenity charges under instructions of the trial judge that, as a matter of law, the nudist magazines distributed by petitioner were not obscene. Following his acquittal, petitioner filed this diversity action in District Court seeking damages under Pensylvania's libel law. Petitioner alleged that *WIP*'s unqualified characterization of the books seized as "obscene" in the 6 and 6:30 p.m. broadcasts of October 4, describing his arrest, constituted libel *per se* and was proved false by petitioner's subsequent acquittal. In addition, he alleged that the broadcasts in the second series describing his court suit for injunctive relief were also false and defamatory in that *WIP* characterized petitioner and his business associates as "smut distributors" and "girlie book peddlers" and, further, falsely characterized the suit as an attempt to force the defendants "to lay off the smut literature racket."

At the trial *WIP*'s defenses were truth and privilege. *WIP*'s news director testified that his eight-man staff of reporters prepared their own newscasts and broadcast their material themselves, and that material for the news programs usually came either from the wire services or from telephone tips. None of the writers or broadcasters involved in preparing the broadcasts in this case testified. The news director's recollection was that the primary source of information for the first series of broadcasts about petitioner's arrest was Captain Ferguson, but that, to the director's knowledge, the station did not have any further verification. Captain Ferguson testified that he had informed *WIP* and other media of the police action and that *WIP* had accurately broadcast what he told the station. The evidence regarding *WIP*'s investigation of petitioner's law suit in the second series of broadcasts was even more sparse. The news director testified that he was "sure we would check with the District Attorney's office also and with the police department," but "it would be difficult to state what additional corroboration we had." In general, he testified that *WIP*'s half-hour deadlines required it to rely on wire-service copy and oral reports from previously reliable sources subject to the general policy that "we will contact as many sources as we possibly can on any kind of story."

III

Pennsylvania's libel law tracks almost precisely the Restatement (First) of Torts provisions on the subject. Pennsylvania holds actionable any unprivileged "malicious"[9] publication of matter which tends to harm a person's reputation and expose him to public hatred, contempt or ridicule. *Schnabel* v. *Meredith*, 378 Pa. 609, 107 A. 2d 860 (1954); Restatement of Torts §§ 558, 559. Pennsylvania law recognizes truth as a complete defense to a libel action. *Schonek* v. *WJAC, Inc.*, 436 Pa. 78, 84, 258 A. 2d 504, 507 (1969); Restatement of Torts § 582. It recognizes an absolute immunity for defamatory statements made by high state officials, even if published with an improper motive, actual malice, or knowing falsity. *Montgomery* v. *Philadelphia*, 392 Pa. 178, 140 A. 2d 100 (1958); Restatement of Torts § 591; and it recognizes a conditional privilege for news media to report judicial, administrative, or legislative proceedings if the account is fair and accurate, and not published solely for the purpose of causing harm to the person defamed, even though the official information is false or inaccurate. *Sciandra* v. *Lynett*, 409 Pa. 595, 187 A. 2d 586, 588–589 (1963); Restatement of Torts § 611. The conditional privilege of the news media may be defeated, however, by " 'want of reasonable care and diligence to ascertain the truth, before giving currency to an untrue communication.' The failure to employ such 'reasonable care and diligence' can destroy a privilege which otherwise would protect the utterer of the communication." *Purcell* v. *Westinghouse Broadcasting Co.*, 411 Pa. 167, 179, 191 A. 2d 662, 668 (1963). Pennsylvania has also enacted verbatim the Restatement's provisions on burden of proof, which place the burden of proof for the affirmative defenses of truth and privilege upon the defendant.[10]

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[8] The text of the final broadcast read as follows:
"U.S. District Judge John Lord told WIP news just before airtime that it may be another week before he will be able to render a decision as to whether he has jurisdiction in the case of two publishers and a distributor who wish to restrain the D.A.'s office, the police chief, a TV station and the Bulletin for either making alleged raids of their publications, considered smut and immoral literature by the defendants named, or publicizing that they are in that category. Judge Lord then will be in a position to rule on injunction proceedings asked by the publishers and distributor claiming the loss of business in their operations."

[9] The reference here, of course, is to common law "malice," not to the constitutional standard of *New York Times* v. *Sullivan*, *supra*. See n. 18, *post*.

At the close of the evidence, the District Court denied respondent's motion for a directed verdict and charged the jury, in conformity with Pennsylvania law, that four findings were necessary to return a verdict for petitioner: (1) that one or more of the broadcasts were defamatory; (2) that a reasonable listener would conclude that the defamatory statement referred to petitioner; (3) that *WIP* had forfeited its privilege to report official proceedings fairly and accurately, either because it intended to injure the plaintiff personally or because it exercised the privilege unreasonably and without reasonable care; and (4) that the reporting was false. The jury was instructed that petitioner had the burden of proof on the first three issues, but that respondent had the burden of proving that the reporting was true. The jury was further instructed that "as a matter of law" petitioner was not entitled to actual damages claimed for loss of business "not because it wouldn't ordinarily be but because there has been evidence that this same subject matter was the subject" of broadcasts over other television and radio stations and of newspaper reports, "so if there was any business lost . . . we have no proof . . . that [it] resulted directly from the broadcasts by WIP . . . ."App., at 331a. On the question of punitive damages, the judge gave the following instruction:

> "if you find that this publication arose from a bad motive or malice toward the plaintiff, or if you find that it was published with reckless indifference to the truth, if you find that it was not true, you would be entitled to award punitive damages, and punitive damages are awarded as a deterrent from future conduct of the same sort.
>
> "They really are awarded for outrageous conduct, as I have said, with a bad motive or with reckless disregard of the interests of others, and before you would award punitive damages you must find that these broadcasts were published with a bad motive or with reckless disregard of the rights of others, of reckless indifference to the rights of others . . . ."

The jury returned a verdict for petitioner and awarded $25,000 in general damages, and $725,000 in punitive damages. The District Court reduced the punitive damages award to $250,000 on remittitur, but denied respondent's motion for judgment n. o. v. In reversing, the Court of Appeals emphasized that the broadcasts concerned matters of public interest and that they involved "hot news" prepared under deadline pressure. The Court of Appeals concluded that "the fact that plaintiff was not a public figure cannot be accorded decisive significance if the recognized important guarantees of the First Amendment are to be adequately implemented." 415 F. 2d, at 896. For that reason, the court held that the *New York Times* standard applied and further directed that judgment be entered for respondent, holding that, as a matter of law, petitioner's evidence did not meet that standard.

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[10] 12 Purdon's Pa. Stat. Ann. § 1584a (Supp. 1971) provides:

"(1) In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

"(a) The defamatory character of the communication;

"(b) Its publication by the defendant;

"(c) Its application to the plaintiff;

"(d) The recipient's understanding of its defamatory meaning;

"(e) The recipient's understanding of it as intended to be applied to the plaintiff;

"(f) Special harm resulting to the plaintiff from its publication;

"(g) Abuse of a conditionally privileged occasion.

"(2) In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

"(a) The truth of the defamatory communication;

"(b) The privileged character of the occasion on which it was published;

"(c) The character of the subject matter of defamatory comment as of public concern." See Restatement of Torts § 613.

IV

Petitioner concedes that the police campaign to enforce the obscenity laws was an issue of public interest, and, therefore, that the constitutional guarantees for freedom of speech and press imposed limits upon Pennsylvania's power to apply its libel laws to compel respondent to compensate him in damages for the alleged defamatory falsehoods broadcast about his involvement. As noted, the narrow question he raises is whether, because he is not a "public official" or a "public figure" but a private individual, those limits required that he prove that the falsehoods resulted from a failure of respondent to exercise reasonable care, or required that he prove that the falsehoods were broadcast with knowledge of their falsity or with reckless disregard of whether they were false or not. That question must be answered against the background of the functions of the constitutional guarantees for freedom of expression. *Rosenblatt* v. *Baer*, 383 U.S. 75, at 84–85, n. 10 (1966).

Self-governance in the United States presupposes far more than knowledge and debate about the strictly official activities of various levels of government. The commitment of the country to the institution of private property, protected by the Due Process and Just Compensation Clauses in the Constitution, places in private hands vast areas of economic and social power that vitally affect the nature and quality of life in the Nation. Our efforts to live and work together in a free society not completely dominated by governmental regulation necessarily encompass far more than politics in a narrow sense. "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs." *Time, Inc.* v. *Hill*, 385 U.S., at 388. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with exigencies of their period." *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1941).

Although the limitations upon civil libel actions, first held in *New York Times* to be required by the First Amendment, were applied in that case in the context of defamatory falsehoods about the official conduct of a public official, later decisions have disclosed the artificiality, in terms of the public's interest, of a simple distinction between "public" and "private" individuals or institutions: "Increasingly in this country, the distinctions between governmental and private sectors are blurred. . . . In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions. . . .

". . . Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'" *Curtis Publishing Co.* v. *Butts*, 388 U.S., at 163–164 (concurring opinion of Warren, C. J.).

Moreover, the constitutional protection was not intended to be limited to matters bearing broadly on issues of responsible government. "[T]he Founders . . . felt that a free press would advance 'truth, science, morality, and arts in general' as well as responsible government." *Curtis Publishing Co.* v. *Butts*, 388 U.S., at 147 (opinion of HARLAN, J.). Comments in other cases reiterate this judgment that the First Amendment extends to myriad matters of public interest. In *Time, Inc.* v. *Hill*, *supra*, we had "no doubt that the . . . opening of a new play linked to an actual incident, is a matter of public interest." 385 U.S., at 388, which was entitled to constitutional protection. *Butts* held that an alleged "fix" of a college football game was a public issue. *Associated Press* v. *Walker*, a companion case to *Butts*, established that the public had a similar interest in the events and personalities involved in federal efforts to enforce a court decree ordering the enrollment of a Negro student in the University of Mississippi. Thus, these cases underscore the vitality, as well as the scope, of the "profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S., at 270–271 (emphasis added).

If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.[11] The present case illustrates the point. The community has a vital interest in the proper enforcement of its criminal laws, particularly in an area such as obscenity where a number of highly important values are potentially in conflict: the public has an interest both in seeing that the criminal law is adequately enforced and in assuring that the law is not used unconstitutionally to suppress free expression. Whether the person involved is a famous large scale magazine distributor or a "private" businessman running a corner newsstand has no relevance in ascertaining whether the public has an interest in the issue. We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.[12]

Our Brother WHITE agrees that the protection afforded by the First Amendment depends upon whether the issue involved in the publication is an issue of public or general concern. He would, however, confine our holding to the situation raised by the facts in this case, that is, limit it to issues involving "official actions of public servants." In our view that might be misleading. It is clear that there has emerged from our cases decided since *New York Times* the concept that the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a "public official," "public figure," or "private individual," as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest. See T. Emerson, "The System of Freedom of Expression" 531–532, 540 (1970). In that circumstance we think the time has come forthrightly to announce that the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases. As our Brother WHITE observes, that is not a problem in this case, since police arrest of a person for distributing allegedly obscene magazines clearly constitutes an issue of public or general interest.[13]

V

We turn then to the question to be decided. Petitioner's argument that the Constitution should be held to require that the private individual prove only that the publisher failed to exercise "reasonable care" in publishing defamatory falsehoods proceeds along two lines. First he argues that the private individual, unlike the public figure, does not have access to the media to counter the defamatory material and that the private individual, unlike the public figure, has not assumed the risk of defamation by thrusting himself into the public arena. Second, petitioner focuses on the important values served by the law of defamation in preventing and redressing attacks upon reputation.

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[11] For example, the public's interest in the provocative speech that was made during the tense episode on the campus of the University of Mississippi would certainly have been the same in *Associated Press* v. *Walker*, n. 1, *supra*, if the speaker had been an anonymous student and not a well-known retired Army General. *Walker* also illustrates another anomaly of focusing analysis on the public "figure" or public "official" status of the individual involved. General Walker's fame stemmed from events completely unconnected with the episode in Mississippi. It seems particularly unsatisfactory to determine the extent of First Amendment protection on the basis of factors completely unrelated to the newsworthy events being reported. See also *Greenbelt Pub. Ass'n* v. *Bresler*, 398 U.S. 6 (1970).

[12] We are not to be understood as implying that no area of a person's activities falls outside the area of public or general interest. We expressly leave open the question of what constitutional standard of proof, if any, controls the enforcement of state libel laws for defamatory falsehoods published or broadcast by news media about a person's activities not within the area of public or general interest.

We also intimate no view on the extent of constitutional protection, if any, for purely commercial communications made in the course of business. See *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942). Compare *Breard* v. *Alexander*, 341 U.S. 622 (1951), with *Martin* v. *Struthers*, 319 U.S. 141 (1943). But see *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265–266 (1964); *Linn* v. *Local 114, Plant Guard Workers*, 383 U.S. 53 (1966).

[13] Our Brother WHITE states in his opinion "The First Amendment gives . . . the privilege to report . . . the official actions of public servants in full detail, with no requirement that . . . the privacy of an individual involved in . . . the official action be spared from public view." *Post*, at - --. This seems very broad. It implies a privilege to report, for example such confidential records as those of juvenile court proceedings.

We have recognized the force of petitioner's arguments, *Time, Inc.* v. *Hill*, *supra*, at 391, and we adhere to the caution expressed in that case against "blind application" of the *New York Times* standard. *Id.*, at 390. Analysis of the particular factors involved, however, convinces us that petitioner's arguments cannot be reconciled with the purposes of the First Amendment, with our cases, and with the traditional doctrines of libel law itself. Drawing a distinction between "public" and "private" figures makes no sense in terms of the First Amendment guarantees.[14] The *New York Times* standard was applied to libel of a public official or public figure to give effect to the Amendment's function to encourage ventilation of public issues, not because the public official has any less interest in protecting his reputation than an individual in private life. While the argument that public figures need less protection because they can command media attention to counter criticism may be true for some very prominent people, even then it is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not "hot" news, and rarely receive the prominence of the original story. When the public official or public figure is a minor functionary, or has left the position which put him in the public eye, see *Rosenblatt* v. *Baer*, *supra*, the argument loses all of its force. In the vast majority of libels involving public officials or public figures, the ability to respond through the media will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media's continuing interest in the story. Thus the unproven, and highly improbable, generalization that an as yet undefined class of "public figures" involved in matters of public concern will be better able to respond through the media than private individuals also involved in such matters seems too insubstantial a reed on which to rest a constitutional distinction. Furthermore, in First Amendment terms, the cure seems far worse than the disease. If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern.[15]

Further reflection over the years since *New York Times* was decided persuades us that the view of the "public official" or "public figure" as assuming the risk of defamation by voluntarily thrusting himself into the public eye bears little relationship either to the values protected by the First Amendment or to the nature of our society. We have recognized that "[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community." *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967). Voluntarily or not, we are all "public" men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern. See n. 12, *supra; Griswold* v. *Connecticut*, 381 U.S. 479 (1965).[16] Thus, the idea that certain "public" figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction. In any event, such a distinction could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of "public figures" which are not in the area of public or general concern.

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[14] See *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc.*, 404 F. 2d 706 (CA9 1968), cert. denied, 394 U.S. 921 1969); *Time, Inc.* v. *McLaney*, 406 F. 2d 565 (CA5), cert. denied, 395 U.S. 922 (1969); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F. 2d 858, 861 n. 4, and cases cited therein (CA5 1970). See generally Cohen, A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases? 18 U. C. L. A. L. Rev. 371 (1970); Kalven, The Reasonable Man and the First Amendment, 1967 Sup. Ct. Rev. 267; Note, Public Official and Actual Malice Standards: The Evolution of *New York Times Co.* v. *Sullivan*, 56 Iowa L. Rev. 393, 398–400 (1970); Note, The Scope of First Amendment Protection for Good-Faith Defamatory Error, 75 Yale L. J. 642 (1966).

[15] Some States have adopted retraction statutes or right of reply of statutes. See Donnelly, The Right of Reply: An Alternative to an Action for Libel, 34 Va. L. Rev. 867 (1948); Note Vindication of the Reputation of a Public Official, 80 Harv. L. Rev. 1730 (1967). Cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

One writer, in arguing that the First Amendment itself should be read to guarantee a right of access to the media not limited to a right to respond to defamatory falsehoods, has suggested several ways the law might encourage public discussion. Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641, 1666–1678 (1967). It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly.

[16] This is not the less true because the area of public concern in the cases of candidates for public office and of elected public officials is broad. See *Monitor Patriot Company* v. *Roy*, —— U.S. —— (1971).

General references to the values protected by the law of libel conceal important distinctions. Traditional arguments suggest that libel law protects two separate interests of the individual: first, his desire to preserve a certain privacy around his personality from unwarranted intrusion, and, second a desire to preserve his public good name and reputation. See *Rosenblatt* v. *Baer*, 383 U.S. 75, 92 (1966) (concurring opinion of STEWART, J.). The individual's interest in privacy—in preventing unwarranted intrusion upon the private aspects of his life—is not involved in this case, or even in the class of cases under consideration, since, by hypothesis, the individual is involved in matters of public or general concern.[17] In the present case, however, petitioner's business reputation is involved, and thus the relevant interests protected by state libel law are petitioner's public reputation and good name.

These are important interests. Consonant with the libel laws of most of the States, however, Pennsylvania's libel law subordinates these interests of the individual in a number of circumstances. Thus, high government officials are immune from liability—absolutely privileged—even if they publish defamatory material from an improper motive, with actual malice, and with knowledge of its falsity. *Montgomery* v. *Philadelphia*, 392 Pa. 178, 140 A. 2d 100 (1958). This absolute privilege attaches to judges, attorneys at law in connection with a judicial proceeding, parties and witnesses to judicial proceedings, Congressmen and state legislators, and high national and state executive officials. Restatement of Torts §§ 585–592. Moreover, a conditional privilege allows newspapers to report the false defamatory material originally published under the absolute privileges listed above, if done accurately. *Sciandra* v. *Lynett*, 409 Pa. 595, 187 A. 586 (1963).

Even without the presence of a specific constitutional command, therefore, Pennsylvania libel law recognizes that society's interest in protecting individual reputation often yields to other important social goals. In this case, the vital needs of freedom of the press and freedom of speech persuade us that allowing private citizens to obtain damage judgments on the basis of a jury determination that a publisher probably failed to use reasonable care would not provide adequate "breathing space" for these great freedoms. Reasonable care in an "elusive standard" which "would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait." *Time, Inc.* v. *Hill*, *supra*, 385 U.S., at 389. Fear of guessing wrong must inevitably cause self-censorship and thus create the danger that the legitimate utterance will be deterred. Cf. *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958).

Moreover, we ordinarily decide civil litigation by the preponderance of the evidence. Indeed, the judge instructed the jury to decide the present case on that standard. In the normal civil suit where this standard is employed, "we view it as to no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor." *In re Winship*, 397 U.S. 358, 371 (1970) (concurring opinion of HARLAN, J.). In libel cases, however, we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement—the three-quarter-million-dollar jury verdict in this case could rest on such an error—but the possibility of such error, even beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate. These dangers for freedom of speech and press led us to reject the reasonable-man standard of liability as "simply inconsistent" with our national commitment under the First Amendment when sought to be applied to the conduct of a political campaign. *Monitor Patriot Co.* v. *Roy*, — U.S. —, — (1971). The same considerations lead us to reject that standard here.

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[17] Our Brothers HARLAN and MARSHALL would not limit the application of the First Amendment to private libels involving issues of general or public interest. They would hold that the Amendment covers all private libels at least where state law permits the defense of truth. The Court has not yet had occasion to consider the impact of the First Amendment on the application of state libel laws to libels where no issue of general or public interest is involved. See n. 1, *supra*. However, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), recognized a constitutional right to privacy and at least one commentator has discussed the relation of that right to the First Amendment. T. Emerson, *supra*, 544–562. Since all agree that this case involves an issue of public or general interest, we have no occasion to discuss that relationship. See n. 12, *supra*. We do not, however, share the doubts of our Brothers HARLAN and MARSHALL that courts would be unable to identify interests in privacy and dignity. The task may be difficult but not more so than other tasks in this field.

We are aware that the press has, on occasion, grossly abused the freedom it is given by the Constitution. All must deplore such excesses. In an ideal world, the responsibility of the press would match the freedom and public trust given it. But from the earliest days of our history, this free society, dependent as it is for its survival upon a vigorous free press, has tolerated some abuse. In 1799, James Madison wrote:

> " 'Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this *liberty* is often carried to excess; that it has sometimes degenerated into *licentiousness*, is seen and lamented, *but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America.*' " VI Writings of James Madison, 1790–1802, 336 (Hunt ed. 1906) (quoting a memorial to a French minister) (emphasis in original).

This Court has recognized this imperative: "[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *St. Amant v. Thompson*, 390 U. S. 727, 732 (1968). We thus hold that a libel action, as here, by a private individual against a licensed radio station for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not.[18] Calculated falsehood, of course, falls outside "the fruitful exercise of the right of free speech." *Garrison* v. *Louisiana*, 379 U. S. 64, 75 (1964).

Our Brothers Harlan and Marshall reject the knowing or reckless falsehood standard in favor of a test which would require, at least, that the person defamed establish that the publisher negligently failed to ascertain the truth of his story; they would also limit any recovery to "actual" damages. For the reasons we have stated, the negligence standard gives insufficient breathing space to First Amendment values. Limiting recovery to actual damages has the same defects. In the first instance, that standard, too, leaves the First Amendment insufficient elbow room within which to function. It is not simply the possibility of a judgment for damages which results in self-censorship. The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to "steer far wider of the unlawful zone" thereby keeping protected discussion from public cognizance. *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958). Cf. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Found.*, — U.S. —, [21]–[29] (1971. Too, a small newspaper suffers equally from a substantial damage award, whether the label of the award be "actual" or "punitive."

The real thrust of Brothers Harlan and Marshall's position, however, is their assertion that their proposal will not "constitutionalize" the factfinding process. But this clearly is not the way their test would work in practice. Their approach means only that factfinding will shift from an inquiry into whether the defamatory statements were knowingly or recklessly uttered to the inquiry whether they were negligently uttered, and if so, to an inquiry whether plaintiff suffered "actual" damages. This latter inquiry will involve judges even more deeply in factfinding. Would the mere announcement by a state legislature that embarrassment and pain and suffering are measurable actual losses mean that such damages may be awarded in libel actions? No matter how the problem is approached, this Court would ultimately have to fashion constitutional definitions of "negligence" and of "actual damages."

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[18] At oral argument petitioner argued that "the little man can't show actual malice. How can George Rosenbloom show that there was actual malice in Metromedia? They never heard of him before." Transcript of oral argument 39. But ill will toward the plaintiff, or bad motive, are not elements of the *New York Times* standard. That standard requires only that the plaintiff prove knowing or reckless falsity. That burden, and no more, is the plaintiff's whether "public official," "public figure," or "little man." It may be that jury instructions that are couched only in terms of knowing or reckless falsity, and omit reference to "actual malice," would further a proper application of the *Times* standard to the evidence.

Aside from these particularized considerations, we have repeatedly recognized that courts may not avoid an excursion into factfinding in this area simply because it is time consuming or difficult. We stated in *Pennekamp* v. *Florida*, 328 U.S. 331, 335 (1946), that:

> "The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." (Footnote omitted).

Clearly, then, this Court has an "obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments," and in doing so "this Court cannot avoid making an independent constitutitonal judgment on the facts of the case." *Jacobellis* v. *Ohio*, 378 U.S. 184, 190 (1964). The simple fact is that First Amendment questions of "constitutional fact" compel this Court's *de novo* review. See *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963); *Blackburn* v. *Alabama*, 361 U.S. 199, 205 n. 5 (1960).

VI

Petitioner argues that the instructions or punitive damages either cured or rendered harmless the instructions permitting an award of general damages based on a finding of failure of *WIP* to exercise reasonable care. We have doubts of the merits of the premise,[19] but even assuming that instructions were given satisfying the standard of knowing or reckless falsity, the evidence was insufficient to sustain an award for the petitioner under that standard. In these cases a court's "duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." *New York Times Co.* v. *Sullivan*, 376 U.S., at 285. Our independent analysis of the record leads us to agree with the Court of Appeals that none of the proofs, considered either singly or cumulatively, satisfies the constitutional standard with the convincing clarity necessary to raise a jury question whether the defamatory falsehoods were broadcast with knowledge that they were false or with reckless disregard of whether they were false or not.

The evidence most strongly supporting petitioner is that concerning his visit to *WIP*'s studio where a parttime newscaster hung up the telephone when petitioner disputed the newscaster's statement that the District Attorney had characterized petitioner's magazines as obscene. This contact occurred, however, after all but one of the second series of broadcasts had been aired. The incident has no probative value insofar as it bears on petitioner's case as to the first series of broadcasts. That portion of petitioner's case was based on the omission from the first two broadcasts at 6 and 6:30 p.m. on October 4 of the word "alleged" preceding a characterization of the magazines distributed by petiioner. But that omission was corrected with the 8 p.m. broadcast and was not repeated in the five broadcasts which followed. And we agree with the analysis of the Court of Appeals which led that court, and leads us, to conclude that the episode failed to provide evidence satisfying the *Times* standard insofar as it bore on petitioner's case based upon the broadcasts on and after October 21 concerning petitioner's law suit:

> "Only one broadcast took place after this conversation. It is attacked on the ground that it contains an inaccurate statement concerning plaintiff's injunction action in that it stated that the district attorney considered plaintiff's publications to be smut and immoral literature. The transcript of the testimony shows that Plaintiff's own attorney, when questioning defendant's representative concerning the allegedly defamatory portion of the last broad-

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[19] The instructions authorized an award of punitive damages upon a finding that a falsehood "arose from a bad motive, or . . . that it was published with reckless indifference to the truth . . . punitive damages are awarded as a deterrent from future conduct of the same sort." App., at 333a. The summation of petitioner's counsel conceded that respondent harbored no ill-will toward petitioner, but, following the suggestion of the instructions that punitive damages are "'smart' money," App., at 313a, argued that they should be assessed because "[respondent] must be careful the way they impart news information, and you can punish them if they weren't because you could say that was malicious." *Ibid.* This was an obvious invitation based on the instructions to award punitive damages for carelessness. Thus the jury was allowed, and even encouraged, to find malice and award punitive damages merely on the basis of negligence and bad motive.

> cast, said that he was not questioning its 'accuracy'. Furthermore, his examination of the same witness brought out that defendant's representative confirmed the story with the judge involved before the broadcast was made. We think the episode failed to provide evidence of actual malice with the requisite convincing clarity to create a jury issue under federal standards." 415 F. 2d, at 897.

Petitioner argues finally that *WIP's* failure to communicate with him to learn his side of the case and to obtain a copy of the magazine for examination, sufficed to support a verdict under the *Times* standard. But our "cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson*, 390 U.S., at 731. Respondent here relied on information supplied by police officials. Following petitioner's complaint about the accuracy of the broadcasts, *WIP* checked its last report with the judge who presided in the case. While we may assume that the District Court correctly held to be defamatory respondent's characterizations of petitioner's business as "the smut literature racket," and of those engaged in it as "girlie-book peddlers," there is no evidence in the record to support a conclusion that respondent "in fact entertained serious doubts as to the truth" of its reports.

Affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, concurring in the judgment.

I concur in the judgment of the Court for the reasons stated in my concurring opinion in *New York Times* v. *Sullivan*, 376 U.S. 254, 293 (1964), in my concurring and dissenting opinion in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 170 (1967), and in MR. JUSTICE DOUGLAS' concurring opinion in *Garrison* v. *Louisiana*, 379 U.S. 64, 80 (1964). I agree of course that First Amendment protection extends to "all discussion and communication involving matters of legitimate public concern, without regard to whether the persons involved are famous or anonymous." *Ante*, at ——. However, in my view, the First Amendment does not permit the recovery of libel judgments against the news media even when statements are broadcast with knowledge they are false. As I stated in *Curtis Publishing Co.* v. *Butts*, *supra*, "[I]t is time for this Court to abandon *New York Times Co.* v. *Sullivan* and adopt the rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments." *Id.*, at 172.

MR. JUSTICE WHITE, concurring in the judgment.

I

Under existing law the First Amendment is deemed to permit recoveries for damaging falsehoods published about public officials or public figures only if the defamation is knowingly or recklessly false. But until today the First Amendment has not been thought to prevent citizens who are neither public officials nor public figures from recovering damages for defamation upon proving publication of a false statement injurious to their reputation. There has been no necessity to show deliberate falsehood, reklessness, or even negligence.

The Court has now decided that the First Amendment requires further restrictions on state defamation laws. MR. JUSTICE BRENNAN and two other members of the Court would require proof of knowing or reckless misrepresentation of the facts whenever the publication concerns a subject of legitimate public interest, even though the target is a "private" citizen. Only residual areas would remain in which a lower degree of proof would obtain.

Three other members of the Court also agree that private reputation has enjoyed too much protection and the media too little. But in the interest of protecting reputation, they would not roll back state laws so far. They would interpret the First Amendment as proscribing liability without fault and would equate non-negligent falsehood with faultless conduct. The burden of the damaging lie would be shifted from the media to the private citizen unless the latter could prove negligence or some higher degree of fault. They would also drastically limit the authority of the States to award compensatory and punitive damages for injury to reputation.

MR. JUSTICE BLACK, consistently with the views that he and MR. JUSTICE DOUGLAS have long held, finds no room in the First Amendment for any defamation recovery whatsoever.

Given this spectrum of proposed restrictions on state defamation laws and assuming that MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS will continue in future cases to support the severest of the restrictions, it would seem that at least five members of the Court would support each of the following rules:

For public officers and public figures to recover for damage to their reputations for libelous falsehoods, they must prove either knowing or reckless disregard of the truth. All other plaintiffs must prove at least negligent falsehood, but if the publication about them was in an area of legitimate public interest, then they too must prove deliberate or reckless error. In all actions for libel or slander, actual damages must be proved, and awards of punitive damages will be strictly limited.

II

For myself, I cannot join any of the opinions filed in this case. Each of them decides broader constitutional issues and displaces more state libel law than is necessary for the decision in this case. As I have said, MR. JUSTICE BRENNAN would extend the privilege enunciated in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), to publications upon any "subject of legitimate public interest." See *ante*, at —. He would thereby extend the constitutional protection to false and damaging, but nonmalicious publications about such matters as the health and environmental hazards of widely used manufactured products, the mental and emotional stability of executives of business establishments, and the racial and religious prejudices of many groups and individuals. All of these are, of course, subjects of real concern and arguments for placing them within the scope of *New York Times* are by no means frivolous.

For MR. JUSTICE MARSHALL and MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN'S opinion is both too severe and too limited. They would make more sweeping incursions into state tort law but purportedly with less destructive weapons. They would permit suit by some plaintiffs barred under MR. JUSTICE BRENNAN'S opinion, but would require all plaintiffs to prove at least negligence before any recovery would be allowed.

I prefer at this juncture not to proceed on such a broad front. I am quite sure that *New York Times Co.* v. *Sullivan* was the wiser course, but I am unaware that state libel laws with respect to private citizens have proved a hazard to the existence or operations of the communications industry in this country. The Court seems haunted by fears of self-censorship by the press and of damage judgments that will threaten its financial health. But technology has immeasurably increased the power of the press to do both good and evil. Vast communication combines have been built into profitable ventures. My interest is not in protecting the treasuries of communicators but in implementing the First Amendment by insuring that effective communication which is essential to the continued functioning of our free society. I am not aware that self-censorship has caused the press to tread too gingerly in reporting "news" concerning private citizens and private affairs or that the reputation of private citizens has received inordinate protection from falsehood. I am not convinced that we must fashion a constitutional rule protecting a whole range of damaging falsehoods and so shift the burden from those who publish to those who are injured.

I say this with considerable deference since all my Brethren have contrary views. But I would not nullify a major part of state libel law until we have given the matter the most thorough consideration and can articulate some solid First Amendment grounds based on experience and our present condition. As it is, today's experiment rests almost entirely on theoretical grounds and represents a purely intellectual derivation from what are thought to be important principles of tort law as viewed in the light of the primacy of the written and spoken word.

This case lends itself to more limited adjudication. *New York Times Co.* v. *Sullivan* itself made clear that discussion of the official actions of public servants such as the police is constitutionally privileged. "The right of free public discussion of the stewardship of public officials" is, in the language of that case, "a fundamental principle of the American form of government." 376 U.S., at 275. Discussion of the conduct of public officials cannot, however, be subjected to artificial limitations designed to protect others involved in an episode with officials from unfavorable publicity. Such limitations would deprive the public of full information about the official action which took place. In the present case, for example, the public would learn nothing if publication only of the fact that the police made an arrest were permitted; it is also necessary that the grounds for the arrest and, in many circumstances, the identity of the person arrested be stated. In short, it is rarely informative for a newspaper or broadcaster to state merely that officials acted unless he also states the reasons for their action and the persons whom their action affected.

Nor can *New York Times* be read as permitting publications that invade the privacy or injure the reputations of officials, but forbidding those that invade the privacy or injure the reputations of private citizens against whom official action is directed. *New York Times* gives the broadcasting media and the press the right not only to censure and criticize officials but also to praise them and the concomitant right to censure and criticize their adversaries. To extend constitutional protection to criticism only of officials would be to authorize precisely that sort of thought control which the First Amendment forbids government to exercise.

I would accordingly hold that in defamation actions, absent actual malice as defined in *New York Times Co.* v. *Sullivan*, the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view. Since respondent Metromedia did nothing more in the instant case, I join with the Court in holding its broadcasts privileged. I would not, however, adjudicate cases not now before the Court.

Mr. Justice Harlan, dissenting.

The very facts of this case demonstrate that uncritical acceptance of the Pennsylvania libel law here involved would be inconsistent with those important First and Fourteenth Amendment values we first treated with in an analogous context in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). However, as the plurality opinion implicitly recognizes, only an undiscriminating assessment of those values would lead us to extend the *New York Times* rule in full force to all purely private libels. My Brother Brennan's opinion would resolve the dilemma by distinguishing those private libels that arise out of events found to be of "public or general concern" from those that do not, and subjecting the former to full-scale application of the *New York Times* rule.

For the reasons set forth in Part I of my Brother Marshall's dissent, I cannot agree to such a solution. As he so well demonstrates, the principal failing of the plurality opinion is its inadequate appreciation of the limitations imposed by the legal process in accommodating the tension between state libel laws and the federal constitutional protection given to freedom of speech and press.

Once the evident need to balance the values underlying each is perceived, it might seem, purely as an abstract matter, that the most utilitarian approach would be to scrutinize carefully every jury verdict in every libel case, in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values[20] transcend the legitimate state interest in protecting the particular plaintiff who prevailed. This seems to be what is done in the plurality opinion. But we did not embrace this technique in *New York Times*, *supra*. Instead, as my Brother Marshall observes, we there announced a rule of general application, not ordinarily dependent for its implementation upon a case-by-case examination of trial court verdicts. See also my dissent in *Time, Inc.* v. *Pape*, —— U.S. ——, —— (1971). Nor do I perceive any developments in the seven years since we decided *New York Times*, *supra*, that suggest our original method should now be abandoned. At least where we can discern generally applicable rules that should balance with fair precision the competing interests at stake, such rules should be preferred to the plurality's approach both in order to preserve a measure of order and predictability in the law that must govern the daily conduct of affairs and to avoid subjecting the press to judicial second-guessing of the newsworthiness of each item they print. Consequently, I fully concur in Part I of Mr. Justice Marshall's dissent.

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[20] Of course, for me, this case presents a Fourteenth, not a purely First, Amendment issue, for the question is one of the constitutionality of the applicable Pennsylvania libel laws. However, I have found it convenient, in the course of this opinion, occasionally to speak directly of the First Amendment as a short-hand phrase for identifying those constitutional values of freedom of expression guaranteed to individuals by the Due Process Clause of the Fourteenth Amendment.

Further, I largely agree with the alternative proposals of that dissent. I, too, think that, when dealing with private libel, the States should be free to define for themselves the applicable standard of care so long as they do not impose liability without fault; that a showing of actual damage should be a requisite to recovery for libel; and that it is impermissible, given the substantial constitutional values involved, to fail to confine the amount of jury verdicts in such cases within any ascertainable limits. However, my reasons for so concluding are somewhat different than his, and I therefore reach a different result than he does with respect to the tolerable limits of punitive damages.

I

I think we will agree on certain core propositions. First, as a general matter, the States have a perfectly legitimate interest, exercised in a variety of ways, in redressing and preventing careless conduct, no matter who is responsible for it, that inflicts actual, measurable injury upon individual citizens. Secondly, there is no identifiable value worthy of constitutional protection in the publication of falsehoods. Third, although libel law provides that truth is a complete defense, that principle, standing alone, is insufficient to satisfy the constitutional interest in freedom of speech and press. For we have recognized that it is inevitable that there will be "some error in situation presented in free debate," *Time, Inc.* v. *Hill*, 385 U.S. 374, 406 (1967) (opinion of this writer), a process that needs "breathing space," *NAACP* v. *Button*, 371 U.S. 415, 433 (1963), to flourish, and that "putting to the pre-existing prejudices of a jury the determination of what is 'true' may effectively institute a system of censorship," *Time, Inc.* v. *Hill*, *supra*, at 406.

Moreover, any system that punishes certain speech is likely to induce self-censorship by those who would otherwise exercise their constitutional freedom. Given the constitutionally protected interest in unfettered speech, it requires an identifiable, countervailing state interest, consistent with First Amendment values, to justify a regulatory scheme that produces such results. And, because the presence of such values dictates closer scrutiny of this aspect of state tort law than the Fourteenth Amendment would otherwise command, it may well be that certain rules, impervious to constitutional attack when applied to ordinary human conduct, may have to be altered or abandoned where used to regulate speech. Finally, as determined in *New York Times*, the constitutional interest in tolerance of falsehood as well as the need to adjust competing societal interests, prohibits, at a minimum, the imposition of liability without fault.

The precise standard of care necessary to achieve these goals is, however, a matter of dispute as is the range of penalties a State may prescribe for a breach of that standard. In analyzing these problems it is necessary to begin with a general analytical framework that defines those competing interests that must be reconciled. My Brother MARSHALL's opinion, I think, dwells too lightly upon the nature of the legitimate countervailing interests promoted by the State's libel law and, as a result, overstates the case agains punitive damages. Because we deal with a set of legal rules that treat truth as a complete defense it strikes, I think, somewhat wide of the mark to treat the State's interest as one of protecting reputations from "unjustified invasion." Opinion, at 1. By hypothesis, the respondent here was free to reveal any true facts about petitioner's "obscure private life." [21]

Given the defense of truth, it is my judgment that, in order to assure that it promotes purposes consistent with First Amendment values, the legitimate function of libel law must be understood as that of compensating individuals for actual, measurable harm caused by the conduct of others. This can best be demonstrated by postulating a law that subjects publishers to jury verdicts for falsehoods that have done the plaintiff no harm. In my view, such a rule can only serve a purpose antithetical to those of the First Amendment. It penalizes speech, not to redress or avoid the infliction of harm, but only to deter the press from publishing material regarding private behavior that turns out to be false simply because of its falsity. This the First Amendment will not tolerate. Where the State cannot point to any tangible danger, even knowingly erroneous publication is entitled to constitutional protection because of the interest in avoiding an inquiry into the mere truth or falsity of speech. Moreover, such a scheme would impose a burden on speaking not generally placed upon constitutionally unprotected conduct—the payment of private fines for conduct which, although not conformed to establish limits of care, causes no harm in fact.

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[21] I would expressly reserve, for a case properly presenting it, the issue whether the *New York Times* rule should have any effect on "privacy" litigation. The problem is briefly touched upon in *Time, Inc.* v. *Hill*, 385 U.S. 374, 404–405 (1967) (HARLAN, J., concurring and dissenting).

Conversely, I think that where the purpose and effect of the law is to redress actual and measurable injury to private individuals that was reasonably foreseeable as a result of the publication, there is no necessary conflict with the values of freedom of speech. Just as an automobile negligently driven can cost a person his physical and mental well-being and the fruits of his labor, so can a printing press negligently set. While the First Amendment protects the press from the imposition of special liabilities upon it, "[t]o exempt a publisher, because of the nature of his calling, from an imposition generally exacted from other members of the community, would be to extend a protection not required by the constitutional guarantee." *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 160 (1967) (opinion of this writer). A business "is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to involve the rights and liberties of others." *Associated Press* v. *NLRB*, 301 U.S. 103, 132–133 (1937). That the damage has been inflicted by words rather than other instrumentalities cannot insulate it from liability. States may legitimately be required to use finer regulatory tools where dealing with "speech," but they are not wholly disabled from exacting compensation for its measurable adverse consequences. If this is not so, it is difficult to understand why governments may, for example, proscribe "misleading" advertising practices or specify what is "true" in the dissemination of consumer credit advertisements.

Nor does this interest in compensating victims of harmful conduct somehow disappear when the damages inflicted are great. So long as the effect of the law of libel is simply to make publishers pay for the harm they cause, and the standard of care required is appropriately adjusted to take account of the special countervailing interests in an open exchange of ideas, the fact that this may involve the payment of substantial sums cannot plausibly be said to raise serious First Amendment problems. If a newspaper refused to pay its bills because to do so would put it out of business, would the First Amendment dictate that this be treated as a partial or complete defense? If an automobile carrying a newsman to the scene of a history-making event ran over a pedestrian, would the size of the verdict, if based upon generally applicable tort law principles, have to be assessed against the probability that it would deter broadcasters from news gathering before it could pass muster under the First Amendment?

However, without foreclosing the possibility that other limiting principles may be surfaced by subsequent experience, I do think that since we are dealing, by hypothesis, with infliction of harm through the exercise of freedom of speech and the press to which the Constitution gives explicit protection, recoverable damages must be limited to those consequences of the publication which are reasonably foreseeable. The usual tort rule seems to be that once some foreseeable injury has been inflicted, the negligent defendant must compensate for all damages he proximately caused in fact, no matter how peculiar were the circumstances of the particular plaintiff involved. Prosser, The Law of Torts § 50 (1964). However, our cases establish, I think, that, unless he has knowledge to the contrary, a speaker is entitled to presume that he is addressing an audience that is not especially susceptible to distress at the spector of open, uninhibited, robust speech. *Cohen* v. *California*, —— U.S. —— (1971). See also *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969); *Butler* v. *Michigan*, 352 U.S. 380 (1957). Thus, I think the speaker should be free from a duty to compensate for actual harm inflicted by his falsehoods where the defamation would not have caused such harm to a person of average sensibilities unless, of course, the speaker knew that his statements were made concerning an unusually sensitive person. In short, I think the First Amendment does protect generally against the possibility of self-censorship in order to avoid unwitting affronts to the frail and the queasy.

II

Of course, it does not follow that so long as libel law performs the same compensatory function as civil law generally it is necessarily legitimate in all its various applications. The presence of First Amendment values means that the State can be compelled to utilize finer, more discriminating instruments of regulation where necessary to give more careful protection to these countervailing interests. *New York Times*, *supra*, and *Curtis Publishing*, *supra*, established that where the injured party is a "public figure" or a "public official," the interest in freedom of speech dictates that the States forgo their interest in compensating for actual harm, even upon a basis generally applicable to all members of society, unless the plaintiff can show that the injurious publication was false and was made "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times, supra*, at 280. Tacitly recognizing that it would unduly sacrifice the operative legitimate state interests to extend this rule to all cases where the injured party is simply a private individual, the plurality opinion would nevertheless apply it where the publication concerned such a person's "involvement in an event of public or general concern." *Ante*, at 22. I would not overrule *New York Times* or *Curtis Publishing* and I do agree, as indicated above, that making liability turn on simple falsity in the purely private libel area is not constitutionally permissible. But I would not construe the Federal Constitution to require that the States adhere to a standard other than that of reasonable care when the plaintiff is an ordinary citizen.

My principal concern with the plurality's view, of course, is that voiced by my Brother MARSHALL. However, even if this objection were not tenable, unlike the plurality, I do think there is a difference, relevant to the interests here involved, between the public and the private plaintiff, as our cases have defined these categories, and that maintaining a constitutional distinction between them is at least as likely to protect true First Amendment concerns as one that eradicates such a line and substitutes for it a distinction between matters we think are of true social significance and those we think are not.

To begin, it does no violence, in my judgment, to the value of freedom of speech and press to impose a duty of reasonable care upon those who would exercise these freedoms. I do not think it can be gainsaid that the States have a substantial interest in encouraging speakers to carefuly seek the truth before they communicate, as well as in compensating persons actually harmed by false descriptions of their personal behavior. Additionally, the burden of acting reasonably in taking action that may produce adverse consequences for others is one generally placed upon all in our society. Thus, history itself belies the argument that a speaker must somehow be freed of the ordinary constraints of acting with reasonable care in order to contribute to the public good while, for example, doctors, accountants, and architects have constantly performed within such bounds.

This does not mean that I do not agree with the rule of *New York Times, supra*, but only that I deem it inapplicable here. That rule was not, I think, born solely of a desire to free speech that would otherwise have been stifled by overly restrictive rules, but also rested upon a determination that the countervailing state interests, described above, were not fully applicable where the subject of the falsehood was a public official or a public figure. For me, it does seem quite clear that the public person has a greater likelihood of securing access to channels of communication sufficient to rebutt falsehoods concerning him than do private individuals in this country who do not toil in the public spotlight. Similiarly, our willingness to assume that public personalities are more impervious to criticism, and may be held to have run the risk of publicly circulated falsehoods concerning them, does not rest solely upon an empirical assertion of fact, but also upon a belief that, in our political system, the individual speaker is entitled to act upon such an assumption if our institutions are to be held up, as they should be, to constant scrutiny. And, at least as to the "public official," it seems to be universally the case that he is entitled to an absolute immunity for what he may utter in response to the charges of others. Where such factors are present the need to provide monetary compensation for defamation appears a good deal more attenuated. Finally, in light of the plurality opinion's somewhat extravagant delineation of the public interest involved in the dissemination of information about nonpublic persons, it bears emphasizing that a primary rationale for extending the *New York Times* rule to public figures was the desire to reflect, in the constitutional balance, the fact that "in this country, the distinctions between governmental and private sectors are blurred." *Curtis Publishing, supra*, at 163 (opinion of Warren, C. J.), and to treat constitutional values as specially implicated where important, albeit nonofficial, policy and behavior was the subject of discussion. At the very least, this tends to diminish the force of any contention that libelous depictions of nonpublic persons are often likely to involve matters of abiding public significance.

I cannot agree that the First Amendment gives special protection to the press from "[t]he very possibility of having to engage in litigation," *ante*, at 23 (opinion of Brennan, J.). Were this assertion tenable, I do not see why the States could ever enforce their libel laws. Cf. my Brother Black's opinion, *ante*, at———. Further, it would certainly cast very grave doubts upon the constitutionality of so-called "right of reply statutes" advocated by the plurality, *ante*, at 17, n. 15, and ultimately treat the application of any general law to a publisher or broadcaster as an important First Amendment issue. The notion that such an interest, in the context of a purely private libel, is a significant independent constitutional value is an unfortunate consequence of the plurality's single-minded devotion to the task of preventing self-censorship, regardless of the purposes for which such restraint is induced or the evils its exercise tends to avoid.

It is, then, my judgment that the reasonable care standard adequately serves those First Amendment values that must inform the definition of actionable libel and that those special considerations that made even this standard an insufficiently precise technique when applied to plaintiffs who are "public officials" or "public figures" do not obtain where the litigant is a purely private individual.

III

There remains the problem of punitive damages.[22] No doubt my Brother Marshall is correct in asserting that the specter of being forced to pay out substantial punitive damage awards is likely to induce self-censorship. This would probably also be the case where the harm actually caused is likely to be great. But, as I indicated above, this fact in itself would not justify construing the First Amendment to impose an arbitrary limitation on the amount of actual damages recoverable. Thus, as my Brother Marshall would apparently agree—since, he, too, proposes no limitation on actual damages—one cannot jump from the proposition that fear of substantial punitive damage awards may be an important factor in inducing self-censorship directly to the result that punitive damages cannot be assessed in all private libel cases. A more particularized inquiry into the nature of the competing interests involved is necessary in order to ascertain whether awarding punitive damages must inevitably, in private libel cases, serve only interests that are incompatible with the First Amendment.

At a minimum, even in the purely private libel area, I think the First Amendment should be construed to limit the imposition of punitive damages to those situations where actual malice is proved. This is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to compensate for harm actually caused, see, *e.g.*, 3 L. Frumer, et al., Personal Injury § 2.02 (1965); H. Oleck, Damages to Persons and Property § 30 (1955), and no conceivable state interest could justify imposing a harsher standard on the exercise of those freedoms that are given explicit protection by the First Amendment.

The question then arises whether further limitations on this general state power must be imposed in order to serve the particularized goals of the First Amendment. The most compelling rationale for providing punitive damages where actual malice is shown is that such damages assure that deterrent force is added to the jury's verdict. If the speaker's conduct was quite likely to produce substantial harm, but fortuitously did not, simple assessment of actual damages will not fully reflect the social interest in deterring that conduct generally. Further, even if the harm done was great the defendant may have unusually substantial resources that make the award of actual damages a trivial inconvenience of no actual deterrent value. And even where neither of these factors obtains, the State always retains an interest in punishing more severely conduct that, although it causes the same effect, is more morally blameworthy. For example, consider the distinction between manslaughter and first-degree murder.

I find it impossible to say, at least without further judicial experience in this area, that the First Amendment interest in avoiding self-censorship will always outweigh the state interest in vindicating these policies. It seems that a legislative choice is permissible which, for example, seeks to induce, through a reasonable monetary assessment, repression of false materials, published with actual malice, that is demonstrably harmful and reasonably thought capable of causing substantial harm, but, in fact, was not so fully injurious to the individual attacked. Similarly, the State surely has a legitimate interest in seeking to assure that its system of compensating victims of negligent behavior also operates upon all as an inducement to avoidance of such conduct. And, these are burdens that are placed on all members of society, thus permitting the press to escape them only if its interest is somehow different in this regard.

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[22] The conclusions I reach in Part III of this opinion are somewhat different than those I embraced four Terms ago in *Curtis Publishing Co., supra*, at 159–161. Where matters are in flux, however, it is more important to re-think past conclusions than to adhere to them without question and the problem under consideration remains in a state of evolution, as is attested to by all the opinions filed today. Reflection has convinced me that my earlier opinion painted with somewhat too broad a brush and that a more precise balancing of the conflicting interests involved is called for in this delicate area.

However, from the standpoint of the individual plaintiff such damage awards are windfalls. They are, in essence, private fines levied for purposes that may be wholly unrelated to the circumstances of the actual litigant. That fact alone is not, I think, enough to condemn them. The State may, as it often does, use the vehicle of a private lawsuit to serve broader public purposes. It is noteworthy that my Brother MARSHALL does not rest his objection to punitive damages upon these grounds. He fears, instead, the self-censorship that may flow from the unbridled discretion of juries to set the amount of such damages. I agree that where these amounts bear no relationship to the actual harm caused, they then serve essentially as springboards to jury assessment, without reference to the primary legitimating compensatory function of the system, of an infinitely wide range of penalties wholly unpredictable in amount at the time of the publication and that this must be a substantial factor in inducing self-censorship. Further, I find it difficult to fathom why it may be necessary, in order to achieve its justifiable deterrence goals, for the States to permit punitive damages that bear no discernible relationship to the actual harm caused by the publication at issue. A rational determination of the injury a publication might potentially have inflicted should typically proceed from the harm done in fact. And where the compensatory scheme seeks to achieve deterrence as a subsidiary by-product, the desired deterrence, if not precisely measured by actual damages, should be informed by that touchstone if deterrence of falsehood is not to replace compensation for harm as the paramount goal. Finally, while our legal system does often mete out harsher punishment for more culpable acts, it typically begins with a gradation of offenses defined in terms of effects. Compare, for example, larceny with murder. It is not surprising then, that most States apparently require that punitive damages in most private civil actions bear some reasonable relation to the actual damage awarded. H. Oleck, *supra* § 275. Pennsylvania included. *Weider* v. *Hoffman*, 238 F. Supp. 437, 444–447 (MD Pa. 1965).

However, where the amount of punitive damages awarded bears a reasonable and purposeful relationship to the actual harm done, I cannot agree that the Constitution must be read to prohibit such an award. Indeed, as I understand it, my Brother MARSHALL's objection to my position[23] is not that the interest in freedom of speech dictates eliminating such judgments, but that this result is compelled by the need to avoid involving courts in an "ad hoc balancing" of "the content of the speech and the surrounding circumstances." Opinion, at 8, much like that undertaken today in Part VI of the plurality opinion, the same technique criticized in my dissent in *Time, Inc.* v. *Pape*, *supra*. I find this argument unpersuasive. First, I do not see why my proposed rule would necessarily require frequent judicial reweighing of the facts underlying each jury verdict. A carefully and properly instructed jury should ordinarily be able to arrive at damage awards that are self-validating. It is others, not I, who have placed upon the federal courts the general duty of reweighing jury verdicts regarding the degree of fault demonstrated in libel actions. Further, to the extent that supervision of jury verdicts would be required it would entail a different process than that undertaken where judges redetermine the degree of fault. The defendant's resources, the actual harm suffered by the plaintiff, and the publication's potential for actual harm are all susceptible of more or less objective measurement. And the overriding principle that deterrence is not to be made a substitute for compensation should serve as a useful mechanism for adjusting the equation. Finally, even if some marginal "ad hoc balancing" becomes necessary, I should

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[23] Of course, I do not envision that, consistently with my views, the States could only exact some predetermined multiple of the actual damages found. I should think a jury could simply be instructed, along the lines set out in my opinion, on the legitimate use of the punitive damage award and the necessity for relating any such judgment to the harm actually done.

think it the duty of this Court at least to attempt to implement such a process before preempting, for itself, all state power in this regard.[24]

In sum, given the fact that it seems to reflect the majority rule, that most of our jurisprudence proceeds upon the premise that legislative purposes can be achieved by fitting the punishment to the crime, and since we deal here with a precise constitutional interest that may legitimately require the States to resort to more discriminating regulation within a more circumscribed area of permissible concern, I would hold unconstitutional, in a private libel case, jury authority to award punitive damages which is unconfined by the requirement that these awards bear a reasonable and purposeful relationship to the actual harm done. Conversely, where the jury authority has been exercised within such constraints, and the plaintiff has proved that the speaker acted out of express malice, given the present state of judicial experience, I think it would be an unwarranted intrusion into the legitimate legislative processes of the States and an impermissibly broad construction of the First Amendment to nullify that state action.

Because the Court of Appeals adjudicated this case upon principles wholly unlike those suggested here, I would vacate the judgment below and remand the case for further proceedings consistent with the views expressed herein.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE STEWART joins, dissenting.

Here, unlike the other cases involving the *New York Times*[25] doctrine, we are dealing with an individual who held no public office, who had not taken part in any public controversy, and who lived an obscure private life.[26] George Rosenbloom, before the events and reports of the events involved here, was just one of the millions of Americans who live their lives in obscurity.

The protection of the reputation of such anonymous persons "from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Rosenblatt* v. *Baer*, 383 U.S. 75, 92 (1966) (STEWART, J., concurring). But the concept of a citizenry informed by a free and unfettered press is also basic to our system of ordered liberty. Here these two essential and fundamental values conflict.

I

The plurality has attempted to resolve the conflict by creating a conditional constitutional privilege for defamation published in connection with an event that is found to be of "public or general concern." The condition for the privilege is that the defamation must not be "published with knowledge that it was false or with reckless disregard of whether it was false or not." I believe that this approach offers inadequate protection for both of the basic values that are at stake.

In order for particular defamation to come within the privilege there must be a determination that the event was of legitimate public interest. That determination will have to be made by courts generally, and in the last analysis, by this Court in particular. Courts, including this one, are not anointed with any extraordinary prescience. But, assuming that under the rule announced by MR. JUSTICE BRENNAN for the plurality, courts are not simply to take a poll to determine whether a substantial portion of the population is interested or concerned in a subject, courts will be required to somehow pass on the legitimacy of interest in a particular event or subject: what information is relevant to self-government. See *Whitney* v. *California*, 274 U.S. 357, 375 (1926) (Brandeis J., concurring). The danger such a doctrine portends for freedom of the press seems apparent.

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[24] The plurality opinion states that the "real thrust" of my position is that it "will not 'constitutionalize' the factfinding process." *Ante*, at 23. In fact, I have attempted to demonstrate throughout this opinion that I believe the position of my Brothers BRENNAN, BLACK, and MARSHALL all, in varying degrees, overstate the extent to which libel law is incompatible with the constitutional guarantee of freedom of expression, and have pointed out that I think my views have merit "even if [the objection noted by the plurality] were not tenable." *Supra*, at 8. Moreover, the assertion that an inquiry into whether actual damages were suffered "will involve judges even more deeply in factfinding," *ante*, at 24, than ascertaining whether "the defendant in fact entertained serious doubts as to the truth of his publication," *ante*, at 27, or whether the publication involved "an event of public or general concern," *ante*, at 22, seems to me to carry its own refutation. The former focuses on measurable, objective fact; the latter upon subjective, personal belief. Finally, I cannot see why juries may not typically be entrusted responsibly to determine whether a publisher was negligent, a function they perform in judging the harmful conduct of most other members of society; or why it should be materially more difficult for judges to oversee such decisions where a speaker, rather than any other actor, is a defendant.

[25] *New York Times* v. *Sullivan*, 376 U.S. 254 (1964).

[26] See, *e.g.*, *Associated Press* v. *Walker*, 388 U.S. 130 (1967); *Curtis Pub. Co.* v. *Butts*, 388 U.S. 130 (1967); *Beckley Newspaper Corp.* v. *Hanks*, 389 U.S. 81 (1967); *Greenbelt Publ. Assn.* v. *Bresler*, 398 U.S. 6 (1970); *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966).

The plurality's doctrine also threatens society's interest in protecting private individuals from being thrust into the public eye by the distorting light of defamation. This danger exists since all human events are arguably within the area of "public or general concern." My Brother Brennan does not try to provide guidelines or standards by which courts are to decide the scope of public concern. He does, however, indicate that areas exist that are not the proper focus of public concern, and cites *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). But it is apparent that in an era of a dramatic threat of overpopulation and one in which previously accepted standards of conduct are widely heralded as outdated, even the intimate and personal concerns with which the Court dealt in that case cannot be said to be outside the area of "legitimate public concern."

The threats and inadequacies of using the plurality's conditional privilege to resolve the conflict between the two basic values involved here have been illustrated by the experience courts have had in trying to deal with the right of privacy. See Cohen, A New Niche For the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?, 18 U.S.L.A. L. Rev. 371, 379–381 (1970); Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 Law and Contemp. Problems 326, 336 (1966). The authors of the most famous of all law review articles recommended that no protection be given to privacy interests when the publication dealt with a "matter which is of public or general interest." Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 214 (1890). Yet cases dealing with this caveat raise serious questions whether it has substantially destroyed the right of privacy as Warren and Bandeis envisioned it.[27] For example, the publictaion of a picture of the body of plaintiff's daughter immediately after her death in an automobile accident was held to be protected. *Kelley* v. *Post Publishing Co.*, 237 Mass. 275, 98 N.E. 2d 286 (1951). And the publication of the details of the somewhat peculiar behavior of a former child prodigy, who had a passion for obscurity, was found to involve a matter of public concern. *Sidis* v. *F-R Pub. Corp.*, 113 F. 2d 806 (CA2 1940).

In *New York Times* the Court chose to balance the competing interest by seeming to announce a generally applicable rule. Here it is apparent that the general rule announced cannot have general applicability. The plurality's conditional privilege approach, when coupled with constitutionalizing of the factfinding process,[28] see Part VI of Mr. Justice Brennan's opinion, results in the adoption of an *ad hoc* balancing of the two interests involved. The Court is required to weigh the nuances of each particular circumstance on its scale of values regarding the relative importance of society's interest in protecting individuals from defamation against the importance of a free press. This scale may arguably be a more finely tuned instrument in a particular case. But whatever precision the ad hoc method supplies is achieved at a substantial cost in predictability and certainty. Moreover, such an approach will require this Court to engage in a constant and continuing supervision of defamation litigation throughout the country. See *Time, Inc.* v. *Pape*, —— U.S. ——, —— (1971) (Harlan, J., dissenting); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 171 (Black, J., concurring).

Undoubtedly, ad hoc balancing may be appropriate in some circumstances that involve First Amendment problems. See, *e.g.*, *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). But in view of the shortcomings of my Brother Brennan's test, defamation of a private individual by the mass media is not one of the occasions for unfettered ad hoc balancing. A generally applicable resolution is available that promises to provide an adequate balance between the interest in protecting individuals from defamation and the equally basic interest in protecting freedom of the press.

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[27] For cases in which the courts have protected the privacy of persons involved in dramatic public events see *Mau* v. *Rio Grande Oil, Inc.*, 28 F. Supp. 845 (ND Cal. 1939), and *Melvin* v. *Reid*, 112 Cal. App. 285, 297 P. 91 (4th Dist. 1931).

[28] See *Time, Inc.* v. *Pape*, —— U.S. —— (1971).

II

As the plurality recognizes here and has recognized as the basic premise of the *New York Times* principle, the threat that defamation law presents for the values encompassed in the concept of freedom of the press is that of self censorship.[29] Our notions of liberty require a free and vigorous press that presents what it believes to be information of interest or importance; not timorous, afraid of an error that leaves it open to liability for hundreds of thousands of dollars. The size of the potential judgment that may be rendered against the press must be the most significant factor in producing self censorship—a judgment like the one rendered against Metromedia would be fatal to many smaller publishers.[30]

The judgments that may be entered in defamation cases are unlike those that may be entered in most litigation since the bulk of the award is given to punish the defendant or to compensate for presumed damages. Here the jury awarded Mr. Rosenbloom $725,000 in punitive damages.[31] This huge sum was not given to compensate him for any injury but to punish Metromedia. The concept of punitive or exemplary damages was first articulated in *Huckle* v. *Money*, 2 Wils 206 (K. B. 1763)—one of the general warrant cases. There Lord Camden found that the power to award such damages was inherent in the jury's exercise of uncontrolled discretion in the awarding of damages. See 1 T. Sedgwich, Damages § 345–350 (9th ed. 1912). Today these damages are rationalized as a way to punish the wrongdoer and to admonish others not to err. See Morris, Punitive Damages In Tort Cases, 44 Harv. L. Rev. 1172 (1931). Thus they serve the same function as criminal penalties and are in effect private fines. Unlike criminal penalties, however, punitive damages are not awarded within discernible limits but can be awarded in almost any amount. Since there is not even an attempt to offset any palpable loss and since these damages are the direct product of the ancient theory of unlimited jury discretion, the only limit placed on juries in awarding punitive damages is that the damages not be "excessive" and in some jurisdictions, that they bear some relationship to the amount of compensatory damages awarded.[32] See H. Oleck, Damages to Persons and Property § 275, at 557–560 (1955). The manner in which unlimited discretion may be exercised is plainly unpredictable. And fear of the extensive awards that may be given under the doctrine must necessarily produce the impingement on freedom of the press recognized in *New York Times*.

In addition to the huge awards that may be given under the label of punitive or exemplary damages, other doctrines in the law of defamation allow substantial damages without even an offer of evidence that there was actually injury. See *Montgomery* v. *Dennison*, 363 Pa. 255, 69 A. 2d 520 (1949); Restatement of Torts § 621 (1938). These doctrines create a legal presumption that substantial injuries "normally flow" from defamation. There is no requirement that there be even an offer of proof that there was in fact financial loss, physical or emotional suffering, or that the plaintiff's standing in the community was diminished. The effect is to give juries essentially unlimited discretion and thus give the jury much the same power they exercise under the labels of punitive or exemplary damages. The impingement upon free speech is the same no matter what label is attached.

The unlimited discretion exercised by juries in awarding punitive and presumed damages compounds the problem of self-censorship that necessarily results from the awarding of huge judgments. This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others. Such free wheeling discretion presents obvious and basic threats to society's interest in freedom of the press. And the utility of the discretion in fostering society's interest in protecting individuals from defamation is at best vague and uncertain. These awards are not to compensate victims; they are only windfalls. Certainly, the large judgments that can be awarded admonish the particular defendant affected as well as other potential transgressors not to publish defamation. The degree of admonition—the amount of the judgment in relation to the defamor's means—is not, however, tied to any concept of what is necessary to deter future conduct nor is there even any way to determine that the jury has considered the culpability of the conduct involved in the particular case. Thus the essence of the discretion is unpredictability and uncertainty.

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[29] *New York Times* v. *Sullivan*, 376 U.S. 254, 279 (1964).

[30] The jury awarded Mr. Rosenbloom $25,000 in general damages and $725,000 in punitive damages. The District Court reduced the punitive damages to $250,000 on remittitur.

[31] See n. 6, *supra*.

[32] Most jurisdictions in this country recognize the concept of punitive or exemplary damages. Four States—Illinois, Massachusetts, Nebraska, and Washington—apparently do not recognize the doctrine. In Louisiana and Indiana the doctrine has limited applicability. See H. Oleck, Damages to Persons and Property § 269, at 541 (1955).

The threats to society's interest in freedom of the press that are involved in punitive and presumed damages can largely be eliminated by restricting the award of damages to proven, actual injuries. The jury's wide ranging discretion will largely be eliminated since the award will be based on essentially objective, discernable factors. And the self-censorship that results from the uncertainty created by the discretion as well as the self-censorship resulting from the fear of large judgments themselves would be reduced. At the same time society's interest in protecting individuals from defamation will still be fostered. The victims of the defamation will be compensated for their real injuries. They will not be, however, assuaged far beyond their wounds. And, there will be a substantial although imprecise and imperfect admonition to avoid future defamation by imposing the requirement that there be compensation for actual damages.

My Brother **Harlan** argues that it is unnecessary to go so far. Although he recognizes the dangers involved in failing "to confine jury verdicts . . . within any ascertainable limits," **Mr. Justice Harlan** suggests that on a finding of actual malice punitive damages may be awarded if they "bear a reasonable and purposeful relation to the actual harm done." My Brother **Harlan** envisions jurors being instructed [33] to consider the deterrent function of punitive damages and to try to gear the punitive damages awarded in some undetermined way to actual injury. Apparently, the jury under the suprvision of the court would weigh the content of the speech and the surrounding circumstances—*inter alia*, the position of the plaintiff, the wealth of the defendant, and the nature of the instrument of publication—on the scale of their values and determine what amount is necessary in light of the various interests involved. Since there would be no objective standard by which to measure the jury's decision there would be no predetermined limit of jury discretion and all of the threats to freedom of the press involved in such discretion would remain. The chant of some new incantation will of course provide clear authority for courts to substitute their values for the jury's and remake the decision. If this is what my Brother **Harlan** envisions, he is merely moving the ad hoc balancing from the question of fault to the question of damages.

I believe that the appropriate resolution of the clash of societal values here is to restrict damages to actual losses. See, Hill, The Bill of Rights and the Supervisory Power, 69 Col. L. Rev. 181, 191 n. 62 (1969). Of course, damages can be awarded for more than direct pecuniary loss but they must be related to some proven harm. See Wright, Defamation, Privacy and the Public's Right to Know: A National Problem and a New Approach, 46 Tex. L. Rev. 630, 648 (1968). If awards are so limited in cases involving private individuals—persons first brought to public attention by the defamation that is the subject of the lawsuit—it will be unnecessary to rely, as both the plurality and to some extent **Mr. Justice Harlan** do, on somewhat elusive concepts [34] of the degree of fault and unnecessary, for constitutional purposes, to engage in ad hoc balancing of the competing interests involved.[35] States would be essentially free to continue the evolution of the common law of defamation and to articulate whatever fault standard best suits the State's need.[36]

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[33] "[A] jury instruction is not abracadabra. It is not a magical incantation the slightest deviation from which will break the spell. Only its poorer examples are formalistic codes recited by a trial judge to please appellate masters. At its best, it is simple, rugged communication from a trial judge to a jury of ordinary people, entitled to be appraised in terms of its net effects." *Time, Inc.* v. *Hill*, 385 U.S. 374, 418 (1967) (Fortas, J., dissenting).

[34] See n. 9, *supra*.

[35] Of course, reliance on limiting awards to compensation for actual loss will require some review of the facts of particular cases. But that review will be limited to essentially objectively determinable issues; the contents of the publication will not have to be considered.

[36] Leaving States free to impose liability when defamation is found to be the result of negligent conduct, should make it somewhat more likely that a private person will have a meaningful forum in which to vindicate his reputation. If the standard of care is higher, it would seem that publishers will be more likely to assert the defense of truth than simply contend that they did not breach the standard.

The only constitutional caveat should be that absolute or strict liability like uncontrolled damages and private fines cannot be used.[37] The effect of imposing liability without fault is to place "the printed, writen, or spoken word in the same class with the use of explosives or the keeping of dangerous animals." W. Prosser, The Law of Torts 792 (3d ed. 1964). Clearly, this is inconsistent with the concepts of freedom of the press.

Thus in this case I would reverse the judgment of the Court of Appeals for the Third Circuit and remand the case for a determination of whether Mr. Rosenbloom can show any actual loss.

[From 405 Federal Reporter, 2d series]

JOHN F. BANZHAF, III, PETITIONER, *v.* FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS,

WTRF-TV, Inc. and National Association of Broadcasters, American Broadcasting Companies, Inc., the Tobacco Institute, Inc., the American Tobacco Company, Brown & Williamson Tobacco Corp., Larus & Brother Co., Inc., Liggett & Myers Tobacco Co., Philip Morris, Inc., R. J. Reynolds Tobacco Co., United States Tobacco Co., P. Lorillard Co., intervenors.

WTRF-TV, INC. AND NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONERS, *v.* FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS,

Heart Disease Research Foundation et al., Intervenors.

THE TOBACCO INSTITUTE, INCORPORATED, ET AL., PETITIONERS, *v.* FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.

(Nos. 21285, 21525, 21526, 21577.)

United States Court of Appeals, District of Columbia Circuit.

Argued June 25, 1968.

Decided Nov. 21, 1968.

Petitions for review of orders of the Federal Communications Commission. The Court of Appeals, Bazelon, Chief Judge, held, inter alia, that Cigarette Labeling Act of 1965 does not constitute congressional preemption of field of regulation addressed to health problem posed by cigarette smoking and does not deny FCC authority to require radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking. The Court also held that the cigarette ruling did not violate the First Amendment.

Affirmed.

Wilbur K. Miller, Senior Circuit Judge, dissented in part.

Mr. John F. Banzhaf, III, petitioner pro se, and Mr. Earle K. Moore, New York City, of the bar of the Court of Appeals of New York, pro hac vice, by special leave of court, for petitioner in No. 21,285 and intervenor in Nos. 21525-6.

Mr. Howard C. Westwood, Washington, D.C., with whom Messrs. Ernest W. Jennes, Herbert Dym, Jonathan D. Blake and Richard S. Morey, Washington, D.C., were on the brief for petitioners in Nos. 21525-6. Mr. Jerome Ackerman, Washington, D.C., also entered an appearance for petitioners in Nos. 21525-6.

Mr. Abe Krash, Washington, D.C., with whom Messrs. Paul A. Porter, Daniel A. Rezneck and Jerome I. Chapman, Washington, D.C., were on the brief for The Tobacco Institute, Inc. and Philip Morris, Inc., argued for all petitioners in No. 21,577. Mr. Porter R. Chandler, New York City, was on the brief for R. J. Reynolds Tobacco Co., petitioner in No. 21,577.

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[37] Strict liability for defamation was first clearly established in *Jones* v. *E. Hulton & Co.*, 2 K. B. 444 (1909), aff'd 1910 A. C. 20. See Smith, Jones v. Hulton. Three conflicting Judicial Views As to a Question of Defamation, 60 U. Pa. L. Rev. 365, 461 (1912). The standard has been applied in many jurisdictions in this country. See, *e.g.*, *Upton* v. *Times-Democrat Pub. Co.*, 104 La. 141, 28 So. 970 (1900); *Landati* v. *Stea*, 44 R. I. 303, 117 A 422 (1922); *Taylor* v. *Hearst*, 107 Cal. 262, 40 P. 392 (1896). See also III Restatement of Torts § 582 comment g (1938). Liability without faults has not been applied, however, in Pennsylvania. See *Summit Hotel Co.* v. *National Broadcasting Co.*, 336 Pa. 182, 8 A. 2d 302 (1939), 12 Purdon's Pa. Stat. § 1583 (1953).

Mr. Eugene R. Anderson, New York City, was on the brief for The American Tobacco Company, petitioner in No. 21,577.

Mr. Carleton A. Harkrader, Washington, D.C. was on the brief for P. Lorillard Co., petitioner in No. 21,577.

Mr. John H. Conlin, Associate General Counsel, Federal Communications Commission, with whom Asst. Atty. Gen. Donald F. Turner, Messrs. Henry Geller, General Counsel, Stuart F. Feldstein, William L. Fishman and Mrs. Lenore G Ehrig, Counsel, Federal Communications Commission, were on the brief for respondents. Messrs. Robert D. Hadl, Attorney, Federal Communications Commission, and Howard E. Shapiro, Attorney, Department of Jutice, also entered appearances for respondents.

Messrs. Lloyd N. Cutler, J. Roger Wollenberg, Timothy B. Dyk, Daniel Marcus and Robert A. Warden, Washington, D.C., were on the brief for Columbia Broadcasting System, Inc., intervenor in Nos. 21,525 and 21,326.

Messrs. Donald J. Mulvihill and Howard Monderer, Washington, D.C., were on the brief for National Broadcasting Company, Inc., intervenor in Nos. 21,525 and 21,526.

Mr. Lloyd Symington, Washington, D.C., filed a brief on behalf of The National Tuberculosis Association as amicus curiae urging affirmance.

Messrs. Abe Krash, Paul A. Porter, Daniel A. Rezneck and Jerome I. Chapman, Washington, D.C., also entered appearances for The Tobacco Institute, Inc., American Tobacco Co., Brown & Williamson Tobacco Corp., Larus & Brother Co., Inc., Liggett & Meyers Tobacco Co., Philip Morris, Inc., R. J. Reynolds Tobacco Co., United States Tobacco Co. and P. Lorillard Co., intervenors in Nos. 21,285, 21,525, and 21,526.

Messrs. James A. McKenna, Jr. and Vernon L. Wilkinson, Washington, D.C., entered appearances for American Broadcasting Companies, Inc., intervenor in Nos. 21,525 and 21,526.

Mr. Edgar F. Czarra, Jr., Washington, D.C., entered an appearance for WTRF-TV, Inc. and National Association of Broadcasters, intervenors in Nos. 21,285, and Spartan Radiocasting, Palmetto Radio, W. A. V. E., Inc., WFIE, Inc. and WFRV, Inc. and Indiana Broadcasting, Gulf Television Corporation, Corinthian Television Corporation and Great Western Broadcasting Corp., intervenors in Nos. 21,525 and 21,526.

Messrs. Vincent A. Pepper and Arthur V. Weinberg, Washington, D.C., entered appearances for WLLE, Inc., intervenor in Nos. 21,525 and 21,526.

Before Bazelon, Chief Judge, Wilbur K. Miller, Senior Circuit Judge, and Wright, Circuit Judge.

Bazelon, Chief Judge:

In these appeals we affirm a ruling of the Federal Communications Commission requiring radio and television stations which carry cigarette advertising to devote a significant amount of broadcast time to presenting the case against cigarette smoking. This holding rests on negative answers to the following principal questions:

(I) whether in the Cigarette Labeling Act of 1965 Congress preempted the field of regulation addressed to the health problem posed by cigarette smoking so as to deny the FCC any authority it otherwise had to issue its cigarette ruling (infra, pp. 1087–1091);

(II) if not so forbidden, whether the ruling is nonetheless unauthorized (infra, pp. 1091–1099, either

(A) because the Commission has no authority to regulate broadcast content (infra, pp. 1093–1096), or

(B) because any authority over program content which the Commission may have cannot support a ruling of this kind (infra, pp. 1096–1099); and

(III) if neither forbidden nor unauthorized, whether the ruling is unconstitutional (infra, pp. 1099–1103), either

(A) because the First Amendment permits no regulation of program content (infra, pp. 1099–1101), or

(B) because the cigarette ruling in particular violates the First Amendment (infra, pp. 1101–1103).

The history of the cigarette ruling dates to December 1966, when citizen John F. Banzhaf, III asked WCBS–TV to provide free time in which anti-smokers might respond to the pro-smoking views he said were implicit in the cigarette commercials it broadcast.[1] Although he cited several specific commercial messages,

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[1] Letter from John F. Banzhaf, III to Television Station WCBS-TV, December 1, 1966.

Banzhaf's target included "all cigarette advertisements which by their portrayals of youthful or virile-looking or sophisticated persons enjoying cigarettes in interesting and exciting situations deliberately seek to create the impression and present the point of view that smoking is socially acceptable and desirable, manly, and a necessary part of a rich full life."

He said this point of view raised one side of a "controversial issue of public importance" and concluded that under the FCC's fairness doctrine, WCBS was under obligation to "affirmatively endeavor to make [its] * * * facilities available for the expression of contrasting viewpoints held by responsible elements. * * *"

WCBS replied that it had broadcast several news and information programs presenting the facts about the smoking-health controversy, as well as five public service announcements of the American Cancer Society aired free of charge during recent months.[2] On the basis of these broadcasts it was confident that "its coverage of the health ramifications of smoking has been fully consistent with the fairness doctrine." But it doubted in any event that "the fairness doctrine can properly be applied to commercial announcements solely and clearly aimed at selling products and services. * * *"

Thereupon, Banzhaf forwarded the correspondence to the Federal Communications Commission under cover of a complaint that the station was violating the fairness doctrine.[3] And thereby hangs the following legal tale.

The Commission sustained the Banzhaf complaint. In a letter dated June 2, 1967,[4] it agreed that the cited cigarette commercials "present the point of view that smoking is 'socially acceptable and desirable, manly, and a necessary part of a rich full life,' "[5] and, as such, invoke the fairness doctrine. It said in part:

> We stress that our holding is limited to this product—cigarettes. Governmental and private reports (e.g., the 1964 Report of the Surgeon General's Committee) and congressional action (e.g., the Federal Cigarette Labeling and Advertising Act of 1965) assert that normal use of this product can be a hazard to the health of millions of persons. The advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that, however enjoyable, such smoking may be a hazard to the smoker's health.[6]

The Commission refused, however, to require "equal time" for the anti-smoking position and emphasized that "the type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee. * * * " But it directed stations which carry cigarette commercials to provide "a significant amount of time for the other viewpoint. * * * " And by way of illustration it suggested they might discharge their responsibilities by presenting "each week * * * a number of the public-service announcements of the American Cancer Society or HEW in this field."[7]

In response to numerous petitions and requests for reconsideration, the Commission affirmed its ruling in a lengthy Memorandum Opinion.[8] It rejected contentions that the fairness doctrine is unconstitutional and that the cigarette ruling is precluded by the Cigarette Labeling and Advertising Act of 1965. The opinion did make clear that cigarette advertising *in general*, not any particular commercials, necessarily conveys the controversial view that smoking is a good thing.[9] But the Commission stressed again that its ruling was "limited to this product—cigarettes" and disclaimed any intention "to imply that any appeal to the Commission by a vocal minority will suffice to classify advertising of a product as controversial and of public importance." [10]

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[2] Letter from Clark S. George, Vice-President and General Manager, WCBS-TV to John F. Banzhaf, III, December 30, 1966.

[3] Letter from John F. Banzhaf, III, to Federal Communications Commission, January 5, 1967.

[4] Television Station WCBS-TV, 8 F.C.C. 2d 381 (1967).

[5] *Id.*

[6] *Id.* at 381–382.

[7] *Id.* at 382. The Commission noted WCBS's public service programming in this area, see text at note 2 *supra*, but said "the question remains whether in the circumstances a sufficient amount of time is being allocated each week to cover the viewpoint of the health hazard posed by smoking." *Id.* at 383.

[8] Television Station WCBS–TV ("Applicability of the Fairness Doctrine to Cigarette Advertising"), 9 F.C.C. 2d 921 (1967), hereinafter cited as "Cigarette Advertising."

[9] The Commission explained that it could make its ruling without having before it the text of the particular commercials cited in Banzhaf's complaint, because the controversial issue was not whether smoking is dangerous to health but whether it is desirable. *Id.* at 946 n. 30. *And see id.* at 939. The Commission said it had been cited to "no example of a cigarette commercial that does not portray the use of the particular cigarette as attractive and enjoyable as well as encourage people to smoke," and found it "difficult to conceive of one [which would not do so]." *Id.* at 938.

While defending its failure to provide interested persons an opportunity to be heard before issuing its ruling, the Commission emphasized that any procedural lapse was cured by its exhaustive consideration of the many petitions for review. Finally, it concluded that, "the specifics of the Fairness Doctrine" aside, its ruling was required by the public interest.[11]

Subsequently, in response to a request for clarification, the Commission ruled that stations which carry cigarette advertising are under no obligation to provide the cigarette companies free time in which to respond to broadcast claims that smoking endangers health.[12]

In this review proceeding, the Commission is challenged at virtually every point. Mr. Banzhaf complains that the anti-smoking forces should have been granted equal time. Petitioners Station WTRF-TV, the National Association of Broadcasters, The Tobacco Institute, and eight cigarette manufacturers (hereinafter "petitioners"), all of whose appeals have been consolidated, complain of almost everything else. They are supported by Intervenors CBS and NBC-AB - WLLE Inc. The Commission is supported by the interventions of the American Tuberculosis Association and the ubiquitous Mr. Banzhaf.

We turn now to the issues these legal armies present for our consideration.

I. THE CIGARETTE LABELING ACT

[1] We are confronted at the outset by the contention that the Commission's action is precluded by the Federal Cigarette Labeling and Advertising Act of 1965.[13] That Act requires cigarette manufacturers and importers to print on each pack the warning "Caution: Cigarette Smoking May Be Hazardous to Your Health" and provides that: "no statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.[14]
Since the Commission's ruling does not require the inclusion of any "statement * * * in the advertising of any cigarettes," but rather directs stations which advertse cigarettes to present "the other side" each week, it does not violate the letter of the Act.

But petitioners contend that, though Congress said only "no statement shall be required * * * in * * * advertising," it meant to forbid any regulation addressed to the smoking-health problem except the Federal Trade Commission's specifically exempted power to police false and misleading advertising.[15] In support of this proposition, they refer us primarily to the Act's Declaration of Policy, in which Congress asserts a purpose to: establish a comprehenisve Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.[16]
From this declaration and from assorted snippets of legislative history, they conclude that Congress has definitively balanced the conflicting interests of the health of the public and the health of the economy and determined—in effect as a matter of law—that the public will be "adequately informed" on the smoking-and-health issue until July, 1969,[17] without any further governmental requirements.

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[10] *Id.* at 943.

[11] *Id.* at 949.

[12] Applicability of the Fairness Doctrine to Cigarette Advertising, 10 F.C.C. 2d 16 (1967)

[13] 79 Stat. 282 (1965), 15 U.S.C. §§ 1331–39 (Supp. 1966).

[14] Federal Cigarette Labeling and Advertising Act of 1965 (hereinafter "Act") § 5(b), 15 U.S.C. § 1334(b) (Supp. 1966).

[15] Section 5(c) of the Act states:

> "Except as is otherwise provided * * *, nothing in this Act shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes * * *."

15 U.S.C. § 1334(c) (Supp. 1966).

[16] Act, § 2, 15 U.S.C. § 1331 (Supp. 1966).

[17] Section 10 of the Act provides that the provisions "which affect the regulation of advertising" shall terminate on July 1, 1969. 15 U.S.C. § 1339 (Supp. 1966).

The Commission, on the other hand, thought its ruling implemented a congressional policy of promoting intensive smoker-education during the life of the Act as an alternative to the "drastic step" of requiring warnings in every cigarette advertisement. Its opinion cites the express reliance in both House and Senate Reports on the anti-smoking campaigns of public and private groups as a reason for deferring stronger Congressional action.[18] And it notes that Congress itself appropriated $2 million to fund the extensive informational activities in this area of the Department of Health, Education and Welfare.[19]

This evidence does not establish unequivocally that Congress did not intend to rely exclusively on such non-coercive educational efforts to inform the public. Congress expressed no purpose in the Act of informing the public of anything except the bare fact that "cigarette smoking may be hazardous to health." Its prescribed warnings do that much and no more. They merely flash danger signals without either particularizing the danger or providing facts on which it may be appraised.

But the anti-smoking campaigns are scarcely so pervasive or so well-funded that additional information could be regarded as mere surfeit. Accordingly, if we are to adopt petitioners' analysis, we must conclude that Congress legislated to curtail the potential flow of information lest the public learn too much about the hazards of smoking for the good of the tobacco industry and the economy. We are loathe to impute such a purpose to Congress absent a clear expression. Where a controversial issue with potentially grave consequences is left to each individual to decide for himself, the need for an abundant and ready supply of relevant information is too obvious to need belaboring.

[20] In the present case we find no such clear expression of restrictive intent. On the contrary, these are positive indications that Congress's "comprehensive program" was directed at the relatively narrow specific issue of regulation of "cigarette labeling and advertising." The Act was in fact passed in response to a pending Federal Trade Commission rule which would have required warnings both on packages and in all advertising.[20] Subjected to competing pressures and uncertain of the full extent of the health hazard, Congress apparently settled on half of the FTC's proposed loaf, shelved the other half for four years,[21] and expressly disclaimed any intent to affect other FTC policies or powers.[22] Nothing in the Act indicates that Congress had any intent at all with respect to other types of regulation by other agencies—much less that it specifically meant to foreclosure all such regulation.[23] If it meant to do anything so dramatic, it might reasonably be expected to have said so directly—especially where it was careful to include a section entitled "Preemption" specifically forbidding designated types of regulatory action.[24]

[3–5] In short, we think the Cigarette Labeling Act represents the balance drawn between the narrow purpose of warning the public "that cigarette smoking may be hazardous to health" and the interests of the economy. In that reckoning, the question of the public's need for information about the nature, extent, and certainty of the danger was left out of the scales, and so is left unaffected, except incidentally, by the result. Congress may reasonably have concluded that a warning on each pack was adequate *warning.*[25] It surely did not think the warnings were themselves adequate *information*. And we find no sufficiently persuasive evidence that Congress hoped to impede the flow of adequate information for fear that, if the public knew all the facts, too many of them would stop smoking.[26]

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[18] The Senate Commerce Committee concluded:

> "Considering the combined impact of voluntary limitations on advertising under the Cigarette Advertising Code, the extensive smoking education campaigns now underway, and the compulsory warning on the package which will be required under the provisions of this bill, it was the Committee's unanimous judgment that no warning in cigarette advertising should be required pending the showing that these vigorous, but less drastic, steps have not adequately alerted the public to the potential hazard from smoking."

S. Rep. No. 195, 89th Cong., 1st Sess., p. 5 (1965). *See also* H.R. Rep. No. 449, 89th Cong., 1st Sess. pp. 4–5 (1965), U.S. Code Congressional and Administrative News, p. 2350.

[19] Cigarette Advertising, *supra* note 8, at 933.

[20] On June 22, 1964, the Federal Trade Commission promulgated a proposed regulation requiring warnings on cigarette packs from January 1, 1965, and warnings in advertising as well from July 1, 1965, unless the package warnings and voluntary advertising reforms had changed the circumstances by then. 29 Fed. Reg. 8325 (1964). The next day the House Commerce Committee began hearings on various cigarette legislation which had been introduced in the House during the 88th Congress. Those hearings and that Congress adjourned without action, but the FTC acceded to the request of Chairman Harris to postpone the effective date of the package-warning rule to July 1, 1965, so that the new Congress might legislate. 29 Fed. Reg. 15570 (1964). The 89th Congress rushed into the breach with the Cigarette Labeling Act, and as a result the FTC rule was stillborn.

[21] See Act, § 5(b), text at note 14, *supra;* § 10, *supra* note 17.

[22] Act, § 5(c), *supra* note 15.

[23] The only reference to other agencies besides the FTC in the entire Act is the declaration in Section 10 that the termination in 1969 of the provisions affecting the regulation of advertising "shall not be construed as limiting, expanding, or otherwise affecting the jurisdiction or authority which the Federal Trade Commission or any other Federal agency had prior to the date of the enactment of this Act." 15 U.S.C. § 1339 (Supp. 1966). Since all other agencies are necessarily included in the blanket ban on required warnings in advertising, this negative provision is not evidence that the Act sweeps more broadly than its words import.

[24] Act, § 5, 15 U.S.C. § 1334 (Supp. 1966).

This relatively narrow reading of the Act is not in conflict with its declared objective of protecting commerce and the national economy against "diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health."[27] Congress patently did not want cigarette manufacturers harassed by conflicting affirmative requirements with respect to the content of their advertising. In addition, it evidently decided that the case against smoking was not yet so overwhelming as to warrant compelling the cigarette companies to dig their own graves by neutralizing their own advertising messages.[28] Even if these policies implicitly preempt regulations *of advertising* substantially equivalent to the FTC's proposed required warnings,[29] they do not exclude a single, uniform regulation *of broadcasters* designed to inform the public.

II. THE COMMISSION'S AUTHORITY UNDER THE PUBLIC INTEREST STANDARD OF THE COMMUNICATIONS ACT

A fundamental question, of course, is whether the Commission's ruling, though not expressly forbidden by statute, is within the scope of its delegated authority.

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[25] Too many bare warnings might result in an uninformed and possibly unnecessary stampede away from cigarettes. While we will not assume that Congress wished to protect the economy at the expense of life and health, it clearly did wish to protect it to the maximum extent compatible with intelligent individual decisions on the health issue. Congress gave the benefit of every doubt to the possibility that the benefits of smoking might outweigh the potential danger to health; but that is not to say that it wished to conceal from the public the true extent of the danger. It is true that the anticigarette broadcasts required by the Commission's ruling may include uninformative propaganda as well as hard information. That possibility is a necessary consequence of the Commission's proper reluctance to dictate the content of broadcast material. See Part II, *infra*. But the ruling is reasonably designed to promote the diffusion of information; it is plainly not the substantial equivalent of the required "warnings" in advertisement which Congress has prohibited

[26] Apart from the declaration of policy to establish a "comprehensive" program—which is meaningful only after we discover what subject matter is comprehended—petitioners rely primarily on the broad scope of the congressional hearings from which the Act emerged. The Senate Commerce Committee heard wide-ranging testimony on all aspects of the smoking-health controversy, including the views of the FCC. Congress also considered proposals for more drastic congressional action than that taken by the Act. But the fact that Congress considered and declined to adopt broader legislation does not establish that it intended to bar otherwise-authorized agency action under established powers and duties.

Petitioners also make much of the fact that the FCC, through its Chairman, specifically told Congress that it had no present plans for regulatory action addressed to the smoking-health problem and that it preferred the across-the-board approach taken by the FTC. While it is possible that had the FCC then anticipated its cigarette ruling, Congress would have expressly prohibited it, that possibility must remain in the realm of speculation. We must decide questions of legislative intent by the lights we have, not by those we might have had.

Nor do we think the FCC's 1964 disclaimer of intent to deal with the cigarette problem deprives it of authority it would otherwise have had to do so now. It is not suggested that the FCC acted in bad faith. The 1964 statement came at a time when the FTC was conspicuously taking the lead oar in attacking the problem on a media-wide front. The FCC may well have been reluctant in those circumstances to place a special burden on the communications industry. Primarily because of the Cigarette Labeling Act, the FTC's broad attack is now stalled. *Supra*, note 20. If the Act itself does not preempt FCC regulation, we see no reason why the FCC may not take the effects of the Act into account in assessing the need for its own action.

[27] Act, § 2, text at note 16, *supra*.

[28] In the Congressional hearings on proposed cigarette legislation, tobacco industry spokesmen appeared to view the FTC's rule requiring them to include warnings in their advertising as uniquely obnoxious. One of them, for example, told the House Commerce Committee that

> the insistence upon a warning in advertising, in addition to the demand for a warning on labels, is punitive in nature. The right to advertise—an essential commercial right—is virtually destroyed if a manufacturer is required in every advertisement to disparage the product.

Hearings before the House Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess., p. 284 (1964).

[29] The Commission thought the Act implicitly forbade a requirement that stations present warning statements immediately "adjacent" to each cigarette commercial. We need not decide whether such a requirement, though not a regulation of *advertising*, is so nearly identical to such a regulation in purpose and effect as to fall within the statute's prohibition.

The ruling originated in response to a "fairness doctrine" complaint and held that the fairness doctrine applied to cigarette advertising. But in its opinion affirming the ruling, the Commission also asserted that it "clearly has the authority to make this public interest ruling" under the public interest standard of the Communications Act and relied upon "the licensee's statutory obligation to operate in the public interest." [30]

Last year in *Red Lion Broadcasting Co.* v. *FCC*,[31] we upheld the fairness doctrine in the face of arguments that it was unauthorized and unconstitutional. Since then, in *Radio Television News Directors* v. *FCC*,[32] the Seventh Circuit has held that the Commission's personal attack rules violate the First Amendment and, in so doing, has cast some doubt on the constitutionality of the underlying fairness doctrine.[33] These issues are now to be resolved by the Supreme Court.

In part for this reason, we do not think protracted discussion of the fairness doctrine will materially advance our inquiry. It is clear to us that, even if incorporated into the fairness doctrine, the ruling before us is to all intents a novel application. In only one instance has the Commission previously held the advertising of a consumer product subject to the rule that broadcasters' presentations of controversial public issues must be fair and balanced.[34] The narrow issue presented by the facts of that case was whether a station in the temperance belt which advertised alcoholic beverages could, consistently with the principles now known as the fairness doctrine, refuse to accept anti-liquor advertising from temperance groups.[35] The case has not been followed in the twenty years since it was decided. It is not in any event a clear precedent for a ruling which instructs stations to broadcast opposition to their paid commercials regardless of whether opponents buy—or even request—such broadcast time. In addition, except for the personal attack rules struck down by the Seventh Circuit,[36] we know of no case in which the Commission has so specifically defined the stations' duties under the fairness doctrine.[37]

We also note that elsewhere the Commission has been hesitant to invoke the fairness doctrine where a controversial issue is raised only by implication.[38] Finally, the Commission itself concluded that its main point would be lost if the legal debate concentrated too intensely on the "specifics of the fairness doctrine." [39]

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[30] Cigarette Advertising, *supra* note 8, 9 F.C.C. 2d at 927.

[31] 127 U.S. App. D.C. 129, 381 F. 2d 908, cert. granted, 389 U.S. 968, 88 S. Ct. 470, 19 L. Ed. 2d 458 (1967), argument postponed pending decision of the Seventh Circuit in Radio Television News Directors Ass'n v. United States (*infra* note 32), 390 U.S. 916, 88 S. Ct. 837, 19 L. Ed. 2d 982 (1968).

[32] 400 F. 2d 1002 (7 Cir., decided September 10, 1968).

[33] The Court of Appeals distinguished the personal attack rules from the underlying fairness doctrine on two grounds. First, the rules represent an unusual particularization of the doctrine, since they impose detailed tests for determining which individual broadcasts trigger the stations' duty to provide reply time and since, unlike the cigarette ruling, they also leave the stations little discretion as to how that duty may be fulfilled. Second, the personal attack rules are enforceable by penalties for individual infractions rather than solely by consideration of a station's overall performance in the proceedings for renewal of a license. Radio Television News Directors Ass'n v. United States (FCC), *supra* note 32 (400 F. 2d pp. 1013–1014). Nonetheless, the court expressly refused to decide the constitutionality of the fairness doctrine itself. *Id.*, 400 F. 2d 1017. It did decide that the objective of a fair and balanced presentation of issues of public importance does not justify rules which are likely to inhibit public debate on political issues and might, by their vagueness, set up the Commission as a de facto censor of individual editorial and political broadcasts. This holding cuts very near the heart of the fairness doctrine. See Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

[34] Petition of Sam Morris, 11 F.C.C. 197 (1946). This opinion in fact predates the first formal articulation of the policies now known as the "fairness doctrine" in the 1949 Report of the Commission in the Matter of Editorializing by Broadcast Licensees, *supra* note 33. But the basic requirement of fair and balanced presentation of controversial issues of public importance dates from decisions of the old Radio Commission and from the early rulings of the FCC. See Red Lion Broadcasting v. FCC, *supra* note 31, 127 U.S. App. D.C. at 138–139, 381 F. 2d at 917–918, and cases cited therein.

[35] The Commission observed, "[I]t can at least be said that the advertising of alcoholic beverages can raise substantial issues of public importance." and concluded that the issue of whether or not to drink "may assume the proportions of a controverted issue of public importance." 11 F.C.C. at 199. It did not, however, deny renewal of the respondent station's license for failure to provide time to the temperance advocates.

[36] Radio Television News Directors Ass'n v. United States (FCC), *supra* note 32.

[37] The Commission has, upon rare occasion, identified specific issues it regards as controversial. *E.g.*, Petition of Sam Morris, *supra* note 34; Robert Harold Scott, 3 P & F Radio Reg. 259 (1946). But it has not previously gone so far as to prescribe the frequency with which opposing views must be broadcast.

[38] The Commission has refused to require reply time for atheists who wish to respond to the implicit theism of broadcast church services. Mrs. Madalyn Murray, 5 P & F Radio Reg. 2d 263 (1965). *But see*, Robert Harold Scott, *supra* note 37.

[39] Cigarette Advertising, *supra* note 8, 9 F.C.C. 2d at 949.

None of the novel aspects of the ruling, of course, precludes an extension of the fairness doctrine at this time. But the extension must, like the doctrine itself, find its authority in the public interest standard. Thus, whether the ruling is viewed as a new application of the fairness doctrine or as an independent public interest ruling, the ultimate question is the same. Moreover, in view of the constitutional attack on the doctrine, the specific question of greatest long-term importance may be whether the cigarette ruling can stand on its own feet.

In fact, we think the best statement of the Commission's holding and rationale is contained in the summary paragraph introducing the "Conclusions" section of its opinion:

> There is, we believe, some tendency to miss the main point at issue by concentration on labels such as the specifics of the Fairness Doctrine or by conjuring up a parade of "horrible" extensions of the ruling. The ruling is really a simple and practical one, required by the public interest. The licensee, who has a duty "to operate in the public interest" * * * is presenting commercials urging the consumption of a product whose normal use has been found by the Congress and the Government to represent a serious potential hazard to public health. Ordinarily the question presented would be how the carriage of such commercials is consistent with the obligation to operate in the public interest. In view of the Legislative history of the Cigarette Labeling Act, that question is one reserved for judgment of the Congress upon the basis of the studies and reports submitted to it. * * * But there is, we think, no question of the continuing obligation of a licensee who presents such commercials to devote a significant amount of time to informing his listeners of the other side of the matter—that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user. This obligation stems not from any esoteric requirements of a particular doctrine but from the simple fact that the public interest means nothing if it does not include such a responsibility.[40]

The fairness doctrine, we think, serves chiefly to put flesh on these policy bones by providing a familiar mold to define the general contours of the obligation imposed.

The attack on the alleged statutory authority for this "public interest" ruling takes two forms: (1) a general denial that the Commission has any authority to supervise the content of broadcasting under the public interest standard: and (2) an argument that any delegation of the power to make ad hoc public interest determinations of this kind is invalid for want of adequate limiting standards.

A. The Commission's authority over broadcast content in general

Nothing in the Communications Act of 1934[41] expressly grants the Commission any general authority over programming. The most relevant provisions go no further than to authorize it to grant and renew broadcast licenses according to the dictates of the "public interest, convenience, and necessity."[42] A case could be made, as an abstract proposition, that this licensing power is limited to policing the traffic over the airwaves to prevent interference between stations and perhaps to assure a minimum level of technical competence. If the question were *res nova*, that case would receive substantial support from the Supreme Court decisions requiring a clear mandate for regulatory activity which brushes closely against sensitive constitutional areas.[43]

[6] But the argument was in fact made and rejected long ago in National Broadcasting Company v. United States.[44] Justice Frankfurter, speaking for the Court, said in part:

> "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." Federal Communications Comm. v. Sanders Bros. Radio Station, 309 U.S. 470, 475, 60 S.Ct 693, 697, 84 L.Ed. 869, 1037. The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objec-

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[40] *Id.*

[41] 47 U.S.C. § 301 *et seq.* (1964).

[42] 47 U.S.C. § 307(a), (d) (1964).

[43] Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L. Ed. 2d 1377 (1959); Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113, 2 L. Ed. 2d 1204 (1958); Hannegan v. Esquire, Inc. 327 U.S. 146, 66 S.Ct. 456, 90 L. Ed. 586 (1946).

[44] 319 U.S. 190, 63 S.Ct. 997, 87 L. Ed. 1344 (1943).

> tions to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio [*sic*], comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity." * * *

The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with cmoprehensive powers to promote and realize the vast potentialities of radio. * * *

These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the "larger and more effective use of radio in the public interest."[45]

In fact, neither courts nor Commission have thought it had to make its decisions among competing applicants blindfolded to the content of their programs.[46] Both the old Radio Commission and the FCC have likewise refused to renew licenses on the basis of past programming not in the public interest,[47] and this Court affirmed such a refusal as long ago as 1931.[48] If agency power to designate programming "not in the public interest" is a slippery slope, the Commission and the courts started down it too long ago to go back to the top now unless Congress or the Constitution sends them. But Congress has apparently specifically endorsed this understanding of the public interest.[49] And whatever the limits imposed by the First Amendment, we do not think it requires eradicating every trace of a programming component from the public interest standard.[50]

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[45] *Id.* at 217, 63 S.Ct. at 1010.

[46] In Simmons v. FCC, 83 U.S. App. D.C. 262, 264, 169 F. 2d 670, 672, *cert. denied,* 335 U.S. 846, 69 S.Ct. 67, 93 L. Ed. 396 (1948), this court said:

> "[W]e are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic."

See also, e.g., Henry v. FCC, 112 U.S. App. D.C. 247, 302 F. 2d 191, cert. denied, 371 U.S. 821, 83 S.Ct. 37, 9 L. Ed. 2d 60 (1962); Allen B. Dumont Laboratories v. Carroll, 184 F. 2d 153, 156 (3 Cir. 1950); Bay State Beacon v. FCC, 84 U.S. App. D.C. 216, 171 F. 2d 826 (1948). *See generally* Note, "Regulations of Program Content by the FCC," 77 HARV. L. REV. 701 (1964) and numerous cases cited therein. Also noteworthy in this regard is the concurring opinion of Justice Brennan in Head v. New Mexico Board of Examiners, 374 U.S. 424, 433, 83 S.Ct. 1759, 10 L. Ed. 2d 983 (1963), which grapples at length with the possibility that the FCC's authority to regulate advertising content is so complete as to exclude any state regulation in that area. Justice Brennan concludes that not all state regulation is excluded, but observes that Congress's "failure expressly to regulate *non-deceptive* advertising surely does not deprive the FCC of all such jurisdiction * * *" *Id.* at 444, 83 S.Ct. at 1771.

[47] Community Broadcasting Service, 13 P & F Radio Reg. 179 (1955); Port Frere Broadcasting Co., 5 P & F Radio Reg. 1137 (1950); *Trinity Methodist Church, South* v. *Federal Radio Commission,* 61 U.S.App.D.C. 311, 62 F. 2d 850 (1932); cert. denied, 288 U.S. 599, 53 S.Ct. 317, 77 L.Ed. 975 (1933); *KFKB Broadcasting Ass'n* v. *Federal Radio Commission,* 60 App.D.C. 79, 47 F.2d 670 (1931).

[48] In *KFKB Broadcasting Ass'n, supra* note 47, this court upheld the denial of a license to a station which regularly broadcast a program in which a doctor diagnosed illnesses and prescribed medicines on the basis of symptoms described in listeners' letters. The grounds for denial were both that the doctor, who controlled the station, was using it for his own private interests and also that the "medical question box" program was "inimical to the public health and safety, and for that reason [was] not in the public interest." 60 App.D.C. at 80, 47 F. 2d at 672. The court said:

> "It is apparent, we think, that the [broadcasting] business is impressed with a public interest and that, because the number of available broadcasting frequencies is limited, the Commission is necessarily called upon to consider the character and quality of the service to be rendered. In considering an application for a renewal of the license, an important consideration is the past conduct of the applicant, for " by their fruits shall ye know them." Matt. VII:20."

Id. at 81, 47 F. 2d at 672. *Accord*, Trinity Methodist Church, South, *supra* note 47.

[49] In 1959, Congress amended the provision requiring broadcasters to provide equal time to opponents of candidates for public office who use their stations, 47 U.S.C. § 315 (1964), in order to exempt bona fide newscasts, news interviews, news documentaries, etc., from that requirement. In so doing it included the proviso that nothing in the exemption:

> "shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from *the obligation imposed upon them under this chapter to operate in the public interest* and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

73 Stat. 557 (1959), 47 U.S.C. § 315(a) (1964) (emphasis added). At the very least, this language appears to be an acknowlegment of and acquiescence in the settled Commission and judicial construction that the public interest standard applies to program content.

[50] *Infra,* Part III.

The power to refuse a license on grounds of past or proposed programming necessarily entails some power to define the stations' public interest obligations with respect to programming. It is this power to specify material which the public interest requires or forbids to be broadcast that carries the seeds of the general authority to censor denied by the Communications Act[51] and the First Amendment alike. But elementary canons of administrative and constitutional law prevent the Commission from terminating a license without giving reasons or from condemning a station's overall programming as inimical to the public interest without identifying the offending material and particularizing the public interest. And if the Commission must explain its view of the public interest when it denies or revokes a license, it may surely give advance notice of its views by way of an official ruling which is subject to judicial review. Indeed, in some cases fairness to the stations may require some advance warning of their responsibilities.

[7] Thus, in applying the public interest standard to programming, the Commission walks a tightrope between saying too much and saying too little. In most areas it has resolved this dilemma by imposing only general affirmative duties—*e.g.*, to strike a balance between the various interests of the community,[52] or to provide a reasonable amount of time for the presentation of programs devoted to the discussion of public issues.[53] The licensee has broad discretion in giving specific content to these duties, and on application for renewal of a license it is understood the Commission will focus on his overall performance and good faith rather than on specific errors it may find him to have made.[54] In practice, the Commission rarely denies licenses for breaches of these duties.[55] Given its long-established authority to consider program content, this general approach probably minimizes the dangers of censorship or pervasive supervision.

In other areas, however, the Commission has on occasion imposed more specific duties or found specific programs or advertisements to be contrary to the public interest.[56] Such rulings must be closely scrutinized lest they carry the Commission too far in the direction of the forbidden censorship. But particularity is not in itself a vice; indeed, in some circumstances it may serve to limit an otherwise impermissibly broad intrusion upon a licensee's individual responsibility for programming.

B. The authority for the cigarette ruling in particular

[8–10] Thus, in the context of the Communications Act as it has long been understood, we do not think that public interest rulings relating to specific program content invariably amount to "censorship" within the meaning of the Act.[57] However, there is high risk that such rulings will reflect the Commission's selection among tastes, opinions, and value judgments, rather than a recognizable public interest. Especially with First Amendment issues lurking in the near background, the "public interest" is too vague a criterion for administrative action unless it is narrowed by definable standards.[58]

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[51] Section 326 of the Communications Act of 1934 provides:

> "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship * * *, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

47. U.S.C. § 326 (1964).

[52] Editorializing by Broadcast Licensees, *supra* note 33, 13 FCC at 1247–48.

[53] *Id.* at 1249.

[54] *Id.* at 1251–1252.

[55] "Generally, where objectionable matter has been broadcast in particular instances, renewal of licenses has been granted, usually upon a showing that program services were otherwise meritorious and in the public interest and the objectionable matter discontinued. * * *"

Note, "Governmental Regulation of the Program Content of Television Broadcasting," 19 G.W.L.Rev. 312, 317 (1950). *See also* Note, "Regulation of Program Content by the FCC," *supra* note 46, at 703–704.

[56] *E.g.*, Petition of Sam Morris, *supra* note 34; Robert Harold Scott, *supra* note 37; *KFKB Broadcasting Ass'n* v. *Federal Radio Commission*, *Trinity Methodist Church, South* v. *FCC*, and Port Frere Broadcasting Co., all *supra* note 47; Mile High Station, Inc., 20 P & F Radio Reg. 345 (1960); WSBC, Inc., 2 F.C.C. 293 (1936); Oak Leaves Broadcasting 2 F.C.C. 298 (1936); Farmers & Bankers Life Insurance Co., 2 F.C.C. 455 (1936); and cases cited in Note, "Governmental Regulation of the Program Content of Television Broadcasting," *supra* note 55, at 317 n. 27, 317–318 n. 28.

[57] See note 51, *supra*. It is not clear whether Congress originally thought that such rulings as to program content would constitute "censorship." See Note, 46 Harv.L.Rev. 987, 990 (1933). But view of the settled administrative practice of issuing such rulings and opinions, the doubtful issue of construction must be resolved in the negative. See Note, "Regulation of Program Content by the FCC," *supra* note 46, at 715.

[11] The ruling before us neither forbids nor requires the publication of any specific material. But as an extension of the fairness doctrine it is an unusual limitation of the licensee's discretion. And as an independent public interest ruling it requires independent support. We cannot uphold it merely on the ground that it may reasonably be thought to serve the public interest.

Whatever else it may mean, however, we think the public interest indisputably includes the public health.[59] There is perhaps a broader public consensus on that value, and also on its core meaning, than on any other likely component of the public interest. The power to protect the public health lies at the heart of the states' police power. It has sustained many of the most drastic exercises of that power, including quarantines, condemnations, civil commitments, and compulsory vaccinations. Likewise, public health concerns now support a sizable portion of the civilian federal bureaucracy. The public health has in effect become a kind of basic law, both justifying new extensions of old powers and evoking the legitimate concern of government wherever its regulatory power otherwise extends.

[12] The Radio Commission, predecessor to the FCC, assumed with judicial approval and without question that broadcasting of special medical information was not in the public interest.[60] In the Communications Act of 1934, Congress transferred the Radio Commission's authority to license in the "public interest, convenience and necessity" to the FCC,[61] which has also ruled specific controversial health claims to be not in the public interest.[62] Given the premise that the "public interest" may include some of the content as well as the technical quality of broadcasting, we are satisfied that it includes the public health. But were there any initial doubt, in the absence of evidence to the contrary we think Congress must be deemed to have acquiesced in the determinations to that effect of both Commissions on a matter of such basic and universally recognized importance.

The public health standard removes much of the vagueness and over-breadth attending the standard of the public interest. But we are not prepared to say that the Commission is authorized to condemn every broadcast which might, without arbitrariness or caprice, be thought to pose some danger to the public health. Even the relatively precise concept of the public health is murky at the fringes, and in some cases what is concededly optimal health may be a less important public value than other conflicting interests. Finally, the Commission itself has no special expertise to make it the appropriate arbiter of controversies over whether particular broadcasting is dangerous to health.

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[58] The Supreme Court has suggested that the "public interest" standard may be narrowed by interpreting it in the light of "its context * * * the nature of radio transmission and reception, [and] * * * the scope, character, and quality of services * * *." *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 285, 53 S. Ct. 627, 636, 77 L. Ed. 1166, 89 A.L.R. 406 (1933). While these criteria may be sufficiently precise administrative standards to govern regulation of technical performance and selection among competing applicants, however, we think they are too amorphous, without more, to support supervision over programming.

[59] Petitioners WTRF-TV and the National Association of Broadcasters argue that, if the FCC has any authority with respect to advertising, it can apply only the more specific standard Congress has established to guide the Federal Trade Commission, which they say is vested with "primary" authority to regulate advertising. Thus, they would limit the FCC's role to policing "unfair methods of competition * * * and unfair or deceptive acts or practices," Federal Trade Commission Act § 5 (1914), 15 U.S.C. § 45(a) (1964), at least absent any considerations peculiar to broadcasting. Their sole authority for that proposition is FCC v. American Broadcasting Co., 347 U.S. 284, 74 S. Ct. 593, 98 L. Ed. 699 (1954) That case, however, is not in point. There, the FCC had adopted regulations disapproving of give-away programs on the ground that they were "lotteries' within the meaning of federal prohibitory statutes. The Supreme Court reversed on the ground that the FCC had misread the criminal statutes, but that reversal did not in itself preclude FCC authority to prohibit such programs as inconsistent with the public interest. SEC v. Chenery Corp., 318 U.S. 80, 63 S. Ct. 454, 87 L. Ed. 626 (1943). In any case, the standard of the Federal Trade Act is applicable only to regulation of advertising. While the obligations imposed under the cigarette ruling arise from and are conditioned upon the broadcasting of cigarette advertising, the ruling does not regulate advertising. Rather, it has the effect of regulating stations which carry advertising by requiring them to inform the public.

[60] *KFKB Broadcasting Ass'n v. Federal Radio Commission, supra* note 47.

[61] 47 U.S.C. § 307 (1964).

[62] WSBC, Inc., Oak Leaves Broadcasting, Inc., Farmers & Bankers Life Insurance Co., all *supra* note 56.

But the ruling on cigarette advertising is vulnerable to none of these objections against a broad mandate to the Commission to consider the public health.[63] The danger cigarettes may pose to health is, among others, a danger to life itself. As the Commission emphasized, it is a danger inherent in the normal use of the product, not one merely associated with its abuse or dependent or intervening fortuitous events. It threatens a substantial body of the population, not merely a peculiarly susceptible fringe group. Moreover, the danger, though not established beyond all doubt, is documented by a compelling cumulation of statistical evidence. The only member of the Commission to express doubts about the validity of its ruling had no doubts about the validity of its premise that, in all probability, cigarettes are dangerous to health:[64]

> Cigarette smoking is a substantial hazard to the health of those who smoke which increases both with the number of cigarettes smoked and with the youthfulness when smoking is started. Cigarette smoking increases both the likelihood of the occurrence and the seriousness of the consequences of various types of cancer, of cardiovascular failures and of numerous other pathologies of smokers. These conclusions are established by overwhelming scientific evidence, by the findings of Government agencies, and by Congressional reports and statute. * * * The evidence on this subject is not conclusive, but scientific evidence is never conclusive. All scientific conclusions are probablistic (sic) * * * Furthermore, law does not and cannot demand conclusive proof. Even in a capital case, the law requires only proof beyond a reasonable doubt. * * * The evidence as to the dangers of cigarette smoking to the smoker is clearly beyond a mere preponderance and approaches proof beyond a reasonable doubt.[65]

Finally, the Commission expressly refused to rely on any scientific expertise of its own.[66] Instead, it took the word of the Surgeon General's Advisory Committee,[67] whose findings had already been adopted in substance by the Department of Health, Education and Welfare,[68] the Federal Trade Commission,[69] and the Senate Commerce Committee,[70] and had in addition been recognized and acted upon by Congress itself in the Cigarette Labeling Act.

In these circumstances, the Commission could reasonably determine that news broadcasts, private and governmental educational programs, the information provided by other media, and the prescribed warnings on each cigarette pack, inadequately inform the public of the extent to which its life and health are most probably in jeopardy. The mere fact that information is available, or even that it is actually heard or read, does not mean that it is effectively understood. A man who hears a hundred "yeses" for each "no," when the actual odds lie heavily the other way, cannot be realistically deemed adequately informed. Moreover, since cigarette smoking is psychologically addicting, the confirmed smoker is likely to be relatively unreceptive to information about its dangers: his hearing is dulled by his appetite. And since it is so much harder to stop than not to start, it is crucial that an accurate picture be communicated to those who have not yet begun.

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[63] We agree with the Commission that "cigarette advertising presents a unique situation," and we note that the Commission "do[es] not now know" of any other advertised product which would warrant a comparable ruling. Cigarette Advertising, *supra* note 8, 9 FCC 2d at 943.

[64] The Commission correctly noted that it "is not the proper arbiter of the scientific and medical issue * * * and of course has not sought to resolve it." *Id.* at 949. But the "controversial issue" to which its ruling is addressed is not whether cigarette smoking is dangerous, but whether, in view of its authoritatively documented dangers, it is desirable:

> "It comes down, we think, to a simple controversial issue: the cigarette commercials are conveying any number of reasons why it appears desirable to smoke, but understandably do not set forth the reasons why it is not desirable to commence or continue smoking. It is the affirmative presentation of smoking as a desirable habit which constitutes the viewpoint others desire to oppose.

Id. at 939.

[65] *Id.*, concurring opinion of Commissioner Loevinger at 952–953.

[66] See note 64, *supra*.

[67] On January 11, 1964, the report of the Surgeon General's Advisory Committee concluded that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate. The Committee recommended that "cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." Cigarette Advertising, *supra* note 8, Appendix A at 950.

[68] The Department promptly established the National Interagency Council on Smoking and Health in order, *inter alia*, to use its professional talents to bring to the Nation—particularly the young—an increasing awareness of the health hazards of cigarette smoking. * * * *Id.*, Appendix A at 951. In 1967, HEW also released the Surgeon General's "Report on Current Information on the Health Consequences of Smoking," which reaffirmed the conclusions of the 1964 Report, *supra* note 67, on the basis of more than 2,000 subsequent research studies. This report asserted that cigarette smokers have substantially higher death and disability rates than comparable non-smokers and that a substantial number of earlier deaths and disabilities would not have occurred if the victims had never smoked. *Id.* at 936–937.

[69] Note 20, *supra*.

[70] While there remain [sic] a substantial number of individual physicians and scientists—the Commerce Committee received testimony from 39 of them—who do not believe that it has been demonstrated scientifically that smoking causes lung cancer or other diseases, no prominent medical or scientific body undertaking a systematic review of the evidence has reached conclusions opposed to those of the Surgeon General's Advisory Committee. S. Rep. No. 195, 89th Cong., 1st sess., p. 3 (1965).

Thus, as a public health measure addressed to a unique danger authenticated by official and congressional action, the cigarette ruling is not invalid on account of its unusual particularity. It is in fact the product singled out for special treatment which justifies the action taken. In view of the potentially grave consequences of a decision to continue—or above all to start—smoking, we think it was not an abuse of discretion for the Commission to attempt to insure not only that the negative view be heard, but that it be heard repeatedly. The Commission has made no effort to dictate the content of the required anti-cigarette broadcasts. It has emphasized that the responsibility for content, source, specific volume, and precise timing rests with the good faith discretion of the licensee.[71]

[13] The cigarette ruling does not convert the Commission into either a censor or a big brother. But we emphasize that our cautious approval of this particular decision does not license the Commission to scan the airwaves for offensive material with no more discriminating a lens than the "public interest" or even the "public health."

III. THE FIRST AMENDMENT

It is difficult to separate the First Amendment question from the question of the Commission's authority. Section 326 of the Communications Act expressly provides that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." [72] It might reasonably be thought that "the right of free speech," is shorthand for the First Amendment. But since constructions of the First Amendment have broadened since 1934, and inasmuch as the First Amendment argument advanced in this case challenges a long-settled construction of the Act, we treat the constitutional question separately for purposes of analysis.

A. *Regulation of broadcast content under the First Amendment in general*

[14] Intervenors NBC, *et al.* argue cogently that the public interest standard cannot constitutionally now include any component of program content. They say the First Amendment obviously would not tolerate administrative supervision of the material published by the newspaper press. The radio press was initially treated differently only because (1) peculiar technical factors require a policeman to prevent interference between different stations, and (2) the then available broadcasting channels were so limited in number that the Commission could hardly ignore all considerations of the nature and quality of programming in choosing among applicants. The first reason does not justify supervision of content, they say, and the second, if ever sufficient, is an anachronism now that the available channels often outnumber the applicants and the broadcasting stations serving most areas far outnumber the newspapers.[73] Accordingly, in their view the First Amendment now limits the Commission's licensing discretion to technological considerations: the content of broadcasting, like that of the publishing press, must be left entirely to the licensees and ultimately to the market.

This argument has considerable force. First Amendment complaints against FCC regulation of content are not adequately answered by mere recitation of the technicaly imposed necessity for *some* regulation of broadcasting and the conclusory propositions that "the public owns the airwaves" and that a broadcast license is a "revocable privilege." [74] It may well be that some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets.

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[71] Cigarette Advertising, *supra* note 8, at 941–942.

[72] *Supra* note 51.

[73] See *Radio Television News Directors Ass'n* v. *United States* (*FCC*) *supra*, note 32, 400 F. 2d pp. 1018–1020, where the Seventh Circuit declared that the historical distinction between press and broadcasting is untenable for First Amendment purposes.

[74] See G. Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulations, 52 Minn. L. Rev. 67, 152 (1967).

On the other hand, we cannot solve such complex questions by replacing one set of shibboleths with another. The First Amendment is unmistakably hostile to governmental controls over the content of the press,[75] but that is not to say that it necessarily bars every regulation which in any way affects what the newspapers publish. Even if it does, there may still be a meaningful distinction between the two media justifying different treatment under the First Amendment. Unlike broadcasting, the written press includes a rich variety of outlets for expression and persuasion, including journals, pamphlets, leaflets, and circular letters, which are available to those without technical skills or deep pockets.[76] Moreover, the broadcasting medium may be different in kind from publishing in way which has particular relevance to the case at hand. Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air." In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.[77]

B. Constitutionality of the cigarette ruling in particular

[15] These considerations are at least sufficient to convince us that we are not obliged simply to "invalidate the entire course of broadcasting development"[78] with no inquiry into the particulars of the ruling before us. Rather, we think the proper approach to the difficult First Amendment issues petitioners raise is to consider them in the context of individual regulatory policies and practices on a case-by-case basis. On this approach, since the narrow public health power which supports the cigarette ruling does not "sweep * * * widely and * * * indiscriminately" across protected freedoms,[79] the constitutional question before us is only whether the Communications Act, construed to authorize a public health ruling in the circumstances of this case, offends the First Amendment. And whatever the constitutional infirmities of other regulations of programming, we are satisfied that the cigarette ruling does not abridge the First Amendment freedoms of speech or press. We reach this conclusion in the light of the following considerations:

(1) The cigarette ruling does not ban any speech. In traditional doctrinal terms, the constitutional argument against it is only that it may have a "chilling effect" on the exercise of First Amendment freedoms by making broadcasters more reluctant to carry cigarette advertising.

(2) The speech which might conceivably be "chilled" by this ruling barely qualifies as constitutionally protected "speech." It is established that some ut-

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[75] *E.g., Near v. State of Minnesota, ex rel. Olson,* 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931).

[76] It has also been suggested that a difference in the working of the market mechanism in the two media may justify a difference in the scope of permissible regulations under the First Amendment. It is in a newspaper's economic interest, it is said, to include features which may appeal only to a limited or specialized audience. The cost of adding a page to include special features is relatively small compared to the advertising and subscription revenue which may be expected from the resulting increase in circulation. But a broadcaster can appeal to only one audience at a time. If he devotes an hour to programs appealing to a minority taste, he foregoes the chance to compete for the greater advertising revenues consequent upon reaching a larger audience. Accordingly, it may be that even newspaper monopolies are more likely than broadcasters to serve the entire public without regulatory prodding. See Note, "Regulation of Program Content by the FCC," *supra* note 46, at 714. For support from economists for the proposition that broadcasters will compete for the majority audience at the expense even of a sizable minority taste, see J. Dirlam and A. Kahn, The Merits of Reserving the Cost-Savings from Domestic Communications Satellites for Support of Educational Television, 77 Yale L. J. 494, 515–517 (1968).

[77] The effectiveness of the television commercial is hardly disputed, for it alone appeals to both of man's most receptive senses—hearing and seeing. * * * Psychological, memory experiments indicate strongly that people tend to remember advertising messages presented by a combination of visual and auditory methods significantly more than those presented by either method alone. See *e.g.*, Elliott, Memory for Visual Auditory, and Visual-Auditory Material, 29 ARCHIVES OF PSYCHOLOGY No. 199, at 52–54 (1936). Note, "Illusion or Deception: The Use of 'PROPS' AND 'MOCK-UPS' in Television Advertising." 72 YALE L. J. 143, 156 n. 46 (1962). See generally, V. Packard, THE HIDDEN PERSUADERS (1957).

[78] Note, "Regulation of Program Content by the FCC," *supra* note 46, at 715.

[79] *Aptheker v. Secretary of State,* 378 U.S. 500, 514, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964).

terances fall outside the pale of First Amendment concern.[60] Many cases indicate that product advertising is at least less rigorously protected than other forms of speech.[61] Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression. It is rather a form of merchandising subject to limitation for public purposes like other business practices. In the instant case, this argument is not dispositive because the cigarette ruling was premised on the fact that cigarette advertising implicitly states a position on a matter of public controversy. But though this advertising strongly implies that cigarette smoking is a desirable habit, petitioners have correctly insisted that the advertisements in question present no information or arguments in favor of smoking which might contribute to the public debate. Accordingly, even if cigarette commercials are protected speech, we think they are at best a negligible "part of any exposition of ideas, and are of * * * slight social value as a step to truth * * *."[62]

(3) In any event, the danger that even this marginal "speech" will be significantly chilled as a result of the ruling is probably itself marginal. We cannot, of course, undertake an economic analysis to determine the probability that the volume of cigarette advertising over radio and television will decline. We can say with fair certainty, however, that the cigarette manufacturers' interest in selling their product guarantees a continued resourceful effort to reach the public. We not also that cigarette advertising accounts for a sizable portion of broadcasting revenues,[63] and we think it at best doubtful that many stations will refuse to carry cigarette commercials in order to avoid the obligations imposed by the ruling.[64]

(4) Even if some valued speech is inhibited by the ruling, the First Amendment gain is greater than the loss. A primary First Amendment policy has been to foster the widest possible debate and dissemination of information on matters of public importance.[65] That policy has been pursued by a general hostility toward any deterrents to free expression. The difficulty with this negative approach is that not all free speakers have equally loud voices, and success in the marketplace of ideas may go to the advocate who can shout loudest or most often. Debate is not primarily an end in itself, and a debate in which only one party has the financial resources and interest to purchase sustained access to the mass communications media is not a fair test of either an argument's truth or its innate popular appeal.

Countervailing power on the opposite sides of many issues of public concern often neutralizes this defect. In many other cases, the courts must act as if such an inherent balancing mechanism were at work in order to avoid either weighing the worth of conflicting views or emasculating the robust debate they seek to promote. If the fairness doctrine cannot withstand First Amendment scrutiny, the reason is that to insure a balanced presentation of controversial issues may be to insure no presentation, or no vigorous presentation, at all.[86] But where, as here, one party to a debate has a financial clout and a compelling economic interest in the presentation of one side unmatched by its opponent, and where the public stake in the argument is no less than life itself—we think the purpose of rugged debate is served, not hindered, by an attempt to redress the balance.[87]

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[60] *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942); *Roth* v. *United States,* 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957).

[61] *Valentine* v. *Chrestensen,* 316 U.S. 52, 62 S. Ct. 920, 86 L. Ed. 1262 (1942); *Breard* v. *City of Alexandria,* 341 U.S. 622, 642, 71 S. Ct. 920, 95 L. Ed. 1233, 35 A. L. R. 2d (1951); *Murdock* v. *Pennsylvania,* 319 U.S. 105, 110–111, 63 S. Ct. 870, 87 L. Ed. 1292 (1943); *Martin* v. *City of Struthers,* 319 U.S. 141, 142, n. 1, 63 S. Ct. 862, 87 L. Ed. 1313 (1943); *Jamison* v. *Texas,* 318 U.S. 413, 417, 63 S. Ct. 669, 87 L. Ed. 869 (1943). In *Head* v. *New Mexico Board of Examiners,* the Supreme Court upheld as a health measure a state law prohibiting price-advertising by optometrists. 374 U.S. 424, 83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963). It did not reach the First Amendment question because that question had not been properly raised in the state court. *Id.* at 433 n. 12, 183 S. Ct. 1759. However, in a lengthy concurring opinion, *supra* note 46, Justice Brennan considered the principal issue to be whether in the Communications Act Congress had occupied the field of regulation of broadcast advertising. *Id.* at 433 *et seq.,* 83 S. Ct. 1759. There was no dissent. The Court's collective treatment of this case strongly discounts the possibility that it thought such regulation poses serious constitutional problems.

[62] *Chaplinsky* v. *New Hampshire, supra* note 80, 315 U.S. at 572, 62 S. Ct. at 769.

[63] The briefs indicate that radio and television revenues from cigarette advertising total nearly $300,000,000 annually and account for more than 7% of all television advertising revenue.

[64] The Commission has in fact promised to "tailor the requirement that a station which carries cigarette commercials provide a significant amount of time for the other viewpoint, so as not to preclude or curtail presentation by stations of cigarette advertising that they choose to carry." Cigarette Advertising, *supra* note 8, at 944.

[65] *See, e.g., Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 148–150, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967) (opinion of Justice Harlan); *New York Times* v. *Sullivan,* 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A. L. R. 2d 1412 (1964); *NAACP* v. *Button,* 371 U.S. 415, 429, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963); *Roth* v. *United States,* 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957).

(5) Finally, not only does the cigarette ruling not repress any information, it serves affirmatively to provide information. We do not doubt that official prescription in detail or in quantity of what the press must say can be as offensive to the principle of a free press as official prohibition. But the cigarette ruling does not dictate specific content and, in view of its special context, it is not a precedent for converting broadcasting into a mouthpiece for government propaganda. And the provision of information is no small part of what the First Amendment is about. A political system which assigns vital decisions to individual free choice assumes a well-informed citizenry. We do not think the principle of free speech stands as a barrier to required broadcasting of facts and information vital to an informed decision to smoke or not to smoke.

IV. OTHER CONTENTIONS

[16–18] The resolution of these basic questions leaves a residue of unanswered contentions. Mr. Banzhaf's complaint that the anti-smokers should have been granted equal time need not detain us. Even if it had authority to specify equal time, the Commission could reasonably find such a specific requirement an unnecessary intrusion upon the licensees' discretion. Likewise, the Commission did not abuse its discretion in refusing to require rebuttal time for the cigarette manufacturers. The public health rationale which supports the principal ruling would hardly justify compelling broadcasters to inform the public that smoking might *not* be dangerous. And an issue of "fairness" arises principally because the cigarette manufacturers are deterred from making health claims in their advertisements by the FTC's warning that such claims would be "unfair and deceptive."[88] If the FTC's determination is in error, the remedy does not lie in a further particularization of the FCC's fairness doctrine.

[19, 20] Finally, The Tobacco Institute contends that the Commission's ruling is void on account of procedural irregularities. The initial ruling was made without providing interested parties either notice or an opportunity to be heard. But since the Commission subsequently entertained numerous petitions for review, wrote a thorough opinion affirming its ruling, and made the ruling prospective from the date of the affirming order, we find no prejudice to substantial rights. The Tobacco Institute also intimates that the Commission should have held an oral hearing, should have made factual investigations of its own, or should have instituted a full-fledged rulemaking proceeding, before issuing its ruling. As a general rule, we agree that more careful procedures are required to support innovation by an administrative agency. But the essential premises of the instant ruling are only (1) that cigarette advertising inherently promotes cigarette smoking as a desirable habit, (2) that very substantial medical and scientific authority regards this habit as highly dangerous to health and therefore undesirable, and

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[86] The main thrust of the Seventh Circuit opinion invalidating the FCC's personal attack rules under the First Amendment is that "strict compliance with the rules might result in a blandness and neutrality pervading all broadcasts arguably within the scope of the rules." Radio Television News Directors Ass'n v. United States (FCC), *supra* note 32, F.2d p. 1014. The rules themselves, the Court said, "reflect an apparent desire on the Commission's part to neutralize (or perhaps to eliminate altogether) the expression of points of view on controversial issues and political candidates. Such a result would be patently inconsistent with protecting the invaluable function served by the broadcast press in influencing public opinion and exposing public ills." *Id.*, p. 1014. Thus, the Court was concerned that both the amount and the vigor of debate might be reduced.

[87] *Cf.* Radio Television News Directors Ass'n v. United States (FCC), *supra* notes 32 and 86: "[T]he rules could be sustained only if the Commission demonstrated a significant public interest in the attainment of fairness in broadcasting * * * and that it is unable to attain such fairness by less restrictive and oppressive means." (p. 102 In the instant case, we think that on balance First Amendment interests are advanced by the Commission's ruling. Moreover, the additional public interest at stake is compelling. And the technique of requiring the presentation of opposing views is markedly less "restrictive and oppressive" than many attacks on the cigarette-health problem which might well be within the power of federal agencies, but for the Cigarette Labelling Act.

[88] *E.g.*, FTC, Order Vacating Trade Regulation Rule, 30 Fed. Reg. 9484, 9485 (1965). Industry codes also disapprove of affirmative health claims in cigarette advertising, but in the circumstances we hardly think this self-regulation makes out a sufficient case to require compensatory relief from the FCC.

(3) that in view of the volume of cigarette advertising, existing sources were inadequate to inform the public of the nature and extent of the danger. These premises are supported by the record. We do not see, and The Tobacco Institute has never suggested, what evidence a more extensive proceeding might have produced to refute them.

Affirmed.

WILBUR K. MILLER, Senior Circut Judge:

I concur in the affirmance of No. 21,285, Banzhaf v. Federal Communications Commission and United States, but I dissent from the affirmance of Nos. 21,525–6, WTRF-TV v. Federal Communications Commission and United States, and from the affirmance of No. 21,577, Tobacco Institute, Inc. v. Federal Communications Commission and United States.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN THE MATTER OF TELEVISION STATION WCBS–TV, NEW YORK, N.Y., APPLICABILITY OF THE FAIRNESS DOCTRINE TO CIGARETTE ADVERTISING

(RM–1170)

MEMORANDUM OPINION AND ORDER

(Adopted September 8, 1967)

BY THE COMMISSION: COMMISSIONERS LOEVINGER AND JOHNSON CONCURRING AND ISSUING STATEMENTS; COMMISSIONER WADSWORTH ABSENT.

1. The Commission has before it for consideration: A petition for rulemaking and a petition for stay of effectiveness of application of Fairness Doctrine to cigarette advertising, filed on June 20, 1967, by the law firm of Smith, Pepper, Shack & L'Heureux on behalf of various broadcast clients; a letter, dated June 23, 1967, from Columbia Broadcasting System, Inc. (CBS), requesting reconsideration of a ruling in the Commission's letter of June 2, 1967 to television station WCBS–TV; a petition for reconsideration and a petition for immediate stay of effectiveness pending reconsideration by the Commission, filed on July 3, 1967 by the National Association of Broadcasters (NAB); a letter from Association of National Advertisers, Inc., dated June 29, 1967, requesting reconsideration of the ruling; petitions for reconsideration, incorporating requests for stay, filed by The Tobacco Institute, Inc., et al. and WGN Continental Broadcasting Co., et al. on June 30, 1967 and July 3, 1967, respectively; and petitions or requests for reconsideration filed on July 3 and 5, 1967, by American Broadcasting Companies, Inc. (ABC), National Broadcasting Co., Inc. (NBC), Storer Broadcasting Co., Griffin-Leake TV Inc., et al., the law firm of Dow, Lohnes, & Albertson on behalf of 17 broadcast licenses, and the law firm of Pierson, Ball, & Dowd on behalf of the licensees of 61 radio and television stations. A petition for reconsideration was filed on August 1, 1967, by the Maryland/District of Columbia/Delaware Broadcasters' Association; and a statement of position by Federal Communications Bar Association on July 27, 1967.[1] Requests for reconsideration have also been received from several congressional sources. A pleading in support of the Commission's ruling has been filed by the complainant, John F. Banzhaf, III; his pleading challenges the standing of the petitioners and many of the arguments advanced, and urges denial of the relief sought.[2] Petitioners seek rulemaking on, and reconsideration and rescission of, a ruling in the Commission's letter of June 2, 1967, to television station WCBS–TV, New York City, that the Fairness Doctrine is applicable to cigarette advertising (FCC 67–641), and a stay of the effectiveness of the ruling pending action on their petitions.

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[1] In addition, the Commission has received various resolutions from State associations of broadcasters and numerous letters from the public.

[2] We do not find the arguments raised as to petitioners' standing persuasive.

2. Our ruling (FCC 67–641) was made on a complaint against station WCBS–TV, New York, by Mr. John F. Banzhaf, III, who asserted that this station, after having aired numerous commercial advertisements for cigarette manufacturers, had not afforded him or some other responsible spokesman an opportunity "to present contrasting views on the issue of the benefits and advisability of smoking." Specifically he noted three cigarette advertisements broadcast on November 24, 1966 over WCBS–TV, which presented smoking as "socially acceptable and desirable, manly, and a necessary part of a rich, full life." Attached to the complaint was a letter by Mr. Banzhaf to the station requesting that free time be made available to "responsible groups" roughly approximate to that spent on the promotion of the "virtues and values of smoking." There was also attached a reply to Mr. Banzhaf by WCBS–TV setting forth the programs which it had broadcast on the effect of smoking on health, taking the position that these programs provided contrasting viewpoints on this issue, and stating its view that the Fairness Doctrine may be inapplicable to commercial announcements solely aimed at selling products. In Mr. Banzhaf's complaint, he asserted that the WCBS–TV showing of compliance with the Fairness Doctrine was insufficient to offset the effects of advertisements broadcast daily for a total of 5–10 minutes each broadcast day.

3. The Commission ruled that the Fairness Doctrine is applicable to cigarette advertisements, but rejected Mr. Banzhaf's claim that the time to be afforded roughly approximate that devoted to cigarette commercials. We held that a station which carries commercials promoting the use of a particular cigarette as attractive and enjoyable is required to provide a significant amount of time to the other side of this controversial issue of public importance—i.e., that however enjoyable, such smoking may be a hazard to the smoker's health. We stated that here, as in other areas under the Fairness Doctrine, the type of programing and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee, upon the facts of his situation; and that accordingly, the initial judgment as to whether sufficient time is being allocated each week in this area by WCBS–TV is one for the licensee.

4. By a letter to the Commission dated June 23, 1967, CBS requests that the contents of its letter be treated as the comments of WCBS–TV on the complaint and that the Commission reconsider its ruling on the basis of these comments. CBS does not request a stay of the effectiveness of the ruling, but does challenge the merits of the ruling.

5. In support of their requests for relief, other petitioners urge that the ruling has broad implications and will affect all licensees carrying cigarette advertising though they did not have an opportunity to be heard prior to its adoption. It is asserted that substantial doubts as to the validity of the ruling are presented by the various requests for reconsideration and other relief, and that licensees will not dare risk noncompliance pending action on these pleadings lest their noncompliance be raised at license renewal time. It is further asserted that licensees would suffer irreparable damage in the interim by temporarily adhering to the ruling because they would risk loss of substantial amounts of advertising revenue and compliance would disrupt station advertising policies as well as give rise to scheduling and production problems. Consequently, petitioners state, fairness and an equitable administration of the Fairness Doctrine call for a suspension of the effectiveness of the ruling, pending action on the petitions for reconsideration and rulemaking.

6. We agree that the ruling constitutes a precedent on an important issue which will affect licensees other than WCBS–TV and may necessitate a change in the operations of some. In view of the widespread interest in the ruling by persons who have not hitherto been heard, and since stay relief has been requested, we have decided to give expeditious consideration to the arguments made in all of the pleadings before us to determine whether anything has been advanced on the merits which would warrant reconsideration of our ruling, a stay of its effectiveness, or rulemaking in this area. The positions of the parties appear to be amply set forth in the pleadings on file, and we have given thorough consideration to the arguments made in reaching our decision. For the reasons set forth below, it is the conclusion of this Commission that nothing has been advanced which would warrant reconsideration or a stay of our ruling or rulemaking. However, in the circumstances, we have decided for reasons of equity that the conduct of licensees (including WCBS–TV), in applying the Fairness Doctrine to cigarette advertising prior to the publication date of this memoran-

dum opinion and order (which we shall also mail to all broadcast licensees), will not be considered in connection with their applications for renewal of license; conduct subsequent to that date will receive consideration, in specific rulings where appropriate or at license renewal time.

I. PETITIONERS' ARGUMENTS ON THE MERITS

7. The principal contentions presented on the merits of the ruling are: (*a*) That the Fairness Doctrine is itself violative of the first and fifth amendments to the U.S. Constitution and hence cannot properly serve as a basis for delineating licensee responsibilities under the Communications Act; (*b*) that the Fairness Doctrine, even if constitutional, applies only to programing in the nature of news, commentary on public issues, or editorial opinion, and does not extend to advertising; (*c*) that the Commission is precluded from applying the Fairness Doctrine to cigarette advertising because Congress has preempted the field and the Commission's ruling is contrary to congressional policy: (*d*) that even if the Fairness Doctrine properly applies to cigarette advertising, the Commission has invalidly made a blanket ruling that any cigarette advertisement per se presents a controversial issue of public importance, whereas no controversial issue of public importance can be presented where a lawful business is advertising a lawful product and, in the absence of any health claim in the commercial or affirmative discussion of the health issue, there is no view point to oppose; (*e*) that the requirement that a significant amount of time be allocated each week to cover the viewpoint of the health hazard posed by smoking and the suggestion that a licensee might, inter alia, present a number of public service announcements of the American Cancer Society or the Department of Health, Education, and Welfare, will cause a debasement of the Fairness Doctrine generally and substitute Commission fiat for licensee judgment; (*f*) that the ruling cannot logically be limited to cigarette advertising alone; (*g*) that the ruling will have an adverse financial effect upon broadcast licensees by causing the cigarette industry to turn to other advertising media and will also have an adverse effect on the sale of cigarettes; and (*h*) that the ruling is in any event procedurally invalid for failure to accord interested persons on opportunity to be heard prior to the issuance of a novel and unprecedented policy determination. We shall carefully examine each of these contentions below and set forth in full our reasons for concluding that they lack merit.

A. Constitutionality of Fairness Doctrine

8. Those parties claiming that the Fairness Doctrine is violative of the first and fifth amendments to the Constitution incorporate by reference their comments to this effect in docket No. 16574, In the Matter of Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack or Where a Station Editorializes as to Political Candidates.[3] By a memorandum opinion and order released on July 10, 1967 in that docket (FCC 67–795), the Commission rejected the contention as to the first amendment. For the reasons and authorities there set forth, we adhere to that determination here.[4] The fifth amendment challenge was also rejected in *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, Case No. 19,938 (C.A.D.C., decided June 13, 1967), and we see no valid distinction in the circumstances of this matter.[5]

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[3] This contention is made by the NAB, the law firm of Pierson, Ball, & Dowd, and WGN Continental Broadcasting Co., et al. The petition for rulemaking filed by Smith & Pepper states that it does not address itself to the question of whether *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* case No. 19,938 (C.A.D.C., June 13, 1967), is good law.

[4] Since advertising, although not wholly beyond the first amendment, enjoys less protection than other speech (see *Murdock* v. *Pennsylvania*, 319 U.S. 105, 110–111; *Valentine* v. *Chrestenson*, 316 U.S. 52, 54; *Martin* v. *Struthers*, 319 U.S. 141, 142, note 1; *Beard* v. *Alexandria,* 341 U.S. 622, 641–643), the Commission's power to regulate advertising by radio may, indeed, be broader than it is with respect to programming. See *Head* v. *Board of Examiners*, 374 U.S. 424, 430–431, 437–441 (advertising), and cf. *Farmers Union* v. *WDAY*, 360 U.S. 525, 529–530 (political broadcasts): *Henry* v. *Federal Communications Commission*, 302 F. 2d 191, 194 (C.A.D.C.), certiorari denied, 371 U.S. 821 (entertainment).

[5] Insofar as it is asserted that due process has not been accorded, we believe that our extensive consideration of the pleadings filed since the ruling meets the requirements of due process in view of the nature of the issue and the arguments relating thereto (see pars. 55–58, infra). The conduct of licensees prior to the publication of this memorandum opinion and order will not be considered adversely when the question of renewal of license arises.

B. Scope of Fairness Doctrine

9. In contending that the Fairness Doctrine does not apply to advertising, the parties argue that the doctrine had its genesis in the 1949 Report of the Commission in the Matter of Editorializing by Broadcast Licensees, 13 FCC 1246, which was meant to apply only to dissemination of news, commentary on public issues, and editorial opinion because it contains no reference to advertising. It is further urged that no mention of advertising was made in the 1964 Fairness Primer, 29 F.R. 10415, and that the Commission has never interpreted the doctrine as applying to advertising. In addition, it is asserted that Congress, in giving specific approval to the Fairness Doctrine as a basic delineation of a standard of public interest in broadcasting in the 1959 amendment of section 315(a) of the Communications Act, 73 Stat. 557, 47 U.S.C. 315(a), limited the scope of the doctrine to programing of that nature since it did not amend section 317 of the act to incorporate a similar provision. It follows, the parties state, that the present ruling is an unprecedented extension of the Fairness Doctrine which is beyond the Commission's discretion or statutory authority.

10. We do not find these arguments persuasive. The Fairness Doctrine has its foundation in the obligation imposed on licensees by the Communications Act to operate in the public interest (see discussion, infra, par. 64), which includes the "basic policy of the 'standard of fairness'" and the "broad encompassing duty of providing a fair cross section of opinion in the station's coverage of public affairs and matters of public controversy." (H. Rept. No. 1069, 86th Cong., first sess., p. 5; S. Rept. No. 562, 86th Cong., first sess., p. 13; section 315 (a); 1949 Report on Editorializing, 13 FCC 1246, 1248–1249.) That "one of the basic elements of any such operation" (13 FCC at 1248) is a recognition by the licensee of "the right of the public to be informed" (13 FCC at 1249), as to "opposing positions on the public issues of interest and importance in the community" (13 FCC at 1258), when the licensee is presenting programing in the nature of news, commentary on public issue, or editorial opinion, does not mean that the licensee is relieved of his statutory responsibility for advertising broadcast over his facilities or his overall duty to operate in the public interest and to make a fair presentation of controversial issues of public importance in whatever context they may arise. (Section 315 (a) 1949 Report on Editorializing, 13 FCC at 1257–1258.) Moreover, the circumstance that Congress specifically incorporated in the Fairness Doctrine into the 1959 amendment to section 315 to make it "crystal clear" that the programing exemptions from the equal time requirement of that section did not exempt licensees "from objective presentation thereof in public interest" does "not diminish or affect in any way Federal Communications Commission policy or existing law which holds that a licensee's statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross section of opinion in the station's coverage of public affairs and matters of public controversy." (S. Rept. No. 562, 86th Cong., First sess., p. 13; 105 Cong. Rec. 14439.)[6] Most important, the amendment refers to the obligation imposed upon broadcast licensees "* * * *under this act* to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (emphasis supplied).

11. The Commission's present ruling that advertising falls within the public interest responsibilities of a licensee is not a novel or unprecedented policy determination. See concurring opinion of Mr. Justice Brennan in *Head* v. *Board of Examiners*, 374 U.S. 424, 437–441. This opinion sets out in detail the administrative and other pertinent history establishing the pattern of Commission regulation in this area. (See par. 13, infra.)

12. The Commission has always directed itself particularly to programing and advertising which bears upon public health and safety. The Federal Radio Commission denied a renewal of license to a station which broadcast a "medical question box" devoted to diagnosing and prescribing treatment of illnesses from symptoms given in letters from listeners, and which received a rebate on each prescription sold. *KFKB Broadcasting Association* v. *Federal Radio Commission*, 47 F. 2d 670, 671 (C.A.D.C.). The Radio Commission held, with judicial approval,

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[6] Given the background to the 1959 amendments (see *Red Lion Broadcasting Company* v. *Federal Communications Commission*, supra), we are unable to see any significance in the fact that Congress did not also amend sec. 317 to incorporate the Fairness Doctrine expressly. In any event, as stated, the absence of a specific reference to the Fairness Doctrine in sec. 317 does not show a lack of Commission authority under the general provisions of the act.

that "the practice of a physician's prescribing treatment for a patient whom he has never seen, and bases his diagnosis upon what symptoms may be recited by the patient in a letter addressed to him, is inimical to the public health and safety, and for that reason is not in the public interest." (Id., at 671–672.) The Communications Commission has similarly condemned advertising of alleged medical prescriptions and quack remedies which were deemed inimical to health, and granted renewal only upon assurances that such broacasting would be discontinued. *Farmers and Bankers Life Insurance Co.*, 2 FCC 455, 457–459. The Commission stated that "[a] broadcast station carrying such programs should be held to a high degree of responsibility, affecting as they may the health and welfare of the listeners, and careful investigation of such products, and of the claims made therefor, should be made before they are advertised over a broadcast station." (2 FCC at 458.) See also *WSBC, Inc.*, 2 FCC 293, 294–296, and *Oak Leaves Broadcasting Station, Inc.*, 2 FCC 298 (both involving advertising of quack medicines by one not licensed to pratice medicine). The Commission has also applied the Fairness Doctrine to products such as Krebiozen and to the health issues involved in Carlton Fredericks program, "Living Should be Fun." (See 33 FCC 101, 107 (1962).)[7]

13. Mr. Justice Brennan, in his concurring opinion in the *Head* case, 374 U.S. at 439, noted that—

> "* * * As early as 1928, for example, the General Counsel of the Radio Commission held that abuses in network cigarette advertising—while not a sufficient basis for revocation proceedings against an individual licensee—might on renewal militate against the requisite finding of broadcasting in the 'public interest.' "

The opinion also notes (note 15) that—

> "Shortly after the issuance of the General Counsel's opinion, the Chairman of the Federal Radio Commission was asked by Senator Dill during his appearance before the Senate Commerce Committee whether he thought the Commission had sufficient power "through its power of regulation and its determination of public interest to handle objectionable advertising?" The Chairman replied, "I think so, Senator Dill, because we have had little trouble about it, even without direct power. * * *." (Hearings before Senate Committee on Interstate Commerce on S. 6, 71st Cong., First sess., pt. 6, p. 230.)

See also Hearings before Senate Committee on Interstate Commerce on S. 6, 71st Congress, First and Second sessions, pages 88–89. The particular complaint leading to the General Counsel's opinion charged, inter alia, that "the object of this broadcasting is to transform 20,000,000 adolescent boys and girls into confirmed cigarette addicts by creating a vast child market for cigarettes in the United States," that "10,000,000 boys throughout the country are being viciously and deliberately misled by paid testimonials, secured from professional athletes, football coaches, and others, definitely suggesting the use of cigarettes as an aid to physical prowess," that "the medical opinion of the country is being continuously misrepresented to support the health and medical claims made for cigarettes," that the specific claims made for a particular brand of cigarette advertised on the air are overwhelmingly opposed by established health and medical facts," and that "Such radio activities, the petitioner maintains, are clearly contrary to public interest, public welfare, and public health." (Opinion No. 32, 1928–1929 Opinions of the General Counsel, Federal Radio Commission, 77, at 78 (Apr. 15, 1929).) General Counsel Bethuel M. Webster, Jr., concluded that the "Commission may find, in view of this showing, that public interest, convenience, and necessity will not be served by further renewal of the licenses in question, in which case the matter will be set for hearing pursuant to section 11, and petitioner's prayer for general relief will be granted." (Id., at 82.)

14. In short, we believe that the licensee's statutory obligation to operate in the public interest includes the duty to make a fair presentation of opposing viewpoints on the controversial issue of public importance posed by cigarette advertising (i.e., the desirability of smoking), that this duty extends to cigarette advertising which encourages the public to use a product that is habit forming and, as found by the Congress and governmental reports, may in normal use be hazard-

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[7] As further administrative background in this area, see In re petition of Sam Morris, 11 FCC 197 (1946), where the Commission indicated the applicability of the Fairness Doctrine to advertising in certain situations.

ous to health, and that the licensee's compliance with this duty may be examined at license renewal time (see 1960 Programming Policy Statement, 20 Pike & Fischer, Radio Regulation 1901, 1912–1913). It is our belief that the public interest standard and Fairness Doctrine embodied this principle from their inception. In any event, even assuming the contrary, we think that the Commission clearly has the statutory authority to make this public interest ruling and to extend the Fairness Doctrine to cigarette advertising at this time. While the agency's position as to what the obligation to operate in the public interest requires for cigarette advertising may have fluctuated over the years since 1929, the exercise of such authority in the present circumstances is plainly reasonable. Considering the 1964 Report of the Surgeon General's Advisory Committee, the establishment of the National Interagency Council on Smoking and Health and the enactment of Cigarette Labeling and Advertising Act (Public Law 89-92, 15 U.S.C. 1331 et seq.) in 1965, and the recent Reports to Congress by the Federal Trade Commission and the Department of Health, Education, and Welfare pursuant to that act, it is not an abuse of discretion for the Commission to decide now that a licensee who presents programing and advertising which encourages the public to form this habit potentially hazardous to health has, at the very least, an obligation adequately to inform the public as to the possible hazard..[8] (See infra, pars. 30–32.) Nothing that is presented in the extensive pleadings filed in this matter convinces us that petitioners should prevail on their position to the contrary.

C. Compatibility With the Cigarette Labeling Act

15. Petitioners further urge that Congress in the Cigarette Labeling and Advertising Act of 1965 (Public Law 89–92, 15 U.S.C. 1331 et seq.), preempted Federal, Stat, and loca lauthority --appealsmqz2Pact
eral, State, and local activity to compel health warnings in cigarette advertising, and that the Commission's ruling is not only inconsistent with that policy but lies also in an area where Congress has withdrawn authority. On the basis of our analysis of the provisions of the Labeling Act and its legislative history, we agree that no Federal or State body could legally adopt regulatory measures which would require either a cessation of cigarette advertising or the inclusion of health warning in the advertisement itself. We nevertheless believe, for the reasons set forth below, that our ruling that broadcast licensees presenting cigarette advertising must otherwise inform the public as to the potential health hazard, is not precluded by the Labeling Act and is entirely consistent with the congressional decision to promote extensive smoking education campaigns.

16. The Cigarette Labeling Act states that:

It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

> "(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> "(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

The act thus requires the labeling of cigarette packages with the statement: "Caution: Cigarette Smoking may be Hazardous to Your Health." The act also does the following: (1) Makes it unlawful for any person to manufacture, import, or package for sale within the United States any cigarettes which do not bear the above mentioned statement on the package. Violation of this requirement is made a misdemeanor subject to a fine of not more than $10,000 (secs. 4, 6); (2) prohibits the requirement of any other cautionary statement on the labeling of cigarettes under laws administered by any Federal, State, or local authority (sec. 5(a)), and prohibits, for 3 years, any requirement by any Federal, State, or local authority that cigarette advertising include a statement relating to smoking and health (sec. 5(b)); (3) states that the Federal Trade

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[8] It has long been recognized, of course, that "the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes." *Pinellas Broadcasting Co. v. Federal Communications Commission,* 230 F. 2d 204, 206 (C.A.D.C.), certiorari denied, 350 U.S. 1007.

Commission has not authority to require any cautionary statement in any advertisement of cigarettes labeled in conformity with the act, but otherwise neither limits nor expands the authority of the FTC with respect to the dissemination of false or misleading advertisements of cigarettes (sec. 5(c)); (4) permits injunctions to be obtained to restrain violations of the act, and provides an exemption for cigarettes manufactured for export from the United States (secs. 7 and 8); and (5) requires two Federal agencies to transmit reports to Congress before July 1, 1967, and annually thereafter: (*a*) the Secretary of Health, Education, and Welfare concerning current information on the health consequences of smoking and recommendations for legislation and (*b*) the Federal Trade Commission concerning the effectiveness of cigarette advertising, and recommendations for legislation.

16a. Section 5—the portion preempting Federal, State, and local activity to compel health warnings in cigarette labeling and advertising—provides in subsection (b):

> "No statement relating to smoking and health shall be required in the advertising of any cigarette the packages of which are labeled in conformity with the provisions of this Act."

It is clear from the wording of this section that neither the FCC nor the FTC could require cigarette advertisements to contain statements of health warnings. However, this does not mean that the FCC or the FTC cannot regulate in other aspects concerning smoking and health. The section does not read, as petitioners would have it, that no statement by others interested in informing the public of the potential hazard from smoking may be required "because of the advertising of any cigarette"—i.e., not in or adjacent to the advertising but at some other time period, by others or the licensee, because the advertising has presented but one face of this important issue to the public. Moreover, although the Senate debate on the Labeling Act is not wholly clear in this respect,[9] the House debate indicates that the FTC is still free to regulate with respect to misleading or deceptive advertising concerning smoking and health under Section 5 of the Federal Trade Commission Act.[10] For example, if an advertisement said that cigarette smoking was not a health hazard, the FTC could act to prevent such advertising. The chairman of the House Commerce Committee explained that the Labeling Act did not purport to change the present authority of the FTC, only to limit that authority with respect to compulsory inclusion of statements concerning smoking and health in cigarette labels and advertising[11] (see sec. 5(c) of the act). The FCC's regulatory authority was not discussed in the committee reports on the proposed legislation or in the legislative debates. Nevertheless, the background and legislative history of the Labeling Act furnish some basis for judging what impact, if any, that act has on the FCC's authority in this field, particularly under the Fairness Doctrine.

Legislative History

17. The pertinent background to the 1965 act is set out in appendix A. We turn here to the relevant legislative history. Prior to 1964, a number of bills had been introduced without enactment by Congress in an effort to compel cigarette manufacturers to acquaint the public in various fashions with the health hazards of smoking. With the Advisory Committee's report as a catalyst, many bills were introduced during the second session of the 88th Congress embodying several approaches to acquaint the public with the hazards of smoking: (1) To require that cigarettes sold in interstate commerce be labeled with a health warning, and/or with a disclosure of nicotine and tar content (H.R. 4168; H.R. 7476; H.R 9693); (2) to confer on the FTC the power and duty to regulate advertising and labeling of cigarettes (HR. 9655; H.R. 9657; H.R 9808; S. 2429); (3) to amend the Federal Food, Drug, and Cosmetic Act so as to make that act applicable to smoking (H.R. 5973; H.R. 9512); (4) to provide for informational and educational campaigns by HEW to acquaint the public with the health hazards involved in the use of cigarettes and to provide for continued research in this field (H.R. 9668; S. 2430); and (5) to enjoin all Government agencies, etc., from taking any action or pursuing any policy which encourages or promotes the public to buy or use cigarettes (S. 2430).

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[9] 111 Cong. Rec. 15597–15598 (1965).

[10] 111 Cong. Rec. 16541–16544 (1965).

[11] Remarks of Chairman Harris, 111 Cong. Rec. p. 16544 (1965).

18. As a result of the submission of these bills, Chairman Harris conducted hearings from June 23, 1954 through July 1, 1964, before the House Commerce Committee concerning possible action by Congress. The purposes of the hearings were to review the scientific evidence of the causal link between smoking and cancer and, if Federal action was found to be required in the interest of public health, to determine what approach would be most desirable. Chairman Harris commented later that the closing days of that session of Congress had not permitted sufficient time for further hearings and for the preparation and consideration of carefully drawn legislation in this field. These hearings before the House Commerce Committee were the only hearings conducted on the subject of cigarette labeling and advertising by either side of Congress during the second session of the 88th Congress.

19. Legislative activity resumed in the first session of the 89th Congress with consideration of bills taking three basic approaches to the smoking health hazard problem: (1) To amend the Federal Food, Drug, and Cosmetic Act to regulate smoking products (H.R. 2248); (2) to provide for a health warning and/or nicotine and tar content on the label of cigarette packages (S. 559; H.R. 3014; H.R. 4007; H.R. 7051; H.R. 4244); and (3) to give the FTC the power and duty to regulate advertising and labeling of cigarettes (S. 547). Both the Senate and the House Commerce Committees undertook hearings to determine the state of the medical evidence for and against the causal link between smoking and disease and to determine what Federal action, if any, should be required in the public interest. With regard to these questions, the Senate Committee concluded (S. Rept. No. 195, 89th Cong., First sess., p. 3):

> "While there remain a substantial number of individual physicians and scientists—the Commerce Committee received testimony from 39 of them—who do not believe that it has been demonstrated scientifically that smoking causes lung cancer or other diseases, no prominent medical or scientific body undertaking a systematic review of the evidence has reached conclusions opposed to those of the Surgeon General's Advisory Committee.
>
> "The Commerce Committee, therefore, concurs in the judgment that 'appropriate remedial action' is warranted."

The House Committee was unwilling to conclude for or against the medical opinions embodied in the Advisory Committee's report or the medical evidence elicited by its own hearings. However, it did conclude that congressional action should be taken with regard to the relationship of smoking and health (H. Rept. No. 449, 89th Cong., first sess., p. 3).

20. As petitioners point out, Congress in enacting the Cigarette Labeling Act was concerned about possible economic impact on the tobacco and broadcasting industries, as well as the potential health hazard to the public. The House Report states (id., at p. 3):

> "The determination of appropriate remedial action in this area, as recommended by the Surgeon General's Advisory Committee, is a responsibility which should be exercised by Congress after considering all the facets of the problem. The problem has broad implications in the field of public health and health research, and involves potentially far-reaching consequences for a number of sectors of our economy. The entire tobacco raising and manufacturing industry, and the numerous businesses which market tobacco products are involved. Some proposals have been made in this area which might lead to severe curtailing or the possible elimination of cigarette advertising. This could have a serious economic impact on the television, radio, and publishing industries in the United States."

21. The compromise evolved by Congress was to require a health warning in labeling, but not in advertising, for an interim period pending a further congressional determination as to whether extensive smoking education campaigns and industry self-discipline would render such a drastic step unnecessary. The Senate Report states (S. Rept. No. 195, 89th Cong., first sess., p. 5):

> "Considering the combined impact of voluntary limitations on advertising under the cigarette advertising code, the extensive smoking education campaigns now underway, and the compulsory warning on the package, which will be required under the provisions of this bill, it was the committee's unanimous judgment that no warning in cigarette advertising should be required pending the showing that these vigorous, but less drastic, steps have not adequately alerted the public to the potential hazard from smoking."

The House Report similarly states that the cigarette advertising code and the educational and informational programs of HEW in combination with the Labeling Act made it unnecessary to insert health warnings in cigarette advertising as proposed by the FTC (H. Rept. No. 449, 89th Cong., first sess., pp. 4, 5). The Labeling Act provides that the provisions which affect the regulation of advertising shall terminate on July 1, 1969 (sec. 10). The reason for specifying this termination date was the expectation of Congress that before that date, on the basis of all available information, including that contained in the reports to be submitted by HEW and FTC, it would reexamine the subject matter of the Labeling Act.

Conclusion

22. In the light of the foregoing, it is our view that section 5 of the Labeling Act was meant to preclude any requirement of a health warning in the advertising itself, as proposed by the FTC rule (see par. 7, app. A), but there was no legislative intent otherwise to foreclose the use of radio, along with other educational media, as an effective means of informing the public to the potential hazard of smoking. The Fairness Doctrine has its reason for being in (1949 Report on Editorializing, 13 FCC at 1249):

> "* * * the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting." [Footnote omitted.]

We also cannot believe that Congress would have overturned so basic a tenet of communications law and policy in this area or that it would have withdrawn so fundamental a responsibility of the Commission without some express indication and explanation (See par. 30, infra). On the contrary we believe that for reasons developed below, our action is entirely consistent with the "comprehensive Federal program * * *" (sec. 2, Cigarette Labeling Act), since it will promote the "extensive education campaigns," which Congress noted and relied upon in reaching the policy judgment embodied in the act (see par. 21, supra).

23. As stated, our ruling accords with and is tailored to the legislative policy embodied in the Labeling Act. In the first place, the ruling does not require a health warning in or adjacent to cigarette advertising—a matter coming within section 5(b) of the "preemption" portion of the act. Rather it leaves to the good faith, reasonable judgment of the licensee—upon the facts of his situation—the matters of the type of programing, the nature of the time to be afforded for the opposing viewpoint, and the amount of time to be allocated on a regular basis.

24. Second, our ruling does not preclude or curtail presentation by stations of cigarette advertising which they choose to carry (see also, pars. 48–54, infra). We rejected Mr. Banzhaf's claim that the time afforded for the opposing viewpoint should "roughly approximate" that devoted to cigarette advertising, not only because the Fairness Doctrine does not require "equal time" but also in the belief that this would be inconsistent with the congressional direction in this field provided in the Labeling Act. For, we recognized that the "practical result of any roughly one-to-one correlation would probably be either the elimination or substantial curtailment of broadcast cigarette advertising." We stressed that our action would be tailored so as to carry out the congressional purpose, and we shall of course adher to that guideline in implementation of the ruling.

25. Most important, we think that our ruling implements the smoking education campaigns referred to as a basis for congressional action in the Labeling Act (supra, par. 21). Congress itself has affirmatively promoted such educational efforts by appropriating $2 million for use by HEW in this direction. Public Law 89–156, Title II, Public Health Services, Chronic Diseases and Health of the Aged. As a consequence, HEW has established the National Clearinghouse for Smoking and Health. Its purposes are to collect, organize, and disseminate information on smoking and health, to provide encouragement and support for State and local educational activities, and to conduct research into the behavioral nature of the smoking habit. The Public Health Service and others have acted to inform the public on smoking and health directly by sending lecturers across the United States to address local groups, distributing printed information to the public, and furnishing the broadcast media with spot announcements on smoking

and health. The Public Health Service reported in January 1967 that it has distributed spot announcements to over 900 radio stations and is at present approaching individual television stations to obtain further coverage for its messages. The American Cancer Society reports that it has received favorable responses from all the networks and many independent stations concerning the promotion of its spots on smoking and health.

26. The Public Health Service has also worked through local organizations to warn the public of the health hazards of smoking. It is in direct contact with a number of regional, State, or local interagency advisory committees on smoking and health, which have worked to stimulate community interest in 35 States. As a result of this stimulus and others, the medical societies of at least 18 States have made statements linking cigarette smoking with lung cancer and other health hazards and, in some cases, have undertaken organized activity to publicize the relationship of smoking and health. For example, the California Medical Association has recently undertaken a program urging individual doctors to acquaint their patients with the health hazards of smoking. Local and statewide civic groups have also started public education efforts.

27. The Public Health Service and the U.S. Children's Bureau have directed a special education campaign aimed at school-age children. To date, school programs on smoking and health reach about 70 percent of the schoolchildren in the United States. Forty States have developed materials on smoking and health for children or plan to do so, and 27 States have either held conferences on smoking and health or intend to do so. In September 1966, a nationwide program to discourage smoking among seventh and eighth graders was launched by the National Congress of Parents and Teachers. This plan is being supported by the Public Health Service and is operating in 21 States.

28. The affected industries have renewed their efforts at self-regulation since the enactment of the Labeling Act. While there has been no change in the Cigarette Advertising Code of the cigarette manufacturers, they have sought and obtained FTC approval to make factual advertising statements about tar and nicotine content. On March 25, 1966, the FTC determined that a factual statement of the tar and nicotine content of the mainstream smoke from a cigarette would not be in violation of that Commission's 1955 cigarette advertising guides or of any provision of the law administered by the Commission. However, no collateral statements (other than the factual statement of tar and nicotine content of cigarettes) suggesting the reduction or elimination of health hazards in smoking are allowed, and all these factual statements must be based upon a standardized testing technique.[12]

29. In October 1966 the code authority for the NAB issued the Cigarette Advertising Guidelines which they had announced during the 1965 Senate hearings would be forthcoming.[13] The main objectives of the guidelines are to restrict advertising appeals to youth and statements concerning the health benefits of smoking. In January 1967, the Code Authority announced in a news release a slight change in the Television Code to strengthen its position as to appeals to youth. The Television Code, sec. IX, General Advertising Standards, par. 7, now reads:

> "The advertising of cigarettes shall not state or imply claims regarding health and shall not be presented in such a manner as to indicate to youth that the use of cigarettes contributes to individual achievement, personal acceptance or is a habit worthy of imitation."

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[12] New York Times, Mar. 29, 1966, 53:6.

[13] Text of the "New Cigarette Advertising Guidelines":

Athletic activity.—A person who is or has been a prominent athlete shall not be used in a cigarette commercial. Cigarette commercials shall not depict persons participating in, or appearing to be participants in, sports or athletic activity requiring physical exertion

Tar and nicotine statements.—Factual statements of tar and nicotine content of cigarettes are subject to proper documentation. No statements or claims regarding benefits to health and well-being are acceptable.

Filters.—Cigarette advertising shall not state that because of the presence of the filter or its construction the cigarette is beneficial to the health or well-being of the smoker

Uniformed individuals.—Individuals in certain types of uniforms have a special appeal to youth. Therefore, such uniformed individuals as commercial pilots, firemen, the military and police officers shall not be used in cigarette advertising.

Premiums.—Cigarette advertising shall not include references to offers of premiums which are primarily designed for youth.

Portrayal of youth.—Children or youth shall not appear in cigarette commercials in any manner, even though they are merely bystanders or part of the background. Cigarette advertising shall use individuals who both are and appear to be adults and who are shown in settings associated with adults.

30. Considering these affirmative efforts by Congress, Federal, State, and local public and private agencies, and the affected industries to educate the public as to the smoking health hazard and, particularly, to discourage youth from forming the habit, we are not persuaded by petitioners' argument that HEW and FTC have primary jurisdiction in this matter and that this Commission alone is precluded from following its traditional method of assuring that the public is adequately informed as to both sides of this controversial issue of public importance. Significantly, Congress was at pains to spell out what was preempted (sec. 5 (a) and (b)) and specifically stated that except as is otherwise provided in subsections (a) and (b), "nothing in this Act shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes * * *." Similarly, we believe that there was no preclusion of FCC action, so long as such action is consonant with the "comprehensive Federal program * * *" (sec. 2). As set forth in the prior discussion, we think that our responsibilities and policies under the Communications Act and our ruling herein are entirely consonant with the congressional objectives in this area. Indeed, it is our belief that the Commission could not properly follow any other course in this matter. For this Commission, like other administrative agencies, was "not commissioned to effectuate the policies" of the Communications Act "so single-mindedly that it may wholly ignore other and equally important congressional objectives. Frequently the entire scope of congressional purpose calls for careful accommodation of one statutory scheme to another and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *Southern S.S. Co.* v. *Labor Board*, 316 U.S. 31, 47.

31. One further contention of petitioners on this aspect warrants discussion. It is asserted that we are precluded from issuing our ruling because the Commission declined to make any recommendation to Congress in connection with the Labeling Act legislation on the ground that it had not yet studied the matter, and because the Commission still has not conducted any study or proceeding on the smoking hazard issue. The circumstances giving rise to the contention are as follows: Prior to the issuance of the Advisory Committee Report, the Commission stated in a "by direction" letter, concerning possible rulemaking with regard to advertising, promoting or encouraging cigarette smoking among young people, that action would be inappropriate before the Advisory Committee's report was available and (letter to Senator Magnuson, FCC 63-1033):

> "The Commission's concern is limited, of course, to advertising in the broadcast field. Other agencies may have authority to take comprehensive and effective action, if necessary or appropriate. It is, we think, obviously more desirable to treat such an important matter, if possible, on a broad, across-the-board basis rather than in piecemeal fashion."

When the Advisory Committee's Report was issued and the FTC had announced its rulemaking proceeding concerning cigarette labeling and advertising (see app. A), the Commission on January 1964 initiated plans to coordinate its efforts with the comprehensive regulation which the FTC had proposed and with activities of other interested agencies. FCC letter to FTC Chairman Dixon, FCC 64-29 (Jan. 15, 1964). On February 7, 1964, in "by direction" letters to Congressman Leonard Farbstein (FCC 64-100) and his constituent, Mr. Sidney Katz (FCC 64-99), then Chairman Henry answered a request to institute rulemaking proceedings to ban cigarette advertising by reiterating the policy statement quoted above and noting that the Commission would await the results of the FTC rulemaking proceeding before acting in this area. When asked to comment on S. 2429, 88th Congress, and S. 547 and S. 559, 89th Congress, the Commission reiterated its policy that it favored "across-the-board" treatment of the matter of regulating cigarette advertising and that since the FTC had undertaken a comprehensive remedial regulatory plan, the FCC had not held proceedings or undertaken studies to evaluate the various factors and considerations in this area. Comments on S. 2429, 88th Congress, FCC 64-730; Comments on S. 559 and S. 547, FCC 65-96.

32. We do not believe that these facts preclude us, as a matter of law or of policy, from issuing our ruling in the present circumstances. First, as shown above, circumstances have changed. The FTC, while proceeding in other respects consistent with the 1965 act, is not, of course, undertaking its comprehensive regulatory plan to require a health hazard announcement to accompany each cigarette commercial. Second, as also shown above, our ruling is consistent with and particularly suited to promoting the "across-the-board" objective of Congress to treat this matter through extensive campaigns to educate the public as to the

hazards of smoking. Third, we did not defer to the FTC as a matter of legal authority but rather of policy. The Commission is not precluded from changing its policies so long as any new policy adopted is, like our ruling, reasonable in the circumstances. See supra, par. 14 and footnote 8. And, finally, studies by this Commission are clearly not required to evaluate the various factors and public interest considerations posed by the issue of smoking and health, particularly since Congress declared and pursued its policy of promoting smoking education campaigns. In this connection, see also the discussion below (pars. 33–34 and 60–62).

33. On July 12, 1967, HEW submitted its report to Congress, which includes the Surgeon General's "Report on Current Information on the Health Consequences of Smoking." Upon the basis of more than 2000 research studies that have been completed and reported in the biomedical literature throughout the world in the intervening 3½ years since the Advisory Committee's report, the Surgeon General states that there is no evidence calling into question the conclusions of the 1964 report and, on the contrary, the research studies published since 1964 have strengthened those conclusions. The Surgeon General summarizes the present state of knowledge of these health consequences, in the judgment of the Public Health Service, as follows (Surgeon General's Report on the Health Consequences of Smoking— 1967, p. 2):

> "1. Cigarette smokers have substantially higher death rates and disability than their nonsmoking counterparts in the population. This means that cigarette smokers tend to die at earlier ages and experience more days of disability than comparable nonsmokers.
>
> "2. A substantial portion of earlier deaths and excess disability would not have occurred if those affected had never smoked.
>
> "3. If it were not for cigarette smoking, practically none of the earlier deaths from lung cancer would have occurred; nor a substantial portion of the earlier deaths from chronic bronchopulmonary diseases (commonly diagnosed as chronic bronchitis or pulmonary emphysema or both); nor a portion of the earlier deaths of cardiovascular origin. Excess disability from chronic pulmonary and cardiovascular diseases would also be less.
>
> "4. Cessation or appreciable reduction of cigarette smoking could delay or avert a substantial portion of deaths which occur from lung cancer, a substantial portion of the earlier deaths and excess disability from chronic bronchopulmonary diseases, and a portion of the earlier deaths and excess disability of cardiovascular origin."

In releasing the report, HEW Secretary John W. Gardner stated (HEW press release for July 13, 1967):

> "The relationship between smoking and health has obvious and serious implications for individuals who now smoke and for young people who may be thinking of starting to smoke. From the standpoint of public policy and social concern, this association constitutes one of the most critical health problems today.
>
> "It is perfectly obvious that if we are going to reduce the unnecessary death and illness now caused by cigarette smoking, three things must take place: There must be a reduction in the number of people who smoke, a number which now constitutes 42 percent of our population. We must do everything we can to encourage young people not to start smoking: at present, half of our young people are cigarette smokers by the time they are 18. And finally, we must work toward the development of a less hazardous cigarette and, concurrently, help develop a climate of opinion which will encourage acceptance if such a cigarette is developed."

34. The June 30, 1967, report of the FTC to Congress pursuant to the Labeling Act stressed the importance of educating teenagers before they start smoking since the use of cigarettes is so strongly habit forming (Report, p. 8). The FTC report states (p. 13) that whether intentional or fortuitous, teenagers appear to be a prime target for televised cigarette advertising and that the "average American teenager sees more cigarette commercials on network television than does the average American" (p. 25): " '87.9 percent of teenage boys' and '89.5 percent of teenage girls hear radio on the average day' " (p. 13). The report comments (p. 24):

> "In making a decision on whether to start smoking, youngsters especially have a right to know that once they start, they may never be able to stop. A viewer of cigarette commercials and advertisements would never hear of this aspect of smoking."

The concluding paragraph of the FTC report states (p. 29):

> "Cigarette commercials continue to appeal to youth and continue to blot out any consciousness of the health hazards. Cigarette advertisements continue to appear on programs watched and heard repeatedly by million [sic] of teenagers. Today, teenagers are constantly exposed to an endless barrage of subtle messages that cigarette smoking increases popularity, makes one more masculine or attractive to the opposite sex, enhances one's social poise, etc. To allow the American people, and especially teenagers, the opportunity to make an informed and deliberate choice of whether or not to start smoking, they must be freed from constant exposure to such one-sided blandishments and told the whole story."

35. This Commission agrees. Considering all of the foregoing, we believe that our ruling is within our statutory authority and not precluded by the congressional policy embodied in the Labeling Act—that rather it implements that policy. We also think it is imperative in the public interest that we exercise our discretion now without delay for further studies.

D. The Argument as to Blanket Ruling

36. Petitioners further contend that even if the Fairness Doctrine properly applies to cigarette advertising, the Commission has invalidly made a blanket ruling that any cigarette advertisement per se presents a controversial issue of public importance, whereas no controversial issue of public importance can be presented where a lawful business is advertising a lawful product and, in the absence of any health claim in the commercial or affirmative discussion of the health issue, there is no viewpoint to oppose. But this argument misconceives the nature of the controversial issue. Mr. Banzhaf's complaint was that the cigarette commercials over WCBS–TV presented the point of view that smoking is "socially acceptable and desirable, manly, and a necessary part of a rich full life." Our ruling points out that:

> The advertisements in question clearly promote the use of the particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. But we believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health.

Petitioners point to no example of a cigarette commercial that does not portray the use of the particular cigarette as attractive and enjoyable as well as encourage people to smoke, and we find it difficult to conceive of one.

37. Further, we are unable to accept the argument that in the absence of any express health claim in the commercial or affirmative discussion of the health issue, there is no viewpoint to oppose. The June 30, 1967 FTC report amply documents its conclusion that cigarette commercials today still contain the two principal elements it found to exist in 1964—a portrayal of the desirability of smoking and assurances of the relative safety of smoking (pp. 15–16). The FTC states that desirability is portrayed in terms of the satisfactions engendered by smoking and by associating smoking with attractive people and enjoyable events and experiences, and that by so doing the impression is conveyed that smoking carries relatively little risk (ibid).[14] The report supports this conclusion, more than adequately in our view, by a comprehensive review and analysis of the advertising submitted by a large number of cigarette companies and monitored by the Commission (FTC report, pp. 15–23). Numerous examples are given of the "satisfaction" theme (pp. 15–16)[15]; the "associative" theme (pp. 16–17)[16]; "appeals di-

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[14] The FTC report states (p.17) that an estimated 58 percent of the public feel that current cigarette advertising leaves the impression that smoking is a healthy thing to do.

[15] The report states that portrayal of satisfaction, particularly oral satisfaction, continues to be an important element of cigarette advertising. Taste or flavor of cigarettes is most often described in terms of "mildness" (Tareyton filters, Montclair menthols, Camel regulars, Carlton filters, Lucky Strike filters, Pall Mall filters, and Chesterfield kings); "smoothness" (Tareyton filters, Pall Mall kings, Newport menthols, and Lucky Strike menthols); "real", "true", "rich" or "great" tobacco flavor or taste (Raleigh filters, Newport menthols, Viceroy filters, Salem menthols, and Philip Morris filters). Invariably, the taste of menthol cigarettes is either cool, fresh, and/or refreshing ("coolest flavor." Lucky Strike green; "forest-fresh taste * * * cooler tasting," Pall Mall; "as fresh as you like it." Philip Morris; "most refreshing coolness," Kool; "fresher," Newport; "fresh menthol flavor," Camel; "Springtime fresh" and "refreshes your taste," Salem; "a full, fresh taste," Chesterfield). The FTC comments (p. 16): "The impression forms that

rected to vanity" (pp. 17–18)[17]; subtle methods of "assuaging anxiety" about any health hazard (pp. 19–21)[18]; the "loyalty" theme (p. 15–16)[19]; and the "bonus" theme, which includes promoting longer cigarettes at popular prices as well as coupon promotions (pp. 22–23).[20] We note also the FTC's comment[21] (Report, p. 18):

> "There is in all the array of positive images an element of escape from actuality. Some cigarette advertising transcends mere image association and projects its own separate and unique world. Examples include 'Salem Country,' a land in which romantic couples romp and preen through shifting sylvan settings; the 'Night People,' whose post evening encounters can lead to smoking Parliament filters; and 'Marlboro Country,' where there daily unfolds the simple male heroic virtues of the 'Old West.' Worry over health has been vanished from these Shangri-las."

38. It comes down, we think, to a simple controversial issue: the cigarette commercials are conveying any number of reasons why it appears desirable to smoke but understandably do not set forth the reasons why it is not desirable to commence or continue smoking. It is the affirmative presentation of smoking as a desirable habit which constitutes the viewpoint others desire to oppose. We see no inequity in the circumstance that cigarette advertisers are precluded by various codes from making affirmative health claims in the advertising programing.[22] The Fairness Doctrine affords an avenue for presenting in regular pro-

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'menthol taste' relieves smoking irritation, albeit 'smoking irritation' is never expressly stated."

[16] The report states (p. 16) that associating cigarette smoking with persons, activities, places and things likely to be admired, respected or emulated, i.e., endowing cigarette smoking with a positive associative image, continues unabated in current advertising. For example, outdoor activity of an athletic nature such as sailboating "suggests that the smoking depicted in the foreground, if not conducive to rousingly good health, is certainly not incompatible with it" (FTC Rept. p. 17). In addition, social events abound in which the viewer is brought into the "wholesome, jolly company of cigarette smokers" (ibid.). E.g., "singing aboard the old paddle wheel steamer (with Pall Mall kings); * * * picnicking (with Camel filters); and coffee klatching (with Winston filters)."

[17] The report gives as examples of appeals to vanity (pp. 17–18):

"Be discriminating: 'Particular about taste * * * I'm particular' (Pall Mall kings); 'They like the style of this cigarette' (Parliament filters). Be exclusive: * * * 'exclusive plastic pack' (Philip Morris filters and menthols); 'There's no other cigarette' (Lark filters). * * * 'the smokers who know' (Camel filters). Be a success: 'tastes rich, good, rewarding' (Viceroy filters); 'This man was born rich' (Camel filters). Be a social success: 'Come up to the taste of Kool' (Kool menthols); 'find something better' (Old Gold filters). Be independent: 'break away from the crowd * * * the cigarette for independent people' (Old Gold filters); 'stands out from the crowd' (Salem menthols). Associate with important people: 'Chairmen are never bored with them' (Benson & Hedges filters); the charter boat skipper who has 'got a good ship, a good crew and a good breeze' (Camel regulars)."

[18] The report states that as a result of extensive promotion during 1957–59, the belief appears to be widely held that filter cigarettes are less hazardous to health than regular cigarettes (p. 19). Comparatively overt attempts to allay health anxieties have been made by manufacturers of charcoal filter cigarettes by pictoral details of filters creating the impression that they prevent passage of tars and gaseous effusions (Tareyton, Lucky Strike, Tennyson, Cold Harbor, King Sano, Tempo, Duke, and Lark). Report, p. 20. Other "very low key" advertising enhances the impression of relative safety by adding suitable adjectives to the word "filter": "recessed filters" (Benson & Hedges and Parliaments), "white filters" (Yorks), "menthol filters" (Springs) and "filters with coconut shell charcoal" (Philip Morris). Ibid.

[19] See report (p. 22). Underlying these "loyalty" theme examples is, of course, the promise that the particular cigarette gives great satisfaction (e.g., "Change to Winston and change for good").

[20] The report states (p. 23): "The purchase of Raleigh cigarettes has long been rewarded with coupons redeemable for goods. Today, Belair menthols, Old Gold filters, York filters, Spring menthols, and Domino filters also carry coupons redeemable for goods. Menthol and filter Chesterfields and Philip Morrises carry coupons redeemable for more cigarettes." The report also gives examples of 100-mm. cigarette advertising (Benson & Hedges, Lucky Strike, Winston, and Pall Mall), and states (ibid.): "With a definite relationship having been established between amount of cigarette smoking and incidence of lung cancer and other diseases, a fitting motto for the 100-mm. cigarette campaign might be 'extra health hazard at no extra cost' " (footnotes omitted).

[21] While we have, as petitioners points out, distinguished between explicit and implicit raising of controversial issues in broadcast material where health was not involved (e.g., atheists and agnostics versus the broadcast of religious services), we do not regard those cases as pertinent here in view of the nature of the controversial issue.

[22] We recognize also (as set forth in par. 29 above and app. A) that the tobacco and broadcasting industries have endeavored in their codes to prescribe cigarette advertising standards aimed at reducing the appeal to youth. But the conclusions of the FTC report (par. 37 above) and the statistics and oher matters set forth in pars. 33–34 and 60–61 would seem to indicate that the standards are either not being followed or are not effective in discouraging new teenage smoking. Moreover, it occurs to us that teenagers on the verge of adulthood may be more influenced by a portrayal of the attractiveness and desirability of adult conduct than by one connoting childhood or youthful behavior. A-

gram time the viewpoint of responsible spokesmen for the cigarette advertisers in rebuttal to any health hazard claims made in opposition to cigarette commercials. And, finally, we fail to see any merit in the argument that no controversial issue of public importance can be presented where a lawful business is advertising a lawful product.[23] While an unlawful business advertising an unlawful product over the air waves might well raise some controversial issue of public importance, we do not regard that element as essential. The claim that no controversial issue of public importance is presented by cigarette advertising is neither realistic nor persuasive.

E. The Contention as to a Substitution of "Commission Fit" for Licensee Judgment

39. Petitioners also argue that the ruling, by requiring that a significant amount of time be allocated each week to cover the viewpoint of the health hazard posed by cigarette smoking and by suggesting that a licensee might, among other things, present a number of public service announcements of the American Cancer Society or HEW, will cause a debasement of the Fairness Doctrine generally and a substitution of Commission fiat for licensee judgment. CBS in particular, noting that commercials are by nature repetitive and continuous, urges that treating all cigarette commercials as presentations of one side of a controversial issue will raise a question as to whether any one program or program series—however enlightening and informative as to all points of view—can constitute an adequate opportunity for response. Asserting that inevitably the licensee's only recourse will be a series of health hazard spot announcements, CBS states that broadcast treatment of cigarette health issues should not be reduced to a contest of opposing spot announcements, endlessly repeated long after any member of the public has understood and acted if he wished. It further asserts that such an approach makes no sense in the area of news and public affairs programming and that the net result of our ruling will be to convert licensee responsibility in such areas to presentations very similar to product advertising.

40. Like CBS, we recognize that the presentation of one side of a controversial issue of public importance in advertising programing poses a situation which differs from that usually pertaining to the presentation of controversial issues in news and public affairs programing. In the latter instance, the issue may arise only once, or a few times, or several times in a relatively short time period because of factors such as timeliness. But as CBS points out, commercials are by nature "repetitive and continuous;" the complaint here went to advertisements broadcast daily for a total of 5–10 minutes each broadcast day. We think that the frequency of the presentation of one side of the controversy is a factor appropriately to be considered in our administration of the Fairness Doctrine under the act's basic policy of the "standard of fairness" (supra, par. 10). For, while the Fairness Doctrine does not contemplate "equal time", if the presentation of one side of the issue is on a regular continual basis, fairness and the right of the public adequately to be informed compels the conclusion that there must be some regularity in the presentation of the other side of the issue. This consideration is not limited to advertising. For example, if one side of a controversial issue of public importance were regularly presented in a daily network program, compliance with the Fairness Doctrine would require something more than an occasional presentation of the other side of the issue during the course of the year.

41. Moreover, here the controversial issue posed is one of health hazard and the repeated and continuous broadcasts of the advertisement may be a contributing factor to the adoption of a habit which may lead to untimely death. In the circumstances, we think that the licensee is under a higher duty

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the FTC report notes (p. 8): "They tend to view cigarette smoking as a visible mark of maturity, a passport to adulthood. Because the health dangers of cigarette smoking are not brought home to them in an effective and meaningful way, many teenagers take up the smoking habit."

[23] NBC, in urging that licensees could reasonably and in good faith conclude that no controversial issue of public importance is presented by cigarette advertising, notes that the FTC advertising guides permit presentation of enjoyment since they state:

"Nothing contained in these guides is intended to prohibit the use of any representation, claim, or illustration relating solely to taste, flavor, aroma, or enjoyment."

Our ruling is consistent. It, too, does not in any way prohibit the presentation of enjoyment in cigarette commercials. It merely requires the licensee adequately to inform the public of the potential hazard, as found by Congress and Government reports, entailed in commencing or continuing this habit.

than in the case of other controversial issues to ameliorate the possible harmful effect of the broadcasts by sufficiently informing the public as to the hazard. As indicated in our ruling, and in light of the considerations set forth in paragraphs 33–34 and 60–61, we believe that the frequency of the presentation of the one side and the nature of the potential hazard to the public here necessitates presentation of the opposing viewpoint on a regula basis (e.g., each week).

42. We note that, contrary to CBS' position, the repetition of short communications has apparently been regarded by the broadcasting and advertising industries and other interested organizations as an effective means of reaching the listener or viewer. But in any event, there is nothing in our ruling which compels a licensee to treat the issue through presentation of spot messages. In our ruling we have stated: "A station might, for example, reasonably determine that the above noted responsibility would be discharged by presenting each week, in addition to appropriate news reports or other programing dealing with the subject, a number of the public service announcements of the Cancer Society or HEW in this field." This example does not on its face indicate that the opposing viewpoint should be presented solely or principally through spot announcements, and it was not intended as a "Commission fiat" as to the manner of compliance with the Fairness Doctrine.[24] We stressed in the ruling, and here strongly emphasize again, that "in this, as in other areas under the fairness doctrine, the type of programing and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee, upon the particular facts of his situation." (See *Cullman Broadcasting Co.*, FCC 63–849 (Sept. 18, 1963).)

43. In other words, we agree with CBS that the "question of whether a licensee is responsibly complying with the fairness doctrine cannot be resolved by per se guidelines, ratios or other rigid rules." A licensee which has just presented a very lengthy program on this issue obviously might reach a different judgment as to what his obligation was in this respect for the next week or so. But as stated, the carriage of the normally substantial amount of weekly commercials raises a concomitant responsibility to be met over relatively the same period of time. Further, in these circumstances, while a 1-to-1 ratio is ruled out by considerations of the legislative history of the Cigarette Labeling Act, the licensee's obligation is just as clearly not met by an occasional program a few times a year or by some appropriate announcements once or twice a week. We stress again that what is called for is the allocation of a significant amount of time each week, absent unusual circumstances, to the presentation of the opposing viewpoint in the case of cigarette commercials. We do not see why licensees, proceeding in good faith, should experience any real difficulty in reasonably discharging that responsibility nor why, in view of the nature of the issue—the public's health, they would seek to fulfill that obligation in a niggardly fashion, designed to raise problems or complaints. In sum, we have usurped licensee judgment as to the type of programing or the amount or nature of the time to be afforded, but rather have left these matters to the good faith and reasonable judgment of the license based on his evaluation of the facts of his particular case.[25]

F. Effect of the Ruling on the Advertising of Products Other Than Cigarettes

44. Petitioners further assert that the ruling cannot logically be limited to cigarette advertising alone, and hence will have broadscale effect on broadcast

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[24] As set forth in par. 25, prior to our ruling the American Cancer Society received favorable responses from all the networks and many independent stations concerning the promotion of its spots on smoking and health. Moreover, the Public Health Service reported in January 1967 that it had distributed spot announcements to over 900 radio stations and was then approaching individual television stations to obtain further coverage for its messages. The example we gave merely took cognizance of the fact that such material is available to licensees if, in their judgment, its use would facilitate compliance with their obligations under the Fairness Doctrine. We thought it desirable to note its availability, particularly for the small station with limited resources, which might have difficulty in preparing its own program material dealing with this issue.

[25] It is also argued that the licensees may simply substitute cigarette health messages for other public service announcements now being carried. The duty of a station carrying cigarette commercials to inform the public as to the hazards of smoking stems directly from the fact that its facilities have been used to promote the use of this product found by the Congress and Governmental reports to be so potentially hazardous to health; its responsibility is therefore the same as in the case of any other fairness situation. It thus has a duty to present the other side, over and beyond what a licensee decides in other respects to present in order to serve the best interests of his area. We therefore do not believe that a licensee would or should adopt a pattern of operation which he does not adjudge to serve fully the needs and interests of his public.

operations and the presentation of advertising by radio generally. They state that very little in society is uncontroversial and, since many products are subject to one form of controversy or other, an appeal to the Commission by a vocal minority is all that is needed to classify a subject as controversial and of public importance. They further claim that if governmental and private reports on the possible hazard of a product are a sufficient basis for the cigarette ruling, the ruling would apply to a host of other products, such as: automobiles, food with high cholesterol count, alcoholic beverages, fluoride in toothpaste, pesticide residue in food, aspirin, detergents, candy, gum, soft drinks, girdles, and even common table salt. We do not find this "parade of horribles" argument impressive.

45. We stressed in our ruling that it was "limited to this product—cigarettes," stating further in this connection:

> "Governmental and private reports (e.g., the 1964 Report of the Surgeon General's Committee) and congressional action (e.g., the Federal Cigarette Labeling and Advertising Act of 1965), assert that the normal use of this product can be a hazard to the health of millions of persons. The advertisements in question clearly promote the use of a particular product as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health."

Our ruling does not state, and was in no way meant to imply, that any appeal to the Commission by a vocal minority will suffice to classify advertising of a product as controversial and of public importance. Rather, the key factors here were twofold: (1) Governmental and private reports and congressional action with respect to cigarettes, and (2) their assertion in common that "normal use of this product can be a hazard to the health of millions of persons."

46. The products to which petitioners refer do not present a comparable situation. The example most uniformly cited is auto safety. But the governmental and private reports on this matter do not urge the public to refrain from normal use of automobiles in the interest of public safety; rather, the emphasis is on increased safety features in the manufacture of automobiles and increased care by drivers. Moreover, we know of no widespread contention by governmental or private authorities that the normal use of any of the other products cited by petitioners poses a serious health hazard to millions of persons who otherwise enjoy good health.

47. We adhere to our view that cigarette advertising presents a unique situation. As to whether there are other comparable products whose normal use has been found by congressional and other Government action to pose such a serious threat to general public health that advertising promoting such use would raise a substantial controversial issue of public importance, bringing into play the Fairness Doctrine, we can only state that we do not now know of such an advertised product, and that we do not find such circumstances present in petitioners' contentions about the advertised products upon which they rely. Thus, to say the least, instances of extension of the ruling to other products upon consideration of future complaints would be rare, if indeed they ever occurred. In short, our ruling applies only to cigarette advertising, and imposes no Fairness Doctrine obligation upon petitioners with respect to other product advertising.

G. Claims as to Adverse Financial Impact Upon the Broadcasting and Tobacco Industries

48. Petitioners further assert that the ruling will seriously undermine the commercial structure of broadcasting, cause a substantial reduction in or the elimination of cigarette advertising to the severe detriment of these stations and their ability to serve the public interest, require a major change in the operation of broadcast stations by necessitating the acquisition and presentation of new program material and the keeping of additional records to document compliance with the Fairness Doctrine, limit the ability of cigarette manufacturers and advertisers to obtain advertising time on broadcast media, and adversely affect the sale of cigarettes, all of which will impose an unlawful burden on interstate commerce and conflict with the congressional intent underlying the Cigarette Labeling Act.

49. The Contention that our ruling will seriously undermine the commercial structure of broadcasting is pressed principally by the Association of National Advertisers, Inc., an association composed of leading manufacturers and service concerns that use advertising, seven of whom market cigarettes. Their concern appears to rest principally on the fear that the ruling will be extended to many other products which are subject to controversy in one form or another. However, as set forth in the proceeding section of this opinion (supra. pars. 44–47), we believe that this fear is groundless. The only real question here is the impact of our ruling on cigarette advertising on broadcast media and sale of cigarettes.

50. We have no reason to think, and petitioners have proffered nothing concrete in support of their claim, that the ruling will cause any substantial reduction in or the elimination of cigarette advertising on broadcast media or adversely affect the ability of broadcast licensees to serve the public interest. As we have stated, we shall tailor the requirement that a station which carries cigarette commercials provide a significant amount of time for the other viewpoint, so as not to preclude or curtail presentation by stations of cigarette advertising that they choose to carry.

51. Nor do we think it realistic to assume that the requirement will cause cigarette advertisers and manufacturers to turn to other advertising media. The attractiveness of the broadcast media, particularly television, as a means of effectively reaching the vast majority of the American public with advertising, as well as other, messages is without equal.[26] We find it difficult to believe that cigarette manufacturers and advertisers would abandon or make substantially less use of a medium of this nature merely because our ruling may require an increase in the programing on the smoking-health issue which broadcast licensees are already presenting in the exercise of their judgment under the Fairness Doctrine and pursuant to their obligation to operate in the public interest.[27] Rather, particularly in light of the consideration set forth above (par. 50), we are not persuaded that the effect of our ruling on the amount of cigarette advertising presented on broadcast media will be significant.[28]

52. We also fail to see how the ruling would require any major change in the operation of broadcast stations. In complying generally with the Fairness Doctrine in their overall broadcast operations, broadcast licensees are required to afford reasonable opportunity for the presentation of the other side of controversial issues of public importance when they choose to present one side, and to document their efforts upon complaint. Our rules require the keeping of program logs (see, e.g., §§ 73.111 and 73.112; see also sec. 303(j) of the Communications Act), and we are sure that licensees in the conduct of their business affairs presently keep full accounts as the advertising matters. Thus, we think that this particular controversial issue can be handled by licensees in a manner similar to their established practices in this area.[29]

53. There is nothing in our ruling which would preclude or curtail the ability of cigarette manufacturers to obtain advertising time on broadcast media. Licensees remain free to present such cigarette advertising as they choose. Conceivably, some licensees, in view of the mounting public concern as to the potential health hazard of cigarette smoking, might voluntarily decide to curtail or refrain from cigarette advertising broadcasts in the public interest. But that is appropriately a matter for licensee judgment as to how to conduct broadcast operations to serve the public interest, and not a requirement of our ruling. Under section 3(h) of the Communications Act, broadcasters are not common carriers and they cannot be compelled to present advertising which they do not wish to present. Moreover, cigarette manufacturers clearly have no right to insist that a broadcast licensee, who is willing to present cigarette advertising, present it in a manner that does not comport with his statutory obligation to operate in the

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[26] The FTC report states (p. 10) that more of the money spent for cigarette advertising in the year 1966 was spent on television advertising than on all other media combined (66.6 percent in 1966). The report also states (ibid.) that "in 1966, cigarette advertising accounted for approximately 7.2 percent of total television advertising expenditures."

[27] In this connection, we note that many stations and the television networks (e.g. CBS's efforts as detailed in this case) have given coverage to the smoking-health issue and that they also continue to air numerous cigarette commercials.

[28] Certainly, there is no reason to anticipate that any such minimal impact could have any substantial adverse effect upon the ability of broadcast stations to serve the public interest. Cf., also FTC report of June 30, 1967, at p. 10.

[29] We note that WCBS–TV apparently had no difficulty in ascertaining what programs that station had broadcast on this issue in response to Mr. Banzhaf's complaint.

public interest. Nor does a cigarette manufacturer have any legal right to complain that the use of radio to inform the public as to the potential health hazard of cigarette smoking may lead to some decline in cigarette sales or slow down the present trend of rising cigarette sales (FTC Report, pp. 4–7). Indeed, that is the very purpose of the educational efforts which Congress has directed HEW to undertake.

54. In sum, we see no merit to the contention that our ruling will lead to severe curtailment or possible elimination of cigarette advertising, or have a serious economic impact on the broadcasting industry, contrary to the intent of Congress in the Labeling Act. The ruling properly effectuates the responsibilities of broadcast licensees and this Commission under the Communications Act. There is no unlawful burden on interstate commerce nor conflict with congressional intent in, or the provisions of, the Labeling Act.

H. The Procedural Contention

55. Finally, petitioners urge that the ruling is procedurally invalid because it effects an important and unprecedented change of policy which will affect all licensees and it was adopted without affording WCBS–TV, broadcast licensees generally and other interested persons an opportunity to be heard. CBS, in particular, asserts that this was a departure from the Commission's procedure of advising a licensee of a fairness complaint and requesting its comments (Fairness Primer, FCC public notice of July 1, 1964, 29 F.R. 10415, 10416, cited with approval in the *Red Lion* case, supra, par. 8.) CBS requests that the contents of its letter be treated as its comments on Mr. Banzhaf's complaint, and that we reconsider the ruling on the basis of such comments.[30]

56. We have granted this request of CBS and have carefully considered its comments in determining that reconsideration is not warranted by the arguments contained in its letter. Our omission to seek the comments of WCBS–TV initially was occasioned by our view that Mr. Banzhaf's complaint, which enclosed his request to WCBS–TV and the reply of that station, adequately set forth the facts of the case and the positions of the parties. Since WCBS–TV has a continuing policy of presenting the smoking-health hazard controversy and asserted only its position that the Fairness Doctrine does not apply to advertising, our letter of June 2, 1967, to that station had two purposes: One, to appraise WCBS–TV of the Commission's view that the Fairness Doctrine does apply to cigarette advertising, as a matter of law and policy, and second, to bring to the station's attention our view that a sufficient amount of time must be allocated, usually each week, for the opposing viewpoint so that WCBS–TV could appropriately exercise its licensee judgment in connection with its continuing program. As stated in paragraph 6, supra, the effectiveness of the June 2d ruling will not be the basis for action against any licensee, including WCBS–TV, until publication of this memorandum opinion and order in the Federal Register. In the circumstances, and particularly the fact that we have fully considered the comments submitted by CBS on reconsideration, we conclude that WCBS–TV has not been prejudiced by the procedures followed in this matter.

57. It is true that other interested persons were not accorded an opportunity to be heard prior to the ruling. It is not the Commission's normal procedure or usual practice to accord the public in general an opportunity to be heard with respect to fairness complaints against a particular licensee, even though the complaint may involve an important issue of policy (see, e.g., *Cullman Broadcasting Company*, FCC 63–849; *Times Mirror Broadcasting Co.*, 24 R.R. 404 and 407 (1962)). We thus followed long established procedures in this respect. In any event, we have now heard at length from the three television networks, numerous individual broadcast licensees, the NAB, and representatives of the advertising and tobacco industries. We have given extensive consideration to the arguments raised in support of their positions, and have found them without merit. Moreover, the ruling is not effective as to any broadcast licensee until publication of

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[30] NBC notes that the Commission did not have before it the text of the three commercials Mr. Banzhaf referred to as examples. It has attached to its comments the texts of three advertisements and states that two of them appear to be those mentioned in the complaint and the third is probably the other. NBC further states: "They may show 'attractive' people 'enjoying' themselves while smoking cigarettes, but surely that does not constitute the expression of a viewpoint on whether smoking is a hazard to the smoker's health." For the reasons stated in par. 38 above, we do not think that the text of the particular advertisements was necessary to our ruling or to our decision on the requests for reconsideration.

this opinion in the Federal Register. In the circumstances, we conclude that petitioners have been adequately heard and have suffered no prejudice.

58. Further, we are unable to conclude that any useful purpose would be served by affording petitioners a further opportunity for written comment or oral argument. The viewpoints of petitioners on the legal and policy issues are fully and amply set forth in the pleadings already filed, and nothing has been presented which would indicate the need or desirability of further study or proceedings; thus we are not persuaded that any public purpose would be served by initiating rulemaking in this area, as requested by the law firm of Smith, Pepper, Shack, & L'Heureux. We note that the petition for rulemaking does not propose the adoption of any rules, but only the provision of a forum for consideration of the legal and policy arguments urged by petitioners and discussed herein. We do not think that a rulemaking proceeding is either needed or appropriate for their resolution.[31]

59. And, finally, we point out that we could not in any event conclude that stay relief would be warranted pending any such further proceedings. This is not only because we believe that petitioners have not shown any substantial likelihood of ultimately prevailing on the merits of their position, either before this Commission or the courts, but also because the public interest would require denial of such relief on injury grounds. We have already set forth the basis for our belief that compliance with the ruling will not cause any substantial adverse impact on the broadcasting or advertising industries. We have not been shown that any irreparable injury will flow to petitioners. In any event, in view of the strong public interest in adequately informing the public, and particularly teenagers, as to the health hazard involved in the cigarette habit which broadcast facilities are encouraging them to adopt and continue, we think that any injury to the affected industries is outweighed by the danger of irreparable injury to the public. Indeed, if our ruling will contribute to the avoidance of one untimely death, the public interest would not be served by any delay in its effectiveness.

60. In connection with this latter point, we have taken into account the further studies which have been undertaken since the Advisory Committee Report by persons competent in this field. Most important, of course, is the recent HEW Report of July 12, 1967 (already discussed in par. 33 and since confirmed and amplified in its report of August, 1967). We shall therefore note here other pertinent studies. In February 1966, Dr. E. Cuyler Hammond's study for the National Cancer Institute made the first large-scale survey of women cigarette smokers. His study showed that such women's death rate from heart disease and lung cancer were twice that of nonsmokers.[32] In May 1966, Dr. Green of Harvard University reported experiments with rabbits proving cigarette smoking can cause many lung and throat ailments.[33] Roswell Memorial Institute announced in August 1966 a report finding filter tips of several cigarette brands ineffective in screening out harmful tars and nicotine. This report acknowledged that some filters were better than others, but asserts that none protects smokers.[34] A study by the Public Health Service and the American Cancer Society reported in October 1966 that a 5-year study of Seventh Day Adventists in California, comparing death rates of 11,071 male Adventists who do not smoke and the general male California population, showed one-sixth as many lung cancer deaths and one-third as many deaths from all respiratory diseases among Adventists as among the total male population.[35] Also in October 1966, a Louisiana State University 5-year study, financed partly by the Tobacco Research Council, reported findings of a relationship between cigarette smoking and hardening of the arteries in the heart.[36] Just recently, in a formal report to the President, it was stated by Dr. Kenneth M. Endicott, Chief of the National Cancer Institute, that "lung cancer—which will kill more than 50,000 Americans this year—can be brought under control because it is clearly caused by environmental factors—chiefly

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[31] As set forth in par. 43 above, we agree with the CBS position that licensee responsibilities under the Fairness Doctrine, in this as in other areas, should not be subject to per se guidelines, ratios, or other rigid rules prescribed by the Commission. Accordingly, we would not undertake rulemaking to prescribe such standards in the absence of some compelling showing leading us to revise our present judgment (see par. 43) and to conclude that rulemaking in this particular area would be appropriate and would serve a useful purpose.

[32] New York Times, Feb. 23, 1966, 41 :8.

[33] New York Times, May 2, 1966, 39 :1.

[34] New York Times, Aug. 30, 1966, 1 :7.

[35] New York Times, Oct. 12, 1966, 54 :1.

[36] New York Times, Oct. 22, 1966, 20 :2.

cigarettes." The President was also advised that "lung cancer has reached epidemic levels in men and may soon do so in women." [37]

61. As stated in our ruling, of most serious concern to the Commission are statistics as to the correlative rise in cigarette consumption and teenage smoking. In January 1966, the Department of Agriculture in a public report entitled, "Tobacco Situation", announced that 1965 had been a record year for cigarette consumption.[38] The reason given by the Surgeon General for the increase in new smokers, not the increased use of tobacco by the then-current smokers.[39] In July 1966, Surgeon General Stewart reported, based on American Cancer Society and Public Health Service surveys, that one-half of American teenagers are regular smokers by age 18, despite 2½ years of intensive educational efforts.[40] In October 1966, the Rand youth poll, conducted by the Youth Research Institute, released findings that teenagers smoke 10 million cigarettes per week, that 53 percent of all 16–19 year olds are smokers, and that this represents a rise of 4 percent in this age group during the almost 3-year period since the Advisory Committee's Report.[41] In November 1966, the American Cancer Society noted a 6-year study by Dr. E. Cuyler Hammond showing a marked drop in cigarette smoking among older people and a rise in consumption by young people.[42] In December 1966, the Agriculture Department announced that Americans had once again set a new record for total consumption of cigarettes per year.[43] In light of the statistics concerning teenage smoking, this increase in consumption appears correlated to the increase in population which occurs through the increase in consumption appears correlated to the increase in population which occurs through the increase in youthful persons.

62. We wish to make it clear that this Commission is not the proper arbiter of the scientific and medical issue here involved and of course has not sought to resolve that issue. We have cited the reports in question because they establish (*i*) that here is a most substantial controversial issue of public importance, which must be fairly aired to the American people, and (*ii*) that because of the seriousness of the issue to the health of the people, a stay is patently inconsistent with the public interest. We recognize that there are countering efforts and arguments put forth particularly by the tobacco industry; there are also new and continuing developments in this field. See hearings before the Consumer Subcommittee of the Senate Commerce Committee to review progress being made toward development and marketing of a less hazardous cigarette. We have not gone into detail on these matters, because they do not alter the two crucial findings set forth above.

63. As stated, this Commission agrees with the crucial point set forth in the concluding paragraph of the recent FTC report (see par. 34). In view of the congressional action, the Government and private reports, we conclude that a stay of our action would be contrary to the public interest. Licensees must therefore abide by the ruling, or seek judicial review of it (see *Red Lion Broadcasting Company* v. *F.C.C. supra*). (Even in the event of such review, the ruling remains effective, absent entry of a court stay.)

II. CONCLUSIONS

64. There is, we believe, some tendency to miss the main point at issue by concentration on labels such as the specifics of the Fairness Doctrine or by conjuring up a parade of "horrible" extensions of the ruling. The ruling is really a simple and practical one, required by the public interest. The licensee, who has a duty "to operate in the public interest" (§ 315(a)), is presenting commercials urging the consumption of a product whose normal use has been found by the Congress and the Government to represent a serious potential hazard to public health. Ordinarily the question presented would be how the carriage of such commercials is consistent with the obligation to operate in the public interest. In view of the legislative history of the Cigarette Labeling Act, that question is one reserved for judgment of the Congress upon the basis of the studies and reports submitted to it (except, of course, for whatever voluntary judgment the broadcasting industry

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[37] The Washington Post, July 22, 1967, 2:1.
[38] New York Times, Jan. 2, 1966, IV, 7:1.
[39] New York Times, Jan. 11, 1966, 9:1.
[40] New York Times, July 17, 1966, IV, 10:1.
[41] Advertising Age, Oct. 31, 1966.
[42] New York Times, Nov. 3, 1966, 41:1.
[43] New York Times, Dec. 31, 1966, 4:6.

might now make). But there is, we think, no question of the continuing obligation of a licensee who presents such commercials to devote a significant amount of time to informing his listeners of the other side of the matter—that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user. This obligation stems not from any esoteric requirements of a particular doctrine but from the simple fact that the public interest means nothing if it does not include such a responsibility.

65. In light of all the foregoing, we conclude and find:

> "a. The ruling as to the applicability of the Fairness Doctrine to cigarette advertising is within the Commission's legal authority and discretion, and is in the public interest.
>
> "b. Petitioners have made no showing which warrants reconsideration and withdrawal of the ruling or the institution of rule making in this area.
>
> "c. Petitioners have made no showing that relief, except as indicated in par. 6 above, is warranted or in the public interest; on the contrary, the grant of stay relief would be likely to cause irreparable harm to the public."

Accordingly, *It is ordered*, That the petitions and requests for reconsideration, rulemaking, and stay listed in paragraph 1 of this memorandum opinion and order *Are denied*, except to the extent that relief is granted herein pending publication of this memorandum opinion and order in the Federal Register.

It is further ordered, That copies of this memorandum opinion and order *shall be mailed* to all broadcast licensees of the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[APPENDIX A]

BACKGROUND TO 1965 CIGARETTE LABELLING ACT

1. On January 11, 1964, the report of the Surgeon General's Advisory Committee concluded that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate. The Committee recommended that "cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." After the report was issued, many groups private and public acted to provide this "remedial action."

(a) *The Tobacco and Broadcasting Industries*

2. Soon after the Advisory Committee's report, the tobacco and broadcasting industries reacted with voluntary measures to control the content of cigarette advertising. In January 1964 the Television Code Review Board and the Television Board of Directors of the NAB recommended and approved specific amendments to the Television Code. The amendments prohibited some types of cigarette advertising directed at young people and health claims in cigarette advertising.[44] In June 1964 similar amendments were approved for the Radio Code.[45] These code amendments were motivated by the Advisory Committee's report. In the words of the Television Code Review Board (Hearings, Senate Commerce Committee on S. 559 and S. 547, 89th Cong., 1st sess., pt. 1, p. 591):

> "The board recognizes the burden of responsibility the report imposes on all television licensees in the area of sigarette advertising. Specifically, the board is concerned with the potential of cigarette advertising to give the false impression that cigarette smoking promotes health or physical well-being.

The code authority also made clear that regulation initiated by the cigarette manufacturers was what they envisaged. Thus the authority provided that it would delay the issuance of general guidelines (interpreting the code amendments) which would assist advertisers and code subscribers in adhering to the television code restrictions, pending its determination of the implementation and effectiveness of the tobacco industry's self-regulation. Id., at p. 592.

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[44] Television Code, sec. IV, Program Standards, par. 12: Care should be exercised that cigarette smoking will be depicted in a manner to impress the youth of country as a desirable habit worthy of imitation.

Television Code, sec. IX, General Advertising Standards, par. 7: The advertising cigarettes should not be presented in a manner to convey the impression that cigarette smoking promotes health or is important to personal development of the youth of country.

[45] Radio Code I, Program Standards, sec. H. 13: The use of cigarettes shall not be presented in a manner to impress the youth of our country that it is a desirable habit worthy of imitation in that it contributes to health, individual achievement, or social acceptance.

Radio Code, Advertising Standards, sec. C (g): The advertising of cigarettes shall state or imply claims regarding health and shall not be presented in such a manner as indicate to the youth of our country that the use of cigarettes contributes to individual achievement, personal acceptance, or is a habit worthy of imitation.

3. In April 1964 the major cigarette companies announced their agreement and adherence to a cigarette advertising code to impose standards and enforcement procedures for the self-regulation of cigarette advertising. The code provided advertising standards which would be applied by an independent administrator who would survey the advertising and labeling of cigarettes in the United States, with the power to levy fines for any advertising or labeling which does not conform to the industry code standards. These standards are basically of three types. The first prohibits many types of cigarette advertising specifically directed at persons under 21 years of age. Another prohibits health claims, except in certain limited circumstances. The third type prohibits suggestions that smoking is essential to social prominence, distinction, success, or sexual attraction. Robert B. Meyner, the former Governor of New Jersey, is the first and current administrator for the code. In evaluating the effect of the code on cigarette advertising, Mr. Meyner said in a Senate hearing (id., at p. 568) that the character of cigarette advertising had been altered as a result of his enforcement of the code.[44]

(*b*) *HEW and Private Health Agencies*

4. The Department of Health, Education and Welfare (HEW) also took action after the Advisory Committee's report. On February 18, 1964, the Surgeon General, Luther Terry, convened a meeting of four voluntary agencies to discuss with them and other health agencies means of implementing the recommendations contained in the Advisory Committee report. This meeting eventually resulted in the establishment of the National Interagency Council on Smoking and Health on July 9, 1965. The purposes of the Council are threefold: "(1) to use its professional talents to bring to the Nation—particularly the young—an increasing awareness of the health hazards of cigarette smoking, (2) to encourage, support and assist National, State, and local smoking and health programs, and (3) to generate and coordinate public interest and action related to this area of health." The membership of the Council includes 13 private agencies and three Federal Government agencies (U.S. Public Health Service, U.S. Office of Education, and U.S. Children's Bureau).

5. In 1964, the Public Health Service, which strongly endorsed the conclusions of the Advisory Committee's report, awarded 10 grants and contracts to support demonstrations and projects to design effective methods of reaching various population groups with the facts about smoking. The comprehensive educational campaigns, however, which the Public Health Service desired to start had to await appropriations forthcoming from the 89th Congress. The President's Commission of Heart Disease, Cancer, and Stroke recommended an appropriation of $10 million to educate the public on the health hazards of smoking and to provide a network of control clinics to assist those who desire to give up smoking. Two million dollars were forthcoming in the fall of 1965.

(*c*) *The Federal Trade Commission*

6. As early as September, 1955 the Federal Trade Commission (FTC) had promulgated Cigarette Advertising Guides which, among other things, prohibited representations in cigarette advertising or labeling which refer to either the presence or absence of any physical effects from cigarette smoking, or which made unsubstantiated claims respecting nicotine, tars or other components of cigarette smoke, or which in any other respect contain implications concerning the health consequences of smoking cigarettes or any advertised brand (FTC Ann. Rept. 1960, p. 82). In 1960 the FTC obtained agreement from leading cigarette manufacturers to eliminate unsubstantiated claims of nicotine and tar content (Ibid.).

7. Shortly after the issuance of the Advisory Committee's report the FTC, on January 18, 1964, initiated a trade regulation rule making proceeding concerning the advertising and labeling of cigarettes. On June 22, 1964, after examining

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[44] However, we note the following exchange between Code Administrator Meyner and Senator Bass (id., at p. 581):

"Senator Bass. * * * don't you believe that the industry itself, with you as the administrator, don't you believe that you are capable of protecting the health of the American public as far as advertising of cigarettes is concerned?

"Code Administrator MEYNER. I think you describe a responsibility that is greater than is set forth in the code. As the code sets forth, I am trying to accept that responsibility * * *" the advertising, labeling, and other promotional practices in the cigarette industry, the FTC concluded that cigarette manufacturers should be required to make an affirmative disclosure of the potential hazard from smoking in labeling and advertising (29 F.R. 8325). The basis for its conclusion was twofold. First, the FTC found that the consensus of medical and scientific opinion was that cigarette smoking is a significant cause of certain grave diseases and contributes to the overall death rate. Second, the FTC found that the methods by which cigarettes had been and were being sold to the consuming public—by means of labeling and advertising which fails to disclose the health hazards of cigarette smoking—were deceptive and unfair to consumers under settled legal principles governing truth and fairness in advertising. The rule would have required that each cigarette package bear a warning statement by January 1, 1965. Also, if the warnings on the package together with such voluntary advertising reforms as the industry might have undertaken in the interim, had failed to change the circumstances leading to the FTC's findings, the rule would have then required, in addition, warnings in all cigarette advertising by July 1, 1965.

8. On September 3, 1964, at the request of Chairman Harris of the House Commerce Committee, the FTC extended the effective date of the rule for both packaging and advertising warnings to July 1, 1965 (29 F.R. 15570). Chairman Harris stated that he had requested such action because testimony which he had received during his committee's hearings in June and July 1964, indicated that the validity of the trade regulation rule would be challenged in the courts, that judicial review could delay the enforcement of the labeling requirements for a considerable period of time, and that the enactment of legislation in this area by the Congress could very well eliminate this delay. The FTC rule never went into effect because Congress enacted the Cigarette Labeling Act.

CONCURRING OPINION OF COMMISSIONER LEE LOEVINGER

In the matter of cigarette advertising ruling

I concur with great doubt and reluctance in the Commission ruling that broadcasting licensees presenting cigarette advertising must also present warnings of the health hazards of cigarette smoking. I concur because the result seems to me to be socially and morally right. I have doubts that the action is procedurally and substantively consistent with controlling legal rules. I am reluctant because of concern that this action may represent a subjugation of judgment to sentiment. Briefly these are my views.

Cigarette smoking is a substantial hazard to the health of those who smoke which increases both with the number of cigarettes smoked and with the youthfulness when smoking is started. Cigarette smoking increases both the likelihood of the occurrence and the seriousness of the consequencs of various types of cancer, of cardiovacular failures and of numerous other pathologies of smokers. These conclusions are established by overwhelming scientific evidence, by the findings of Government agencies, and by congressional reports and statute (15 USC sec. 1331 et seq.). The evidence on this subject is not conclusive, but scientific evidence is never conclusive. All scientific conclusions are probabilistic. (See Loevinger, Science and Legal Thinking, 25 Fed. Bar J. 153 (Sprng 1965).) Furthermore, law does not and cannot demand conclusive proof. Even in a capital case, law requires only proof beyond a reasonable doubt. In an ordinary civil case or administrative proceeding a mere preponderance of the evidence is sufficient to carry the day. The evidence as to the dangers of cigarette smoking to the smoker is clearly beyond a mere preponderance and approaches proof beyond a reasonable doubt. This is the basic premise of my position, as well as of the Commission position despite a rather feeble disclaimer that the Commission is not passing judgment on this issue (par. 62).

However, a burning conviction of good to be achieved or harm to be avoided neither establishes jurisdiction in a regulartory agency nor provides a sound legal guide to action. The instant proceeding illustrates the point.

The Commission here was so eager to take its present position that it acted on a complaint against CBS without giving notice to CBS, without affording CBS the opportunity to comment or submit a statement to the Commission directed to the issues under consideration, and without even bothering to secure or examine the text of the advertisements in question. Surprising though it may seem to those unfamiliar with administrative agencies, the Commission was not aware of these irregularities at the time of the initial ruling, and how they occurred is more significant as a study of administrative efficiency than as an issue of due process. It is enough to say that were the issue before us now merely the validity of the original letter to CBS these procedural defects would plainly invalidate the action.

However, what the Commission is doing now is issuing a prospective, legislative-type rule relating to cigarette advertising and broadcastng. CBS has been entirely exonerated from any imputation of unfairness in its broadcasting regarding cigarettes. That ends the proceeding so far as CBS is concerned; so the absence of due process in handling that complaint is no longer significant. In its present action, the Commission is exercising its quasi-legislative authority to make a prospective rule. It is acting on the material that has been submitted to it since the original letter to CBS, so it has before it a variety of differing views from many interested parties. I think it would be preferable to have oral argument on the proposed rule to give the Commission the advantage of the interchange and confrontation between advocates of opposing views, and to permit the exploration of issues by direct questioning. But the refusal to hold such oral argument is not fatal and does not preclude legislative-type action.

Despite the reiterated certainty of the Commission opinion, doubts remain as to the legal authority of the Commission. Repetitious reference to the public interest as establishing whatever conclusion is contended for is no more than question-begging. The "public interest" is a judgment encompassing whatever the person making the judgment deems to be socially desirable. (See dissenting opinion in Regulation of CATV Systems, 6 FCC 2d 309, 330, at 335 et seq. (1967); Loevinger, Regulation and Competition as Alternatives, 11 Antitrust Bulletin 101. 129 et seq. (1966); Schubert, The Public Interest (1960).) The Commission believes, and I concur, that it is socially desirable to discourage rather than encourage, smoking by people, especially young people.

But the Commission has not been given a roving mandate by Congress to do whatever it may regard as socially desirable (i.e., "in the public interest"). On the contrary, it has been established by Congress with a limited jurisdiction and can act only within the power delegated to it by Congress, which means that it cannot act without some definite statutory basis.

The Commission opinion rests the present action on the Fairness Doctrine. This is a rule that broadcast licensees must afford reasonable opportunity for the discussion of conflicting view on issues of public importance. This principle was first developed on the basis of the statutory licensing power as to broadcasters, Editorializing by Broadcast Licensees, 13 FCC 1246 (1949), and was recognized by reference in a 1959 amendment to section 315 (47 USC, sec. 315). The context of both sources refers to "news" and the basic Commission opinion also refers to "commentary" and "discussion of public issues". Neither contains the slightest suggestion that the principle has anything to do with advertising, and that conclusion is most dubious.

Further, I am concerned that extension of the Fairness Doctrine to advertising is likely to lead either to its attenuation to the point of ineffectiveness or its broadening to a scope that is wholly unworkable. No matter what the Commission now says about the distinction between cigarette advertising and other types of advertising, it is establishing the principle that the Fairness Doctrine applies to commercial advertising, as distinguished from paid political broadcasting. The Commission will be hard pressed to find a rational basis for holding that cigarettes differ from all other hazards to life and health. Contrary to the argument in the Commission opinion (par. 46), the normal use of automobiles does pose a health hazard, polluting the atmosphere to a degree that is dangerous not only to those using the automobiles but, even worse, in some localities to everyone, including infants and invalids. The Commission will also find itself embarrassed when, as will surely happen, the cigarette companies demand time from some broadcaster who refuses to carry cigarette advertising but presents public service messages warning against the dangers of cigarette smoking. Having declared this to be a "controversial issue of public importance", the Commission will be bound to require that the viewpoints of those manufacturing and selling cigarettes are afforded access to broadcasting facilities.

The Commission opinion does contain findings that might support the result reached. Paragraph 37 finds that cigarette advertising expressly represents smoking as desirable and implicitly represents that it involves "relative safety" or "relatively little risk." This finding is corroborated by common experience and by scientific investigation. (See Preston, Logic and Illogic in the Advertising Process, 44 Journalism Q. 231 (Summer 1967).) In view of the clear weight of scientific evidence and official findings on this subject, this means that cigarette advertising constitutes both implicit misrepresentation and concealment of a material fact, if the health hazards are not disclosed by the seller. It is elementary law that the supplier of a chattel is bound to disclose its latent dangers to prospective users. (Restatement of the Law, Torts 2d, sec. 388.) There is sound statutory and precedential authority for Commission action to prevent false representations on the broadcasting media (18 USC sec. 1343; KWK Radio, Inc., 34 FCC 1039 (1963), 119 App. D.C. 144, 337 F. 2d 540 (1964), certiorari denied 380 US 910 (1965); Loevinger, The Issues in Program Regulation, 20 FCBA J 3 (1966)).

The normal remedy for such misrepresentation or concealment would be either to forbid the advertising altogether or to require that it carry adequate disclosure of the material facts. There are two reasons precluding such Commission action. First, the Commission has no authority over advertisers as such. Second, the 1965 Cigarette Labeling Act apparently forbids such action.

The first reason is easily surmounted. The Commission has held that a broadcast licensee must take reasonable measures to prevent the use of his licensed facilities for public deception. (KWK Radio, Inc., supra.) The application of this principle to the present situation suggests a means of achieving the result reached here within the limits of statutory authority and without doing violence to the Fairness Doctrine. The second reason is more difficult.

The Commission opinion recognizes the Cigarette Labeling Act as a substantial argument against the present action, since it devotes a large part of the discussion to it (pars. 15–35 and app. A). By reading the terms of the act very literally and the presumed purposes of the act very loosely, the opinion concludes that the present ruling is not precluded by the act but rather implements the policy of the act. The opinion offers a mass of detail in support of this conclusion, but a review of the relevant points casts some doubt. In several messages to Congress prior to passage of legislation on this subject and during consideration of such legislation, the FCC stated that its authority is limited to the broadcasting field and that it believed that cigarette advertising should be regulated on a "broad across-the-board basis" (par. 31). After receiving several such messages from the Commission, Congress in 1965 passed an act expressly stating: "It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, * * *" (15 USC sec. 1331). This was clearly the "broad, across-the-board" regulation which the FCC had suggested, and Congress surely was warranted in assuming that the FCC would not undertake to exercise its limited jurisdiction in a "piecemeal" attack upon the problem.

Nevertheless, the Commission opinion argues that FCC action is not precluded for several reasons. The opinion says that conditions have changed because the FTC is not undertaking the comprehensive regulatory plan which it formerly proposed (par. 32). But the reason for this is that the FTC plan was expressly forbidden by statute, and thus the only change in circumstance is the passage of the statute which limits, rather than extends, administrative authority to act in the field. The opinion also concludes that the terms of the Cigarette Labeling Act do not prohibit the present ruling because the act refers only to statements made "in advertising" and not to statements made "because of the advertising" of cigarettes (pars. 16a, 23). However, the act prescribes the form of health warning that is required on cigarette packages and explicity provides that no other statement relating to health and smoking shall be required on cigarette packages or in cigarette advertising. If the act is read as literally as the Commission opinion construes it, then it does not preclude the total prohibition of cigarette advertising, either altogether or in the broadcasting media. The opinion states that this would be inconsistent with the act (par. 15), although there is no specific provision of the act relating to this, any more than there is a specific provision relating to statements to be required "because of" cigarette advertising. The Commission opinion does not explain why the act is construed to permit one remedy but not another for misleading advertising, when neither is explicitly covered. Despite the profusion of detail and the length of the discussion the opinion does not come to grips with the issue posed by the Cigarette Labeling Act. The real reason for the Commission's present action is that during the last several years the Commission has changed its policy—that is, its collective opinion—on this subject and now believes that it should take whatever action it can take to combat the health hazard of smoking, especially by young people who are likely to be influenced by the broadcast media.

It seems to me that the construction of the Cigarette Labeling Act attempted in the Commission opinion is strained and unconvincing. However, the basic difficulty is that Congress was obviously ambivalent on this subject and that there is no unequivocally clear congressional intent to be derived from the act or its history. It was a compromise between conflicting viewpoints which still have spokesmen who are heard in Congress.

I am as persuaded as the Commission majority and its draftsmen that cigarette smoking is hazardous and injurious to the health of smokers and extremely hazardous and injurious to the health of those who start smoking while young. Therefore, I think it desirable that all legal and practical steps be taken to discourage smoking. I have serious doubts that the action taken now by the Commission is legally sound or practically effective. I think that if we spent less effort and space in proclaiming the righteousness of our purposes and objectives and more in careful and rigorous analysis of our procedures and of our legal jurisdiction and authority, and attempted greater specification of the scope and application of our ruling, we would be more convincing and more effective.

Consequently, I am reluctant to concur because this ruling seems to be the result of sentiment rather than conviction. It is based on a strong feeling that the public, especially the younger members of the public, should be protected against enticement to smoke cigarettes, rather than upon a well-reasoned conclusion that this is an effective means of achieving that objective and that this ruling is soundly based on legal authority. My opinion cannot change the result, so all I can do is indicate the difficulties I see in this approach to the subject and the reasons that I have doubts, while confessing candidly that I put doubts aside and join, albeit reluctantly, in voting for the ruling here because of a strong feeling that suggesting cigarette smoking to young people, in the light of present knowledge, is something very close to wickedness.

Concurring Opinion of Commissioner Nicholas Johnson

FAIRNESS AND CIGARETTE ADVERTISING

I join the Commission's decision to apply the Fairness Doctrine to the use of television and radio broadcasting to promote cigarette smoking. In view of Commissioner Loevinger's concurring opinion, however, I believe some brief remarks are appropriate.

With admirable honesty, Commissioner Loevinger has confessed to "doubts and reluctance" about our cigarette ruling. The issues he raises are provocative and significant. They touch on concerns which are, I believe, widely shared by members of the public. They inspire qualms about a case of landmark importance. I consider these doubts unwarranted.

Commissioner Loevinger does not state flatly that he thinks the ruling unlawful. But he does cast grave doubt on its validity, for his dismissal of a number of arguments against the Commission's position displays something less than full enthusiasm. For this reason, I feel obligated to set forth the simple logic behind my support for the decision.

The decision takes as its major premise a factual assertion which is so trivial as to be beyond cavil. Advertising messages are part—an important and substantial part—of the information put before the public by television and radio broadcasting. Roughly one-third of radio's hour is spot commercials. As such, advertising messages should no more be granted automatic immunity from considerations of fairness than any other category of advocacy. If an advertisement takes a position on an issue that is controversial and of public importance then fairness—whether as a matter of section 315, FCC regulations, or common decency—requires that an opportunity be granted to ventilate opposing views (Communications Act of 1934, as amended, 47 U.S.C. § 315(a)(4) (1964); Federal Communications Commission, Public Notice, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964)).

The Commission's minor premise seems equally hard to question. The issue of whether people ought to smoke cigarettes is a controversial issue, and it is one of public importance. It has been recognized as such by Congress, the executive branch, the Federal Trade Commission as well as the FCC, the scientific and educational community, and the mass media. Millions of Americans smoke. Commissioner Loevinger agrees with the by now quite impressive evidence that they thereby incur grave risks of impairing their health and shotening their lives.

Broadcasters licensed by this Commission to serve the public interst devote significant amounts of their prime time to encouraging Americans to incur those risks. Given ths set of circumstances, it is the minimum obligation of this Commission to see to it that a fair opportunity exists to present the other view: the warnings of those responsible citizens who believe cigarette smoking to be a dangerous and insidious habit.

Commissioner Loevinger does not explicitly dispute this line of reasoning. But he cautions against such an interpretation of the Fairness Doctrine by advancing what lawyers call a "slippery slope" argument. If the Commission brands cigarette advertisements controversial issues of public importance, he says, virtually all advertising will be covered by the logic of that decision. No one will know where to draw the line. Now, it is certainly true that it is no easy matter to decide what is and what is not a controversial issue of public importance. But that difficulty is one with which the Commission must live, whenever it confronts a fairness case. The fact that this particular case happens to involve paid commercial announcements does not make it unique in that respect. The slippery slope argument states, in essence, that the logic of this decision, however justified on the facts before us, could be extended to other, more questionable, cases. Of course, this is right. This decision could be extended to other situations. But the fact is that all the hypothetical cases brandished by Commissioner Loevinger are more questionable than this one. By drawing the line at cigarette advertising we have framed a distinction fully as sound and durable as those in thousands of other rules laid down by courts every day since the common law system began.

Finally, Commissioner Loevinger broaches the argument that Congress may have intended to preclude FCC regulation of cigarette advertising when it passed the Cigarette Labeling Act. With all respect, I consider such a sweeping interpretation of that statute (which Commissioner Loevinger himself seems disinclined to accept) altogether misguided. It seems to me to reflect a very limited view of the relationship between particular congressional actions and administrative agencies charged with enforcing established public policies of great significance.

This Commission has few, if any, responsibilities to the people of America greater than its duty to insure that its licensees act consistently with the dictates of the Fairness Doctrine. That doctrine insures that the most powerful medium of mass communication in our society does not stifle competition in the marketplace of ideas. Had the Congress and this Commission not written this doctrine into statutory and regulatory prescription, early in the history of the Communications Act of 1934, the Supreme Court might well have felt obligated to make the requirements of fairness a matter of constitutional law. For fairness plainly deals with issues of constitutional dimension.

In view of the stature of the Fairness Doctrine, we would be underestimating our obligations as members of this Commission if we concluded that the Cigarette Labeling Act tied our hands in the present case. I agree with the Commission that our action here is entirely consistent with the regulatory design created by that act. But even if I shared Commissioner Loevinger's conclusion that the act is ambiguous, it would not alter my view of this issue. Elemental principles of public law dictate that forces within the legislature cannot override a major national policy, unless they persuade a majority of the legislature to inhibit the application of that policy with clarity if not explicitly. In plain political terms, if there was "ambivalence" it means that a majority of Congress did not state an intention to immunize the advocacy of cigarette smoking from the requirements of the Fairness Doctrine. Thus, the Commission's obligation to apply that doctrine according to its inherent logic remains in force.

In conclusion, I would like briefly to express my personal regret at the seeming reluctance of some broadcasters to accept the spirit of the fairness doctrine and this ruling. There is no social force more powerful than broadcasting today. If popular support is to be sustained for industry programing relatively unfettered by governmental restraint—which I encourage—the broadcasters must not only act responsibly but appear to act responsibly. Nothing contributes more to the appearance as well as the reality of responsible broadcasting than the Fairness Doctrine, and the FCC's enforcement of that doctrine. The broadcaster need not withstand alone both the charge that he has been unfair and that he has been unilaterally irresponsible in the self-evaluation of others' charges of his unfairness. He can point to the FCC, its procedures for evaluating such complaints, and its judgments on his behalf. Indeed, if this Fairness Doctrine and procedures did not exist I would think the broadcasters would be the first to urge their creation.

Note that, for a variety of reasons, the FCC has not banned cigarette advertising from broadcasting. Our action today simply requires broadcasters—public licensees charged with operating in the public interest—to afford opportunity for fair response to the appeals of cigarette commercials. It is a mild form of regulation. It will have little, if any, impact on the advertising revenues of station owners and networks. It will increase the amount of public service time for which they may take credit.

Unfortunately, it will probably also do little to brake the still-climbing rate of cigarette consumption by Americans, especially our young people—who see, on the average, at least one television program every day sustained by commercials associating cigarette smoking with adulthood and other goals of youth. FTC Commissioner Elman has estimated that some 300,000 Americans die prematurely each year because of their affection for cigarettes. Given these facts, I should think broadcasters would want to give far more serious consideration than they have to a voluntary ban on the carriage of cigarette advertisements.

For, once again, it is the appearance as well as the reality that moves men's souls. And, unfortunately from the standpoint of the broadcasters' relations with their public, broadcasting's encouragement of cigarette consumption is an issue wrapped in profits as well as propriety (roughly $200 million a year). This is not an insignificant amount of money voluntarily to forgo. But, especially if its loss is ultimately inevitable anyway, it may be far cheaper in the long run to gain the goodwill of voluntary forbearance than to risk forever tainting the good name of American broadcasting.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

(No. 24,492)

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, PETITIONER *v.* FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

Post-Newsweek Stations, Capital Area, Inc., INTERVENOR

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(No. 24,537)

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER *v.* FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

American Broadcasting Companies, Inc. and Columbia Broadcasting System, Inc., INTERVENORS

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

(Decided August 3, 1971)

Mr. Thomas R. Asher, with whom *Messrs. Albert H. Kramer* and *Michael Schneiderman* were on the brief, for petitioner in No. 24,492.

Mr. Joseph A. Califano, Jr., with whom *Messrs. David H. Lloyd* and *Irvin B. Nathan* were on the brief, for petitioner in No. 24,537.

Mr. Daniel R. Ohlbaum, Deputy General Counsel, Federal Communications Commission, for respondents.

Messrs. John H. Conlin, Associate General Counsel, and *Stuart F. Feldstein*, Counsel, Federal Communications Commission, were on the brief for respondents in No. 24,492. *Mr. John H. Conlin* and *Miss Katrina Renouf*, Counsel, Federal Communications Commission, were on the brief for respondents in No. 24,537.

Mr. Henry Geller, General Counsel, Federal Communications Commission, at the time the record was filed, also entered an appearance for respondent Federal Communications Commission in No. 24,492.

Mr. Howard E. Shapiro, Attorney, Department of Justice, entered an appearance for respondent United States of America.

Mr. Ernest W. Jennes, with whom *Messrs. Charles A. Miller* and *Henry Goldberg* were on the brief, for intervenor in No. 24,492.

Mr. J. Roger Wollenberg, with whom *Messrs. Timothy B. Dyk* and *Daniel Marcus* were on the brief, for intervenor Columbia Broadcasting System, Inc. in No. 24,537.

Messrs. James A. McKenna, Jr. and *Vernon L. Wilkinson* were on the brief for intervenor American Broadcasting Companies, Inc. in No. 24,537.

Before WRIGHT, MCGOWAN and ROBINSON, *Circuit Judges.*

Opinion filed by WRIGHT, *Circuit Judge.*

Dissenting opinion filed by MCGOWAN, *Circuit Judge.*

WRIGHT, *Circuit Judge:* In these cases we are asked to decide whether a broadcast license may, as a general policy, refuse to sell any of its advertising time to groups or individuals wishing to speak out on controversial public issues. The Federal Communications Commission concluded that such a policy is permissible.[1] We reverse the Commission's decision. And we remand for further proceedings.

The principle at stake here is one of fundamental importance: it concerns the people's right to engage in and to hear vigorous public debate on the broadcast media. More specifically, it concerns the application of that right to the substantial portion of the broadcast day which is sold for advertising. For too long advertising has been considered a virtual free fire zone, largely ungoverned by regulatory guidelines. As a result, a cloying blandness and commercialism—sometimes said to be characteristic of radio and television as a whole—have found an especially effective outlet. We are convinced that the time has come for the Commission to cease abdicating responsibility over the uses of advertising time. Indeed, we are convinced that broadcast advertising has great potential for enlivening and enriching debate on public issues, rather than drugging it with an overdose of non-ideas and non-issues as is now the case.

Under attack here is an allegedly common practice in the broadcast industry—airing only those paid presentations which advertise products or which deal with "non-controversial" matters, and confining the discussion of controversial public issues to formats such as the news or documentaries which are tightly controlled and edited by the broadcaster. In the Commission's view, an attack on the permissibility of this practice "goes to the heart of the system of broadcasting which has developed in this country."[2] We disagree. The actual issue before us is relatively narrow and we decide it narrowly. We do not have to cut to the "heart" of our system of broadcasting; we leave undisturbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time. All we do is forbid an *extreme* form of control which totally excludes controversial public debate from broadcast advertising time.

We hold specifically that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted. We do not hold, however, that the planned announcements of the petitioners—or, for that matter, of any other particular applicant for air time—must necessarily be accepted by broadcast licensees. Rather, we confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many "editorial advertisements" will be put on the air.

I

Both petitioners in these cases are organizations whose primary *modus operandi* is public persuasion and communication. As a rule, they do not attract attention to their views by performing newsworthy acts, such as engaging in civil disobedience or organizing mass demonstrations. They depend, instead, on their ability to get a hearing—as full as possible and as direct as possible—from the general public. Surely radio and television would seem to be the most effective media for their purposes. Yet they contend that their self-expression on those media—and, therefore, the public's access to their views—is significantly inhibited by broadcaster policies barring any and all paid editorial messages from the airwaves.

The Business Executives Move for Vietnam Peace (BEM) is a national organization of over 2,700 business owners and executives, organized in opposition to the war. BEM apparently believes that it is in a position to offer the public a unique viewpoint on what is no doubt one of the great political and moral issues of our time. In order to communicate that viewpoint, it prepared several recorded one-minute radio announcements. The announcements urged "immediate withdrawal of American forces from Vietnam and from other overseas military installations" and featured statements by leading businessmen and retired military officers whose views may carry particular weight with the general public. BEM sought to buy time to air these announcements on the broadcast media, just as commercial advertisers do. It must have seemed an extraordinarily effective means of directly communicating its ideas and sense of urgency to the broad listening audience.

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[1] *Business Executives Move for Vietnam Peace*, 25 F.C.C. 2d 242 (1970); *Democratic National Committee*, 25 F.C.C. 2d 216 (1970).

[2] *Democratic National Committee, supra* Note 1, 25 F.C.C. 2d — 221.

In June 1969 BEM sought to purchase time for its announcements on WTOP, an all-news radio station in the nation's capital. Like most broadcasters, WTOP sells substantial amounts of time for short advertisements. Yet over a period of eight months it repeatedly refused to sell any time to the business executives. WTOP cited no particular objection to the planned announcements. Rather, it relied solely upon an across-the-broad policy barring all editorial advertisements—"its long established policy of refusing to sell spot announcement time to individuals or groups to set forth views on controversial issues."[3] BEM then filed a complaint with the Federal Communications Commission alleging violations of both the fairness doctrine and the First Amendment.

The Democratic National Committee (DNC) came to the Commission with much the same sort of complaint. It stated that it was in the process of planning an extensive media campaign to communicate the Democratic Party's views on crucial issues and to solicit funds. In our political system, it is of obvious importance that the public have access—as direct and full as possible—to the views of the political parties. A party currently out of office may well regard such communication as particularly vital. Yet DNC alleged that it confronted several obstacles to direct self-expression on the broadcast media, among them the refusal of some broadcasters to sell time for comment on controversial public issues. Unlike the business executives, DNC did not complain of any individual refusal to sell time for a particular editorial advertisement. Rather, it cast the issue in a somewhat different light by seeking a declaratory ruling from the Commission that "[a] broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues."

The Commission considered the two cases together and rejected the arguments of both BEM and DNC on the same day. The issues involved did not overlap completely. For example, the Commission found a defect in the vagueness and generality of BEM's fairness doctrine complaint,[4] and it resolved DNC's contention concerning fund solicitation by noting that all three television networks had agreed to accept such solicitations and by stating that any broadcaster policy of confining solicitations to election periods alone "would appear arbitrary."[5] On the matters central to these petitions for review, however, the Commission resolved both cases in the same fashion, and we, therefore, are also considering them as one.

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[3] WTOP also stated "that 'subjects of this type require a more in-depth analysis than can be provided in a 10, 20, 30 or 60 second announcement.'" *Business Executives Move for Vietnam Peace, supra* Note 1, 25 F.C.C.2d at 242. There is no indication, however, that WTOP's "long established policy" of refusing to sell time for *any* controversial advertisement would have permitted it to sell BEM 5 minutes or 10 minutes for a more "in-depth" treatment of its antiwar views. For a discussion of the permissibility of a flat ban on "short" public issue advertisements, *see* text at pages 28–29 *infra*.

[4] In its original complaint, BEM alleged generally that WTOP had failed to cover antiwar views fully and fairly. However, it offered no specific proof whatever of its allegations, and WTOP, on the other hand, offered a lengthy compilation of news and interview shows which aired the opinions of some antiwar groups and individuals. BEM has not pressed its fairness doctrine argument on appeal, but rather has relied solely upon the First Amendment right-of-access contention which it also made before the Commission. Therefore, we need not consider here the Commission's holding that BEM failed to shoulder its full burden of going forward under the fairness doctrine.

[5] All three television networks also commented on the sale of time for editorial advertising. CBS stated it would sell no time for such advertising, although an exception would be made for broadcasts on behalf of political candidates or ballot propositions. ABC said it would not sell time to most groups for public issue advertising since that would inspire a "flood" of requests, but it would "be prepared, consistent with its other obligations, to accept such orders for time from major political parties as can be accommodated on a reasonable basis." And NBC stated it "has no policy which would prevent the purchase of program time envisioned by DNC." We are constrained to note here that any discrimination in the sale of editorial advertising time in favor of political parties alone or the "major" political parties—and totally excluding other more issue-oriented groups or "minor" political parties—would be highly suspect under the First Amendment. *See* text at pages 33–35 *infra*.

The Commission held that it is permissible for a broadcast licensee to follow a general policy of rejecting all editorial advertisements. The essence of its reasoning in the two cases was as follows: First, it interpreted the fairness doctrine to allow rejection of paid controversial announcements. The doctrine, evolved by the Commission and endorsed generally in the Communications Act, demands that all controversial issues of public importance be covered both fully and fairly by broadcasters. Yet the Commission held that it leaves the licensees broad leeway to exercise their professional judgment as to "the format for presentation of controversial issues 'and all others facets of such programming'." Editorial advertising, the Commission said, is simply one of several possible formats for coverage of public issues. Under the permissive "reasonableness" standard of the fairness doctrine, acceptance of that particular format is by no means compulsory.

Second, the Commission interpreted the First Amendment to be equally permissive. Its reasoning on this point was rather sparse. It made no effort, for example, to identify the peculiar First Amendment interests attaching to paid editorial announcements as opposed to coverage of controversial issues on news, interview or discussion programs. Instead, it was content to raise the spectre of the "chaos" and other practical difficulties that, it said, would attend a right of access to the broadcast media. The Commission concluded that the fairness doctrine's requirement of full and fair coverage—tolerant as it is of a flat ban on the editorial advertisement format of expression—provides as much protection of public debate as the First Amendment demands.

Before this court, both petitioners make substantially the same attack on the Commission's decision. They do not ask for a ruling that *all* editorial advertisements submitted to broadcasters must be accepted. Nor do they seek to foreclose entirely the broadcasters' exercise of reasonable discretion. What they advocate is a *limited* right of access to radio and television for paid public issue announcements. They atack the Commission's ruling that a total exclusion of such announcements is permissible.

Petitioners have left no stone unturned in their attack on the exclusion of editorial advertising. They have invoked the Communications Act's "public interest" requirement[6] and the statutory-regulatory fairness requirement[7]—as well as First Amendment principles—to support their argument. In other contexts, we might attempt to avoid the constitutional issue by coming to a decision on nonconstitutional grounds. But that course is neither fruitful nor possible here.

Speaking specifically of the Commission, the Supreme Court has stressed the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1969). Thus the nonconstitutional question here is whether there are "compelling indications" that the public interest and fairness requirements compel some opening for public issue advertisements on radio and television. In matters of allocating burdens, reforming procedures and ensuring full attention to all relevant factors in agency decision making, we have not been reluctant to reverse the Commission in order to vindicate "the public interest."[8] We have also intervened to see that broad policies developed by the Commission under the fairness doctrine are applied fully and consistently to all cases.[9] However, when we are asked to reverse major substantive interpretations of the grand and open-ended statutory requirements, we tread somewhat more difficult terrain. Obviously, the requirements mean something and there must be a great range of actions which they foreclose to the Commission; but, in establishing the necessary guidelines, we must ourselves seek extrinsic guidance.

In these cases, that guidance comes from the Constitution. Petitioners have presented no "compelling" evidence from legislative history to indicate a congressional policy in favor of, or even a real congressional attention to, editorial advertising. Rather, their arguments on the nonconstitutional points closely parallel their constitutional arguments. The general policy considerations which they invoke encompass all of the interests that would have to be evaluated under the relevant First Amendment law. It would make no sense for us to blind ourselves to the constitutional status of those interests and to the doctrine that has been built up around them.

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[6] U.S.C. §§ 307(d), 309(a) (1964).

[7] 47 U.S.C. § 315(a) (1964). For a discussion of the regulatory development of the fairness doctrine and its eventual adoption in the Communications Act, *see Red Lion Broadcasting Co.* v. *F.C.C.*, 395, U.S. 367, 375–381 (1969).

[8] *See, e.g., Office of Communication of United Church of Christ* v. *F.C.C.*, 123 U.S. App. D.C. 112, 425 F2d 543 (1969).

[9] *See, e.g., Retail Store Employees Union, Local 880* v. *F.C.C.*, —— U.S. App. D.C. ——, 436 F.2d 248 (1970).

What then might be the "compelling indications" we are to consider? The ones which seem to us truly "compelling" involve First Amendment principles. Thus we conclude that the constitutional question must be faced and is, indeed, the essence of these cases. Whether our decision is styled as a "First Amendment decision" or as a decision interpreting the fairness and public interest requirements "in light of the First Amendment" matters little.

III

It has always been clear that the broadcast media—so vital to communication in our society—are affected by strong First Amendment interests.[10] Yet the nature of those interests has not been so clear; an evolution of constitutional principles in this area is still very much in progress. Until quite recently, the only interest raised to constitutional status was that of the broadcast licensees themselves. In a leading cae, the Commission's powers over program content were attacked and upheld with reference solely to the licensees' right of immunity from governmental interference with their "speech." The scarcity of broadcast frequencies was said to justify some regulation trenching on the broadcasters' First Amendment interests. *National Broadcasting Co.* v *United States*, 319 U.S. 190 (1943). These cases mark a new effort by members of the public to assert *their* First Amendment interests in the operations of radio and television.

There is scant precedent for such an effort. Indeed, the few previous attempts by individuals or groups to enforce their First Amendment interests in court have failed. In each case, the litigants have run up against not only an unreceptiveness to their constitutional theory, but also a crabbed judicial view of "state action"—a view that the "[First] Amendment limits only the action of Congress or of agencies of the federal government and not private corporations such as [broadcast licensees]." *Massachusetts Universalist Convention* v. *Hildredth & Rogers Co.*, 1 Cir., 183 F.2d 497, 501 (1950); *McIntire* v. *Wm. Penn Broadcasting Co. of Philadelphia*, 3 Cir., 151 F.2d 597, 601 (1945). *See also Post* v. *Payton*, E.D. N.Y., 323 F.Supp. 799 (1971).

We believe the path is now clear of such doctrinal impedimenta. Perhaps the most important recent development is the Supreme Court's seminal decision in *Red Lion Broadcasting Co., supra.* There the Court upheld another aspect of the Commission's regulations of program content—the fairness doctrine's personal attack and campaign editorial rules. However, the Court's opinion went well beyond the scarcity rationale of the *National Broadcasting Co.* case. It justified the Commission's interference with broadcasters' free speech by invoking specifically constitutional rights of the general public which, it said, underlie and support the fairness doctrine rules at issue. Issuing what must become a clarion call for a new public concern and activism regarding the broadcast media, the Court stated that "the people as a whole retain their * * * collective right to have the medium function consistently with the ends and purposes of the First Amendment." [11] it went on to say:

> "* * * The right of free speech of a broadcaster * * * does not embrace a right to snuff out the free speech of others. * * *
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> * * * * * * *
>
> "* * * [A] licensee has no constitutional right * * * to monopolize a radio frequency to the exclusion of his fellow citizens. * * *
>
> * * * * * * *
>
> "* * * It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. * * *" [12]

Of course, the *Red Lion* Court had to invoke the public's First Amendment interests for a narrow purpose only—to uphold legislative and administrative action already taken. It did not have to reach the issue, presented in these cases, of invoking those interests for a direct attack on broadcasters' policies approved by the Commission. However, the language used by the Court is significantly expansive. It spoke of a First Amendment "right" held by "the people as a whole." A constitutional "right" is hardly deserving of the name if it can function only to permit legislative and administrative action and if its content depends entirely upon the current policies of the legislative and executive branches. The First Amendment, after all, contains nothing analogous to the fifth section of the Fourteenth Amendment, authorizing Congress to enforce constitutional interests unenforceable by the courts.[13]

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[10] *See, e.g., United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948). Congress itself has prohibited any interference by the Commission with "the right of free speech by means of radio communication." 47 U.S.C. § 326 (1964).

[11] 395 U.S. at 390.

[12] *Id.* at 387, 389, 390.

For many purposes, it is proper to consider broadcast licensees as "private" businesses. Yet, for purposes of the First Amendment, "[o]wnership does not always mean absolute dominion." *Marsh* v. *Alabama*, 326 U.S. 501, 506 (1946). "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans* v. *Newton*, 382 U.S. 296, 299 (1966). The *Red Lion* Court itself commented on the impermissibility of "private censorship" and cited old doctrine that "'[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.'"[14] The reach of the First Amendment, therefore, depends not upon "public"—"private" technicalities, but upon more functional considerations. They are (1) the governmental involvement in or public character of a particular enterprise, and (2) the importance or suitability of that enterprise for the communication of ideas.[15]

The last few decades of court decisions expanding the concept of "state action" have focused on myriad indicia of governmental involvement and public character. Many of them are apparently applicable to the operations of the broadcast industry.[16] But we need stress only two more basic factors which, taken together, bring broadcast licensees well within the ambit of the First Amendment for the purposes of these cases. First, the general characteristics of the broadcast industry reveal an extraordinary relationship between the broadcasters and the federal government—relationship which puts that industry in a class with few others.[17] It is one of "interdependence" and "joint participa[tion]." *See Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). "[T]he [federal] regulatory system," it has been said, "is as much responsible for the existence of a broadcasting medium as the Bureau of Engraving is responsible for the existence of United States currency."[18] It has long been recognized that the airwaves are "a limited and valuable part of the public domain,"[19] leased out temporarily by the federal government which retains ultimate control over them.[20] Federal agency review and guidance of broadcasters' conduct is automatic, continuing and pervasive.[21] For broadcast licensees are considered the "proxies" or "fiduciaries" of the people.[22] Almost no other private business—almost no other regulated private business—is so intimately bound to government and to service to the commonweal.

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[13] On the effect of the specific language in the fifth section of the Fourteenth Amendment, *see Oregon* v. *Mitchell*, 400 U.S. 112 (1970); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). Of course, the Fourteenth Amendment does not apply to federal regulation of the broadcast industry since no interference with the states is involved.

[14] 395 U.S. at 392, quoting *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

[15] Most "state action" cases, of course, have been concerned with equal protection rights under the Fourteenth Amendment rather than with free speech rights under the First Amendment. However, the principle of governmental involvement developed therein has been applied equally well in the First Amendment context. *See, e.g., Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451 (1952); *Farmer* v. *Moses*, S.D. N.Y., 232 F. Supp. 154 (1964). The principle of "public character" may be found in decisions dealing directly with application of First Amendment rights to "private" entities. *See, e.g., Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Tanner* v. *Lloyd Corp.*, D. Ore., 308 F. Supp. 128 (1970); *Diamond* v. *Bland*, 91 Cal. Rptr. 501, 477 P. 2d 733 (1970). The importance and suitability of a particular place for the communication of ideas has been stressed in all of the cases cited above, as well as in all of the acess-to-public-forum cases, *see* Notes 40–43 *infra*.

[16] Dissenting in the BEM case now under review, Commissioner Johnson dealt exhaustively with the Supreme Court's state action doctrine, isolating eight separate indicia of "state action." He argued very strongly that all eight indicia apply to broadcast licensees. *Business Executives Move for Vietnam Peace*, *supra* Note 1, 25 F.C.C.2d at 253–261. Because this highly analytical—one might say mechanical—approach runs the risk of reading Supreme Court opinions for more than they mean, we have chosen to paint with a broader brush. Ours is the approach which the Supreme Court seems in fact to have used in the past.

[17] In particular, broadcasting may be easily distinguished from the newspaper industry in terms of "state action." In two recent decisions, courts have held that newspapers are not subject to the First Amendment. *Associates & Aldrich Co., Inc.* v. *Times Mirror Co.*, 9 Cir., 440 F.2d 133 (1971); *Chicago Joint Board* v. *Chicago Tribune Co.*, 7 Cir., ——— F.2d ———, 39 U.S. L. WEEK 2360 (December 17, 1970). While the governmental involvement in and public character of newspapers is surely less than that of broadcasting, we of course need express neither agreement nor disagreement with the cited decisions here.

[18] Pemberton, *The Right of Access to Mass Media*, in N. DORSEN (ed.), THE RIGHTS OF AMERICANS 277, 290 (1971). The Government is also directly responsible for the very existence of particular broadcasters. "[E]xisting broadcasters have often attained their

A second and even more important factor is the *specific* governmental involvement in the broadcasters, action now under review here. All of the cases in which previous courts have characterized broadcasters as mere "private corporations" immune from First Amendment constraints, *see* text at page 12 *supra*, have involved direct suits against broadcast licensees. In the cases before us now, however, the Commission has given its imprimatur to the flat ban on editorial advertising. It specifically considered and specifically authorized the flat ban. Thus we are called upon to review not simply a private decision, but a decision by a government agency, a decision which must inevitably provide guidance for future broadcaster action.

There is ample authority for the principle that specific governmental approval of or acquiescence in challanged action by a private organization indicates "state action."[23] Indeed, in a case similar to ours the Supreme Court held that a private bus company franchised by the federal government and regulated by the District of Columbia Public Utilities Commission could be subject to First Amendment constraints. It emphasized the specific regulatory acquiescence in the challenged action of the bus company:

> " * * * In finding [state action] we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the [challenged action], ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby. * * *"

Public Utilities Commission v. *Pollak*, 343 U.S. 451, 462 (1952). (Footnote omitted.)

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present position because of their initial government selection in competition with others * * *. * * * [Their present] advantages are the fruit of a preferred position conferred by the Government." *Red Lion Broadcasting Co.* v. *F.C.C., supra* Note 7, 395 U.S. at 400.

[19] *Office of Communication of United Church of Christ* v. *F.C.C., supra* Note 8, 123 U.S. App. D.C. at 337, 359 F.2d at 1003.

[20] The licensing-out or delegation of governmental authority has been an element in some of the Supreme Court's most expansive state action decisions. *See Evans* v. *Newton*, 382 U.S. 296 (1966); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Smith* v. *Allwright*, 321 U.S. 649 (1944). The mere existence of a licensing or delegation relationship is not, of course, enough by itself to establish state action; licensed pharmacists cannot be equated with licensed broadcasters. The actual extent of governmental involvement and the public character of the enterprise in question remain the final tests of state action.

[21] The activities of a governmental regulatory agency have also been emphasized in at least one of the Supreme Court's expansive state action decisions. *See Public Utilities Comm'n* v. *Pollak, supra* Note 15, 343 U.S. at 462, *citing American Communications Ass'n* v. *Douds*, 339 U.S. 382, 401 (1950) ("[W]hen authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itelf.").

[22] *See Red Lion Broadcasting Co.* v. *F.C.C., supra* Note 7, 395 U.S. at 394, 396; *Office of Communication of United Church of Christ* v. *F.C.C., supra* Note 8, 123 U.S. App. D.C. at 337, 359 F.2d at 1003.

[23] The Supreme Court has said that "action of state courts and judicial officers in their official capacities is to be regarded as action of the State * * *." *Shelley* v. *Kraemer*, 334 U.S. 1, 14 (1948). *See New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 DUKE L. J. 219, 227–230. *See also* this court's discussion of the *Shelley* principle—which surely must apply to actions of a federal administrative agency specifically approving private action—in *Edwards* v. *Habib*, 130 U.S. App. D.C. 126, 397 F. 2d 687 (1968). Specific governmental acquiescence, as well as specific approval, has also been a focus of Supreme Court state action decisions. *See Marsh* v. *Alabama, supra* Note 15, 326 U.S. at 507 & n. 4, 509; *Burton* v. *Wilmington Parking Authority, supra* Note 20, 365 U.S. at 725.

Broadcasting's importance and suitability for communication of ideas need not be labored. Mere presence of large and appropriate audiences (and thus opportunities for effective communication) has sometimes been emphasized by the courts to show the relevance of First Amendment protections.[24] In *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), for example, the Supreme Court held that a privately owned shopping center was an appropriate place for the "speech" of labor union picketers. It stressed "[t]he large-scale movement of the country's population from the cities to the suburbs [that] has been accompanied by the advent of the suburban shopping center * * *." *Id.* at 324. With this demographic change, the "speech" that once took place on the public streets around downtown shopping areas must be allowed to move to privately owned parking areas in the suburbs, for that is where the relevant audiences now are. The technological and cultural changes connected to the current preeminence of the broadcast media as our primary means of communication are no less striking. The soap box orator and the leafleter are becoming almost obsolescent; their Saturday afternoon audiences have increasingly moved indoors—in front of their television sets.[25]

Moreover, unlike most of the private entities held to be subject to First Amendment constraints, the broadcast media are specifically dedicated to communication. They function as both our foremost forum for public speech and our most important educator of an informed people. In a populous democracy, the only means of truly mass communication must play an absolutely crucial role in the processes of self-government and free expression, so central to the First Amendment. That can be said of almost no other "private" enterprise.

IV

Broadcast licensees, then, serve not only as "speakers" but also as administrators of a highly valuable communications resource, subject to First Amendment constraints. Their dual role demands that their own constitutional interests in free speech coexist with those of the general public. But what are the dimensions of the public's First Amendment interests in the operation of radio and television? And how do they apply to the issue of editorial advertising?

It is particularly important that these cases deal only with the public's First Amendment interests in broadcasters' allocation of advertising time. They deal only with time relinquished by broadcasters to others; petitioners argue only that, in relinquishing that time, broadcasters must not discriminate against protected expression. In normal programming time, closely controlled and edited by broadcasters, the constellation of constitutional interests would be substantially different. In news and documentary presentations, for example, the broadcasters' own interests in free speech are very, very strong.[26] The Commission's fairness doctrine properly leaves licensees broad leeway for professional judgment in that area. But in the allocation of advertising time, the broadcasters have no such strong First Amendment interests. *Their* speech is not at issue; rather, all that is at issue is their decision as to which other parties will be given an opportunity to speak.

Though the broadcasters themselves have no substantial First Amendment interest in the allocation of advertising time, we might expect that the interest of members of the public—potential advertisers—would be quite strong. However, the Commission and the broadcaster-intervenors have argued just the opposite. They contend that the public's constitutional concerns do not extend to advertising time. Thus we must decide whether the substantial block of the broadcast day devoted to advertising is but a vacuum, devoid of First Amendment constraints, in the midst of a medium powerfully affected by those constraints—a desert in the midst of an oasis.

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[24] *See, e.g., Wolin* v. *Port of New York Authority,* 2 Cir., 392 F. 2d 83, 90–91 (1968) ("The propriety of a place for use as a public forum * * * [may be established if] the place is where the relevant audience may be found."). Of course, the cases before us involve the right to speak on a *medium* of communication, not in a particular *place*. Thus many of the considerations are different; but the basic concern with the ability to reach to relevant audience applies in both situations.

[25] The Supreme Court has noted that broadcast "technology * * * supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news * * *." *Red Lion Broadcasting Co.* v. *F.C.C., supra* Note 7, 395 U.S. at 386 n. 15.

[26] *See id.* at 396.

The Commission and intervenors work from the following premise. They define the public's overall constitutional interests in the operations of radio and television quite narrowly. The public's only interest, they suggest, is as viewers and listeners—not as speakers. They cite to us the *Red Lion* Court's mention of "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences" over the broadcast media.[27] And they read that statement to set forth not only *an* interest of the public, but the *only* interest of the public.

Working from that premise, the Commission and intervenors contend that the public already receives "suitable access" to controversial views on normal programming time. Application of the fairness doctrine's requirement of full and fair coverage of public issues in non-advertising time, they suggest, insures that all views on these issues will in fact be presented. They assume that editorial advertising adds nothing new to the debate. The fairness guarantee alone, they say, is enough to eliminate petitioners' claim on advertising time—and enough to satisfy the First Amendment. We disagree.

Surely the public's interest in free access to the full spectrum of ideas and controversial views on radio and television is highly important. The right to receive ideas and information is deeply rooted in First Amendment law.[28] The *Red Lion* Court stressed that right, since it was the one primarily relevant to the fairness doctrine rules at issue in the case. But we do not believe that the *Red Lion* decision makes the goal of an informed public the exclusive First Amendment interest constraining broadcasters. Certainly the Supreme Court has done so in no other context.

The public has a First Amendment interest in the mode or manner—as well as the content—of public debate aired on the broadcast media. The *Red Lion* Court itself stated specifically that "[i]t is the purpose of the First Amendment to preserve an ***uninhibited*** marketplace of ideas [in the broadcast media]."[29] This court, similarly, has said that the Commission is obliged to administer the airwaves 'in such a manner that * * * debate on public issues is 'uninhibited, robust and wide-open.'" *National Ass'n of Theatre Owners* v. *F.C.C.*, 136 U.S. App. D.C. 352, 365, 420 F.2d 194, 207 (1969). The reference to "uninhibited" debate is, of course, borrowed from the Supreme Court's decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). The Court there extended First Amendment protection to some forms of libel on public officials. It made clear that the Amendment's concern extends beyond the mere fostering of speech whose content will properly inform the public. The *New York Times* decision establishes a strong First Amendment interest in vigorous, "wide-open" public debate.

Furthermore, we must take note of a third—but, perhaps, most important—First Amendment interest. That is the interest of individuals and groups in effective self-expression. The *Red Lion Court* did say that "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[30] For, as it pointed out, broadcast time is necessarily limited. But the limited nature of broadcast time does not dictate that the individual and group interest in self-expression be brushed aside entirely; it allows for a reasonably regulated, "abridgeable" right to speak. The First Amendment values of individual self-fulfillment through expression and individual participation in public debate have long been recognized.[31] We all have an interest in speaking up ourselves as well as in hearing others. It is too late to argue that the First Amendment protects ideas but not an individual's interest in expressing them and doing so in his own way.

We conclude, then, that the public's First Amendment interests constrain broadcasters not only to provide the full spectrum of viewpoints, but also to present them in an uninhibited, wide-open fashion and to provide opportunity for individual self-expression.[32] How do these three First Amendment interests relate to a more specific interest in the airing of editorial advertisements? The answer emerges when we understand the special importance of advertising time to our system of free expression. First, the initial decision to produce an editorial advertisement is in the hands of members of the public. The initiative to present a particular view does not have to come from a member of the broadcaster's staff. Second, a paid advertisement is basically controlled and edited by the advertiser. He is allowed to present his views in a fashion chosen by himself. If an individual is interviewed for a news program, he may expect his comments to be abbreviated and edited; reporters' commentary will qualify what he has to say. For it is the broadcasters' responsibility to be objective, to condense issues into available time for presentation, and to play up or play down views acocrding to the *broadcaster's* opinion of what is important and interesting. But when an individual or group buys time to say its piece, the crucial controls are in its own hands. Editorial advertising is thus a special and separate mode of expression, not simply a duplication of other expression on the same medium.[33]

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[27] *Id.* at 390.

[28] *See Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); *Lamont* v. *Postmaster General*, 381 U.S. 301, 307–308 (1965) (Mr. Justice Brennan, concurring); *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943). The "right to receive," however, has not been considered the central First Amendment interest, and never the only First Amendment interest.

[29] 395 U.S. at 390. (Emphasis added.)

[30] *Id.* at 388.

[31] *See, e.g.,* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4–7 (Vintage ed. 1967).

[32] Of course, all three of these interests apply to non-advertising time as well as to advertising time. The Commission, in fact, has encouraged broadcasters to present conflicting

The importance of initiative and control to the First Amendment interests in wide-open debate and individual self-expression should be obvious. Vigorous, free expression is promoted when members of the public have *some* opportunity to take the initiative and editorial control into their own hands on the broadcast media. It has traditionally been thought that the best judge of the importance of a particular viewpoint or issue is the individual or group holding the viewpoint and wishing to communicate it to others. In the First Amendment area, our best guarantee has always been a "free market" in which partisans who feel strongly on particular issues may decide on their own to speak out and to speak out in their own way. The present system, allowing a flat ban on editorial advertising, conforms instead to a paternalistic structure in which licensees and bureaucrats decide what issues are "important," how "fully" to cover them, and the format, time and style of the coverage.

Even if broadcasters were to succeed in presenting a full spectrum of viewpoints and partisan spokesmen on non-advertising time, their retention of *total* initiative and editorial control is inimical to the First Amendment. The importance of fair, objective and full treatment of controversial issues on normal programming cannot be doubted. But, as the Supreme Court has said in the context of classroom debate, "supervised and ordained discussion" is not enough. *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969). "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967). In other words, there is always a strong First Amendment interest expression.[34]

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views through partisan voices as well as through predigested commentary. *See Democratic National Committee, supra* Note 1, 25 F.C.C. 2d at 222–223. However, as we make clear in text, the selective, edited presentation by the Government's licensee of partisan voices on news shows, for example, does not erase the *special* advantages of allowing self-selected partisan voices on advertising time.

[33] *See* text at pages 27–29 & Note 37 *infra*. *See also* Note, *A Fair Break for Controversial Speakers: Limitations of the Fairness Doctrine and the Need for Individual Access*, 39 GEO. WASH. L. REV. 532, 557–560 (1971).

[34] We are cognizant of current proposals to reform the Commission's fairness doctrine and invigorate its enforcement, so lackluster in the past. We recommend the Commission's consideration of new roles to "encourage and implement" presentation of opposing viewpoints by reemphasizing the obligation to "seek out" controversial issues. *Obligations of Broadcast Licensee Under the Fairness Doctrine*, 35 FED. REG. 7820 (1970). But, as the Commission says, the proposed rules would be but a "modest * * * step in promoting access to the media." *Id.* at 7821. They go little beyond the present obligation to give "full" coverage to controversial issues. Such an obligation is inherently difficult to define and enforce. At best, the Commission can evaluate only the *general* willingness of a licensee to "seek out" issues and glaring examples of noncoverage of obviously important issues. The Commission cannot be expected to engage licensees in fine debates over coverage of less obviously life-or-death issues. But the fundamental point—the point we emphasize—is that no matter how "fully" controversial issues might be covered in a perfect broadcasting world, the basic initiative and control remains with the licensee. Because there is not even a partial "free market" opening to the public at large, the crucial First Amendment interests in decentralized initiative and control go unsatisfied.

We realize that there is another possible, but purely speculative, reformation of the fairness doctrine now under consideration which might be supposed to obviate the need for a measure of "free market" access to advertising time. It has been proposed that licensees be required to provide self-edited advertising time to groups or individuals under the fairness doctrine only when a commercial advertiser has already taken a controversial position in his broadcast messages. Such an approach has been taken regarding cigarette advertisements, though that case was said to be extraordinary and not to establish a general precedent. *Banzhaf* v. *F.C.C.*, 132 U.S. App. D.C. 14, 405 F. 2d 1082 (1968). But even if that principle were made to apply generally, it would leave the initiative solely in the

Even in terms of the public's First Amendment interest emphasized by the Commission and intervenors—the interest of "viewers and listeners" in passive access to the full spectrum of viewpoints on radio and television—editorial advertising plays an important role. The concept of "full" coverage of "controversial" issues "of public importance" is vague to say the least, and leaves much to the broadcasters' diiscretion (and possible oversight).[35] Assuming that broadcasters are sometimes fallible, the goal of a fully informed public is best attained by opening of outlets for members of the public to supplement the licensees' assessments of "importance," "controversiality" and "full" coverage. The Commission's and intervenors' argument might be somewhat stronger if it were designed to support a partial ban on editorial advertising concerning issues and views which have *in fact* been substantially aired on normal programming time.[36] The argument is unconvincing, however, in support of a flat, *per se* ban on any and all editorial advertisements.

Moreover, even if "antiwar views," for example, have in fact been presented on news and interview shows, it is not *necessarily* clear that a particular antiwar editorial advertisement would add nothing to the public's information and understanding. "Viewpoints" cannot be so neatly and infallibly catalogued as the Commission would have us believe. Self-expression and public debate are much more subtle phenomena; matters of style and intensity of feeling are important components.[37] Again, an across-the-board ban on editorial advertisements—leaving the quality of public debate in the control of one licensee, supplemented by no other autonomous inputs—may well ignore opportunities to enliven and enrich the public's overall information.

We recognize, of course, that the onesidedness and private editing of particular "spot" editorial advertisements may in the end steer viewers and listeners always from the "truth" by distorting complex issues. Being brief, these "spot" messages—no less than normal broadcast news coverage—may not canvass all possible arguments or develop all possible implications of the position they espouse. But that does not mean that they are unprotected by the First Amendment. Our Constitution protects many forms of misleading and overly simplified political expression in order to ensure robust, wide-open debate. "[N]either factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct * * *." *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 273. Nor does the brevity of the criticism. We must, then, be very, very slow to judge any sort of speech on public issues worthless. The marketplace of ideas protected by the First Amendment, after all, is not governed by the tastes and intellectual standards of the universities or the broadcast newsroom—or even of judicial chambers.

We conclude, therefore, that the fairness doctrine's goal of full and fair coverage of issues on normal programming time does not eliminate the public's interest in a further, complementary airing of controversial views during advertising time. We must concur in the Supreme Court's only recorded comments on

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hands of commercial advertisers: the only issues on which noncommercial groups and individuals could speak through editorial advertisements would be those issues which commercial advertisers had already chosen to raise themselves. Allowing such a narrow group, motivated largely by business profit, to set the agenda for editorial advertising is unconscionable and contrary to First Amendment precepts. It is crucial that noncommercial groups and individuals have the same rights of initiative as commercial advertisers.

[35] The guarantees of full and fair coverage have proved particularly difficult to define and enforce in the past. They have taken on effective meaning only in the most extreme cases of broadcaster irresponsibility. For a depressing critique of the Commission's apparent inability to enforce its own standards, *see* Cox & Johnson, *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*, 14 F.C.C.2d 1 (1968).

[36] Even then, however, the special attributes of editorial advertising would not be eliminated by the broadcaster's own coverage. *See* text at pages 23–25 *supra* & pages 27–29 *infra*.

[37] In *Lee* v. *Board of Regents of State Colleges*, W.D. Wis., 306 F. Supp. 1097 (1969), *affirmed*, 7 Cir., 441 F.2d 1257 (1971), the court held that a school newspaper was obliged under the First Amendment to print antiwar editorial advertising, even though antiwar views could be printed in the newspaper's news and letters-to-the-editor columns. The court stressed the qualitative—and valuable—difference in expression of views through an editorial advertisement. "It is readily apparent," it said, "that a paid advertisement can be cast in such a form as to command much greater attention than a letter to the editor. Large type, photographs, repeated publication and full pages of space are some of the modes of expression available in an editorial advertisement that might not be available in a letter to the editor." *Id.* at 1101. Another court has come to the same result in a newspaper editorial advertising case. *Zucker* v. *Panitz*, S.D. N.Y., 299 F.Supp. 102 (1969). *See* text at pages 31–32 *infra*.

constitutional protection for editorial advertising—comments made in the context of newspapers, like broadcasting a medium which may be expected, if not required, to present the various sides of public issues in its non-advertising space. The Court said that editorial advertisements, unlike commercial advertisements,[38] are of fundamental First Amendment concern, since they deal with political questions. And it protected them from libel law attack to the same extent as the newspapers' own editorial columns, for

> "[a]ny other conclusion * * * might shut off an important outlet by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. * * * The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.' * * *"

New York Times Co. v. *Sullivan, supra,* 376 U.S. at 266.

V

We come now to the aspect of the broadcasters' policy which, petitioners say, trenches on the First Amendment interest in editorial advertising. The constitutional defect of that policy is somewhat ironic. The *New York Times* Court made clear that the fact distinguishing fully protected editorial advertising from less fully protected commercial advertising is that the former deals with controversial public issues. Indeed, the political nature of editorial advertising places it near the core of the First Amendment. However, the very characteristic which affords it strict constitutional protection is also the characteristic causing the broadcasters' challenged policy to single it out and exclude it from the airwaves. That, we believe, is the crucial aspect of these cases.

It is important to note that petitioners do not attack the exclusion of editorial advertising by broadcasters who accept no advertisements whatever.[39] We do not have to decide whether the broadcast medium inherently amounts to a "public forum" on the order of public streets or parks or meeting halls or even bus terminals.[40] We leave open the possibility that broadcasters may constitutionally relinquish no time at all for advertising of any sort. For the issue in these cases is the permissibility of discrimination, within a given block of advertising time, against "controversial" speech and in favor of commercial and "noncontroversial" speech. We deal here with a forum that already has been opened up by the licensees themselves, opened up for direct broadcast presentations by members of the public.

Fortunately, we do not write on a clean slate in this area. Six courts have confronted discriminations among types of speech like the one challenged here. Every one of them—four federal courts and two state supreme courts—has held that once a forum, subject to First Amendment constraints, has been opened up for commercial and "noncontroversial" advertising, a ban on "controversial" editorial advertising is unconstitutional unless clearly justified by a "clear and present danger." *Lee* v. *Board of Regents of State Colleges*, W.D. Wis., 306 F.Supp. 1097 (1969), *affirmed*, 7 Cir., 441 F.2d 1257 (1971); *Zucker* v. *Panitz*, S.D. N.Y., 299 F.Supp. 102 (1969); *Kissinger* v. *New York City Transit Authority*, S.D. N.Y., 274 F.Supp. 438 (1967); *Hillside Community Church, Inc.* v. *City of Tacoma*, Wash., 455 P.2d 350 (1969); *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal.Rptr 430, 434 P.2d 982 (1967). We join this unbroken line of authority.

First Amendment doctrine governing access to forums for communication has been elaborated often in recent years. The essential test is an exercise in balancing, though weighted in favor of First Amendment values.[41] On one hand, the court must assess the constitutionality protected interest in the particular expressive activity in the particular forum. On the other hand, it must assess the importance of other uses of the forum which may be threatened and the extent to which they actually will be disrupted. Access may be denied only if the disruption caused by a particular type of expression (*e.g.*, public speaking, marching, picketing) clearly overrides the "preferred" interest in free speech. Thus there is some right of access by demonstration to state capitol grounds [42] but not to a jailyard.[43]

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[38] Commercial advertising—indeed, any sort of commercial speech—is less fully protected than other speech, because it generally does not communicate ideas and thus is not directly related to the central purpose of the First Amendment. *See Breard* v. *City of Alexandria*, 341 U.S. 622 (1951); *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942).

[39] DNC's position is somewhat ambiguous. The ruling which it requested from the Commission would, by its terms, apply to all broadcasters, whether or not they accept any advertising. *See* text at page 6 *supra*. However, on appeal DNC's arguments have been focused entirely on broadcasters who do already accept noncontroversial advertising. The interests of particular licensees in keeping all advertising off the air were not explored before the Commission or before this court—for example, an all music station may have a very substantial interest in broadcasting no paid announcements. Because the special issues relating to such licensees were not presented here, we do not decide them.

[40] *See, e.g., Schneider* v. *State*, 308 147 (1939); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Wolin* v. *Port of New York Authority, supra* Note 24. *See generally* Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 Sup. Ct. Rev. 1.

Ordinarily, courts have to make the basic balancing judgment on their own. However, when the administrator of a forum has determined to grant access to some speakers or some picketers, he has implicitly made that basic judgment himself. When some public speaking is allowed in a park, the park's administrator has determined that the normal and proper functions of the park will not be excessively harmed by public speaking. If he then attempts to deny access to other public speakers, he cannot be heard to claim the opposite. The burden is on him to show some very substantial factor distinguishing the disruption they would cause from that caused by the speaking or picketing already allowed.

The same principle applies to broadcasters who have opened their forum to commercial speech but would close it to controversial political speech. By opening up a forum for some paid presentations, independently edited and controlled by members of the public, the broadcasters have waived any argument that advertising is inherently disruptive of the proper function of their stations. The exclusion of only one sort of advertising—which we have shown to have great First Amendment value—is then highly suspect, a *prima facie* constitutional violation. To justify the exclusion, there must be a substantial factor distinguishing the disruptive effect of editorial advertising from that of commercial advertising.

The content of the idea which the excluded speakers seek to promote is—emphatically—*not* permitted as a distinguishing factor in itself. Indeed, the existence of an exclusionary discrimination apparently based on the content of ideas presents an additional, or greatly heightened, *prima facie* constitutional violation. Both free speech and equal protection principles condemn any discrimination among speakers which is based on what they intend to say.[44] If the First Amendment prohibits anything at all, it must be a censorial discrimination among ideas. And since First Amendment rights have been held to be "fundamental rights" triggering the strict standard of review under equal protection principles, *Williams* v. *Rhodes*, 393 U.S. 23, 30–31 (1968), it is doubly clear that the burden of justifying any apparent discrimination is very great indeed.

At least 20 years ago, the Supreme Court began condemning discriminations among different exercises of the same type of expression. *Fowler* v. *Rhode Island*, 354 U.S. 67 (1953); *Niemotko* v. *Maryland*, 340 U.S. 268, 272–273 (1951). Both cases involved access to a forum already opened to others. More recently, the Court in *Cox* v. *Louisiana*, 379 U.S. 536 (1965), invalidated a state regulation that permitted labor picketing but not civil rights picketing. In his concurrence, Mr. Justice Black stated that this sort of discrimination is "censorship in a most odious form" and violates both the First Amendment and the equal protection clause. *Id.* at 581. Similarly, in *Adderley* v. *Florida*, 385 U.S. 39 (1966), the Court upheld a ban on demonstrations in a jailyard, but was careful to note that "[t]here is not a shred of evidence in this record * * * [the demonstrators were excluded] because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest." *Id.* at 47.

No doubt a discrimination against all controversial speech—such as we face in these cases—is somewhat less "odious" than a discrimination among different controversial viewpoints on particular issues. But it is a form of censorship just the same.[45] It is a favoritism toward the *status quo* and public apathy and, in these cases, a favoritism toward bland commercialism.[46] Such favoritism flies in the face of the First Amendment, whose central purpose is to protect and promote controversy, "uninhibited, robust and wide-open," on public issues.

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[41] Most of the cases, other than those cited above in text, have involved access to particular places in order to perform expressive activities such as speaking, leafleting, or demonstrating in some fashion. For general discussions of the cases and the principles applied, *see* H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT (paper ed. 1965); Note, *Regulation of Demonstrations*, 80 HARV. L. REV. 1773 (1967). There is no reason why the general principles applied in cases involving access to *places* should not apply to our cases involving access to a particular *medium* of expression. *See* Note 24 *supra*.

[42] *Cox* v. *Louisiana*, 379 U.S. 536 (1965).

[43] *Adderley* v. *Florida*, 385 U.S. 39 (1966).

[44] For discussions of the First Amendment-equal protection intersection, *see* Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1482, 1492–1497 (1970); Kalven, *supra* Note 40, 1965 SUP. CT. REV. at 29–30; Van Alstyne, *Political Speakers at Universities: Some Constitutional Considerations*, 111 U. PA. L. REV. 328, 337–339 (1963).

Moreover, it is by no means clear that a broadcasters' ban on "controversial" advertising does not impermissibly open the door to a *sub rosa* discrimination *among* controversial ideas. The term "controversial" is extraordinarily vague. Some advertisements may not be deemed "controversial"—and may not even be "controversial" for purposes of the fairness doctrine [47]—but may still express ideas, the negative of which would surely be labeled "controversial." [48] Ads for Radio Free Europe or Army recruiting, for example, may be allowed unanswered on the air, while ads calling the notion of the "free world" a sham or ads calling the Army a threat to democracy would be banned entirely. The line between ideological and nonideological presentations is an almost impossible one to draw. All too often in our society one particular ideology—that of passivity, acceptance of things as they are, and exhaltation of commercial values—is simply taken for granted, assumed to be a nonideology, and allowed to choke out all the rest.[49]

Thus the editorial advertising ban, particularly when licensees accept advertising generally, establishes an unmistakable infringing of First Amendment liberties. The Commission and the broadcasters, then, bear a very heavy burden of justification. Whether we require a "compelling" justification, an "overriding" justification, or a "clear and present danger" is relatively unimportant.

VI

It being established that there is a strong and specific First Amendment interest in editorial advertising and that the policies discriminatorily barrng such expression work a *prima facie* violation of constitutional principles, we must consider the countervailing considerations raised by the Commission and the broadcaster-intervenors. In order to justify the policy at issue, they must show some very substantial harm that would be caused by acceptance of editorial advertising—a sort of harm great enough to override the First Amendment interests at stake and a sort of harm not already involved in the acceptance of commercial and "noncontroversial" advertising. Only such a showing could convince us that the ban on editorial advertisements is supported by sufficient countervailing values and is not based solely on the content of the ideas conveyed.

The Commission and intervenors have begun from the assumption that our holding for petitioners would deprive broadcast licensees of their highly prized editorial independence and control over their frequencies, giving editorial advertisers a *right* to air time which commercial advertisers do not presently have. They have argued that petitioners seek the right to "grab the mike" from broadcasters' hands.[50] The result, they say, would be a three-fold disaster. First, they foresee "'a return to the chaotic situation of radio's early days'"[51] when too many hands grabbing for too few mikes made successful broadcasting impossible. Second, they argue that compulsory acceptance of editorial advertising would allow a few rich individuals or groups to buy up great blocks of time to purvey views on only one side of important issues, thus grossly unbalancing the broadcast station's treatment of those issues. And third, they point out that broadcasters compelled to accept editorial advertisements on one side of an issue would then be required by the fairness doctrine to accept at least some advertisements on the other side—free of charge if necessary. Provision of such free advertising time, they say, would cut into the broadcasters' revenues and might bring financial collapse.

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[45] In *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Rptr. 430, 434 P. 2d 982, 986 (1967), the California Supreme Court came to the same conclusion as we do on this issue, saying:

> "* * * The vice is not that the district has preferred one point of view over another, but that it chooses between classes of ideas entitled to constitutional protection, sanctioning the expression of only those selected, and banning others. Thus the district's regulation exercises a most pervasive form of censorship.
>
> "* * * [T]he district's policy * * * affords total freedom of the forum to mercantile messages while banning the vast majority of opinions and beliefs extant which enjoy First Amendment protection because of their noncommercialism. No statistical data is required to demonstrate that in the totality of man's communicable knowledge, that which bears no relationship to material value preponderates."

The Supreme Court of Washington specifically adopted this view in *Hillside Community Church, Inc.* v. *City of Tacoma, Wash.*, 455 P. 2d 350, 353 (1969).

[46] Commissioner Johnson commented in his dissent that broadcasters "have created a system in which immediate access is granted to one, privileged class of applicants: the commercial peddler of goods and services. * * * We have an individual right of access, all right, but only for hucksters of industrial garbage." *Democratic National Committee, supra* Note 1, 25 F.C.C.2d at 223.

[47] *See Banzhaf* v. *F.C.C.*, 132 U.S. App. D.C. 14, 405 F. 2d 1082 (1968); *Green* v. *F.C.C.*, —— U.S. App. D.C. ——, —— F. 2d —— (Nos. 24470 & 24516, decided June 18, 1971).

[48] In *Wirta* v. *Alameda-Contra Costa Transit District, supra* Note 45, 434 P. 2d at 987, the California Supreme Court made the same point very forcefully, and provided several telling examples:

> "* * * A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write to the President or Governor about protecting our natural resources. An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes. An insurance company may announce its available policies, but a senior citizens' club cannot plead for legislation to improve our social security program."

[49] *See generally* C. Waxman (ed.), The End of Ideology Debate (1969).

The arguments of the Commission and intervenors fall well short of the mark. The reason is that they have apparently misunderstood the narrowness of the issue here. All that we are considering is the permissibility of a total, flat ban on editorial advertising. All petitioners ask is that broadcasters be required to accept *some* editorial advertising. They do not advocate an absolute right to air their advertisements. As the *Red Lion Court* made clear, there could not be any such absolute right because advertising time, like all broadcast time, is severely limited. *See* text at page 23 *supra.* Under the Communications Act, broadcasters are not "common carriers" obliged to accept any advertising message that is submitted.[52] And petitioners do not argue that they should be. What petitioners do argue is that editorial advertisements should at least be considered and that some should be aired.

Such a modest reform would not substantially undermine broadcasters' editorial control over their frequencies. For broadcasters would retain full latitude to control the content of their programming. Their editorial control over non-advertising time would not be disturbed whatever. All that would be affected is their allocation of advertising time—an area in which *editorial* control over content has never been of major importance. The interest in deciding which advertisements to accept is not as great as in deciding what public issues to cover and how to cover them on news presentations, for example. *See* text at page 20 *supra.* It surely cannot be equated, as the Commission and intervenors suggest, with the interest of law review editors in deciding what articles to publish. *See Avins* v. *Rutgers, State University of New Jersey,* 3 Cir., 385 F.2d 151 (1967), *cert. denied,* 390 U.S. 920 (1968). A broadcaster traditionally is not nearly as involved in the preparation and editing of advertisements as a law review staff is in the preparation and editing of articles.

Within the affected block of advertising time, neither chaos nor anything approaching chaos would follow the modest reform at issue. For, again, broadcasters would retain wide-ranging control. It is well established in First Amendment law governing access to forums that "reasonable regulations" may be promulgated and enforced to limit the exercise of free speech.[53] At the least, there may be regulations determining the time, place and manner of speech. They may not be used to stifle speech, but they are absolutely necessary to see that too many groups speaking at once do not drown out one another or trench overly much on the normal uses to which the forum is put by the public in general. The same principle applies to broadcasters' methods for allocating advertising time. All that petitioners condemn here are regulations providing that public issue advertising may be aired "at no time, in no place and in no manner" over the broadcast media.

Clearly, for example, broadcasters are entitled to place an outside limit on the

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[50] Statement of attorney for intervenor Columbia Broadcasting System at oral argument before this court.

[51] Brief for the Commission in Case No. 24,537 at p. 12.

[52] 47 U.S.C. § 153(h) (1964). The Commission and intervenors argue that this "common carrier" provision would be declared unconstitutional if we were to decide for petitioners in these cases. That, of course, is absolutely incorrect. The Commission and intervenors also point to a part of the Communications Act providing that if a station permits one candidate for office to use its facilities, it must then permit others equal time, but providing also that "[n]o obligation is imposed upon any licensee to allow the use of its station by any such candidate." 47 U.S.C. § 315(a) (1964). This statutory provision squares perfectly with our holding that a broadcaster is not necessarily obliged to provide any time for advertisements, but that if he does sell some advertising time he may not totally exclude editorial advertising.

[53] *See, e.g., Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308, 320 (1968); Note, *supra* Note 15.

total amount of editorial advertising they will sell. To fail to impose some such limit would be to deny the public the other sorts of programming which it legitimately expects on radio and television. Similarly, "reasonable regulation" of the placement of advertisements is altogether proper. No advertiser has a right to air his presentation at any particular point in an evening's programming. Nor does he have a right to clog a particular time segment with his messages. A regulation of all editorial advertising to non-"prime time" or any other major discrimination in the placement of editorial advertisements would no doubt go too far. But there is still room for broad exercise of the broadcasters' discretion.

We need not define the precise control which broadcasters may exercise over editorial advertising. Rather, the point is that by requiring that *some* such advertising be accepted, we leave the Commission and licensees broad latitude to develop "reasonable regulations" which will avoid any possibility of chaos and confusion. The spectre of chaos and "mike grabbing" raised by the Commission and intervenors here is, as petitioners say, a "'bogus issue." Broadcasters, after all, have dealt quite successfully with the scheduling problems involved with commercial advertising. We require only that noncommercial advertisers be treated in the same evenhanded way. Although many broadcasters already do allow editorial advertisements on the air, we have not been shown one reason, drawn from their experience, to suggest that chaos has resulted.

Beyond the mistaken suggestion of administrative apocalypse, the Commission and intervenors have raised a more plausible and important claim, involving the danger that a few individuals or groups might come to dominate editorial advertising time. Of course, the mere fact that wealthy people may use their opportunities to speak more effectively than other people is not enough to justify eliminating those opportunities entirely. It takes more money to operate a magazine or newspaper—or, for that matter, a broadcast station—than to buy a segment of time for an editorial advertisement. Yet we are not reluctant to provide strict First Amendment protection for the operators of magazines, newspapers and broadcast stations. The real problem, then, is not that editorial advertising will cost money, but that it may be dominated by only one group from one part of the political spectrum. A onesided flood of editorial advertisements could hardly be called the "robust, wide-open" debate which the people have a right to expect on radio and television.

Again, however, invalidation of a flat ban on editorial advertising does not close the door to "reasonable regulations" designed to prevent domination by a few groups or a few viewpoints. Within a general regime of accepting *some* editorial advertisements, there is room for the Commission and licensees to develop such guidelines.[54] For example, there could be some outside limits on the amount of advertising time that will be sold to one group or to representatives of one particular narrow viewpoint. The licensee should not begin to exercise the same "authoritative selection" in editorial advertising which he exercises in normal programming. *See* text at pages 24–25 *supra*. However, we are confident of the Commission's ability to set down guidelines which avoid that danger.

We are no less confident of its ability to deal reasonably with the final problem it has raised that relating to licensees' fairness obligations. Invalidation of a flat ban on editorial advertising, of course, leaves the Commission the power to require that if editorial advertisements are accepted on one side of an issue, then broadcasters must also accept at least some advertisements on the other side of the issue, free of charge if necessary. *See Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963). The result of such a reasonable regulation, however, need not be financial disaster. Indeed, it is incredible that the Commission would enforce a rule so rigid that licensees would be driven out of business.[55] If the obligation to provide some free time for answering editorial advertisements were shown to threaten actual financial harm to particular broadcasters, the Commission could make necessary adjustments.[56]

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[54] In the context of regulating demonstrations or picketing, guidelines which limit access because the same or similar groups had already had substantial access would be unusual and perhaps impermissible. However, the interest in maintaining some degree of balance on the broadcast media is particularly great. And "the characteristics of news media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co.* v. *F.C.C.*, *supra* Note 7, 395 U.S. at 386.

[55] We note that the Commission's requirement of free time for antismoking was administered generously toward the financial concerns of licensees and, indeed, few broadcasters seem to have been deterred from accepting cigarette commercials as a result. *See National Broadcasting Co., Inc.*, 16 F.C.C.2d 947 (1969).

[56] *See* Note, *Fairness Doctrine: Television as a Marketplace of Ideas*, 45 N.Y.U.L. Rev. 1222, 1249 (1970). We must be somewhat skeptical of the talk about financial disaster

We conclude that none of the spectres raised by the Commission and intervenors—spectres of chaos, grossly unbalanced programming and financial disaster—is enough to justify a flat ban on editorial advertising. What real problems there are may be dealt with while the acceptance of *some* editorial advertisements is required. The keynote must be a scheme of reasonable regulation, administered by the licensee and guided by the Commission. At least in the past, the Commission has not considered this task so impossible. Twenty-five years ago it decided a case in which a union charged that a broadcaster was violating free speech rights by refusing to sell program time for the airing of controversial views. The Commission stated:

> " * * * The spirit of the Communications Act of 1934 requires radio to be an instrument of free speech, subject only to general statutory provisions imposing upon the licensee the responsibility of operating its station in the public interest. * * *
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> " * * * No single or exact rule of thumb for providing time, on a nondiscriminatory basis, can be stated for application to all situations which may arise in the operation of all stations. The Commission, however, is of the opinion that the operation of any station under the extreme principles that no time shall be sold for teh discussion of controversial public issues and that only charitable organizations and certain commercial interests may solicit memberships is inconsistent with the concept of public interest * * * . The Commission recognizes that good program balance may not permit the sale or donation of time to all who may seek it for such purposes and that difficult problems calling for careful judgment on the part of station management may be involved in deciding among applicants for time when all cannot be accommodated. However, competent management should be able to meet such problems in the public interest and with fairness to all concerned. The fact that it placed an arduous task on management should not be made a reason for evading the issue by a strict rule against the sale of time for any programs of the type mentioned."

United Broadcasting Co., 10 F.C.C. 515, 517–518 (1945). We agree with those views, and see no reason why the Commission and broadcast licensees should be any less competent in 1971 than they were in 1945. Given a scheme of reasonable regulation, there is no reason why acceptance of editorial advertising should cause any substantial harm or disruption not already involved in the acceptance of other advertising. Therefore, to single out and exclude editorial advertising is to violate the First Amendment of the Constitution.

VII

On the basis of the foregoing, we reverse the Commission's decision that a flat ban on all editorial advertising is permissible. However, we remand these cases to the Commission for further consideration. On remand, the Commission should develop reasonable regulatory guidelines to deal with editorial advertisements. Petitioners should be allowed to reapply for advertising time: and, unless their presentations are found to be excludable under the Commission's guidelines, their applications should be accepted. Since the issues on which BEM and DNC seek to speak are current and changing, it is essential that regulations be developed speedily and that the affected broadcasters pass promptly upon petitioners' applications to buy time.

In the end, it may unsettle some of us to see an antiwar message or a political party message in the accustomed place of a soap or beer commercial. But we must not equate what is habitual with what is right—or what is constitutional. A society already so saturated with commercialism can well afford another outlet for speech on public issues. All that we may lose is some of our apathy. That is a small price to pay. For, as the Supreme Court has said, "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949).

Reversed and remanded.

McGowan, *Circuit Judge, dissenting:* The majority do not hold that petitioner in No. 24,492 is entitled to have its proposed spot announcements carried by the

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For, according to Commissioner Johnson, television broadcasters at least "*average* a 90 to 100 percent return on tangible investment annually." N. Johnson, How to Talk Back to Your Television Set 65 (1969). (Emphasis in original.)

intervenor-licensee there involved, or that the petitioner in No. 24,537 is assured of being able to buy time for its programs on public issues. What is held is that the Constitution commands that "*some*", but not all, editorial advertising be accepted; and the Commission is directed to embark upon rulemaking to determine how a licensee is to differentiate the "*some*" from the all.

The majority appear to believe that this assignment will not prove difficult. I am not so sure, particularly when I note that the only Commissioner who has perceived the same constitutional requirement as the majority responds to the practical requirement as the majority responds to the practical problems by suggesting that sales of a significant proportion of the total broadcast time be made on a first-come, first-served basis, accompanied by a possible suspension of the fairness doctrine. That approach does not seem to me a promising one in terms of the public's right to know.

The difficulties derive, of course, from the physical peculiarity which distinguishes radio and television communication from all other forms, namely, the limited number of frequencies and the impossibility of accommodating all who may wish to be heard over them. This, so the Supreme Court has said in *Red Lion*, makes it "idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of each individual to speak, write or publish." The majority, in recognition of this fact, do not purport to discern other than an "abridgeable" or "limited" First Amendment right to initiate paid editorial advertising. Petitioners themselves, it is said, may concievably never be able to insist that their particular advertising be accepted. That will depend upon the rules which the Commission propounds.

The Commission has, at the least, been set a task of heroic proportions, and one whose very complexities may undermine the premise upon which it is founded. The question is whether the Constitution requires that it be undertaken. I am not convinced that it does. It is presently the obligation of a licensee to advance the public's right to know by devoting a substantial amount of time to the presentation of controversial views on issues of public importance, striking a balance which is always subject to redress by reference to the fairness doctrine. Failure to do so puts continuation of the license at risk—a sanction of tremendous potency, and one which the Commission is under increasing pressure to employ.

This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation of radio and television communications facilities. This approach has neved been thought to be other than within the permissible limits of constitutional choice. Its existence provides a mechanism for implementation of the public's right to know which, by and large, has been effective. Indeed, the loudest voices in criticism of it complain that it has been working too well for the comfort of governmental policy makers in the areas of greatest current concern.

It is hardly the path of wisdom to scrap it for a system in which money alone determines what issues are to be aired, and in what format, even assuming, as is likely to be the case, that those issues, whatever they may prove to be, compare favorably with the intellectual content of the great bulk of commercial advertising. The responsibility for informing the public is now squarely on the licensee. That responsibility will only be diluted and obscured by requiring the licensee, against his own better judgment, to accept paid editorial advertising. I do not think the First Amendment requires that result, at least not within the context of a regulatory scheme which has made provision for the airing of controversial issues of public importance.

Of course it is true that licensees are currently free to accept paid editorial advertising, and some do, subject always to the limitations of the fairness doctrine. It may well be that a detailed inquiry and investigation by the Commission of this area, by formal rulemaking or otherwise, would be both useful and consonant with the Commission's continuing obligation to see to it that the public interest obligations of the licensees are being met in the most effective way. The Commission's currently announced purpose to undertake a comprehensive and wide-ranging review of the operation of the fairness doctrine might well include the subject of paid editorial advertising. But, believing as I do that the First Amendment exerts no compulsion to the contrary, I would not order the Commission to undertake that review in a constitutional straitjacket which dictates the result in advance.

LEGAL BRIEFS

UNITED STATES v. CALDWELL, AFFIDAVITS FILED IN SUPPORT OF CALDWELL PETITION TO QUASH SUBPOENA, DOCKET NO. 10426 (N.D. CAL. 1970)

AFFIDAVIT OF WALTER CRONKITE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

WALTER CRONKITE, being duly sworn, deposes and says:

1. I am a News Correspondent with CBS News, a division of Columbia Broadcasting System, Inc. My principal assignment since April 1962 has been Managing Editor of the "CBS Evening News with Walter Cronkite," a thirty minute television news program broadcast five nights each week by the CBS Network. In addition, I frequently serve as "anchor man" in the coverage of such special events as space missions and national political conventions and elections. Prior to joining CBS in 1950, I was a reporter-correspondent with United Press International for eleven years, covering the Western Front in World War II, the Nuremberg Trials and post-war Moscow.

2. My work involves the preparation, through reading and talking with news sources, of the considerable volume of material necessary for such extemporaneous broadcasts as political conventions, elections, and space missions, and for analytical broadcasts such as my daily radio program. It also involves participation in the determination of which stories should be covered on daily television news broadcasts and how they should be covered and participation in the selection of the news items to be broadcast and reading, correcting and, in some cases, rewriting those items. All of this work entails the exercise of editorial judgment based on an extensive background of information and ideas gathered from a wide variety of sources.

3. In doing my work, I (and those who assist me) depend constantly on information, ideas, leads and opinions received in confidence. Such material is essential in digging out newsworthy facts and, equally important, in assessing the importance and analyzing the significance of public events. Without such materials, I would be able to do little more than broadcast press releases and public statements.

4. The material that I obtain in privacy and on a confidential basis is given to me on that basis because my news sources have learned to trust me and can confide in me without fear of exposure. In nearly every case their position, perhaps their very job or career, would be in jeopardy if this were not the case. There are almost daily examples of this. For example: A member of the staff of a United States Senator advised me, far in advance of the announcement, that his employer did not plan to run for reelection. Another person in a similar position tipped me to his employer's intention to seek a higher office. An officer high in Pentatgon circles recently offered evidence of pressure high in the military command structure to get the President to cut back on his Viet Nam withdrawal commitments. A bartender told me of fraud in restaurant inspection in New York City. A scientist asserted that the Atomic Energy Commission's safety standards for atomic energy installations were not adequate. None of these persons would have volunteered this information if they thought they would be exposed as the source of the information. In short, I would be unable to obtain much of the material that is indispensable to my work if it were believed that people could not talk to me confidentially. I certainly could not work effectively if I had to say to each person with whom I talk that any information he gave me might be used against him.

5. On the basis of the foregoing and my experience as a news correspondent, it is my opinion that compelling news correspondents to testify before grand juries with respect to matters learned in the course of their work would largely destroy their utility as gatherers and analysts of news. Furthermore, once it is established and believed that news correspondents are to be utilized in grand jury investigations, they will be of precious little value to such investigations because they will no longer have access to information that grand juries might want.

WALTER CRONKITE.

Sworn to before me this 1st day of April, 1970.

LILIAN C. LANGEN,
Notary Public

AFFIDAVIT OF ERIC SEVAREID

DISTRICT OF COLUMBIA, *ss.:*

ERIC SEVAREID, being duly sworn, deposes and says:

1. I am National Correspondent for CBS News, a division of Columbia Broadcasting System, Inc. I am stationed in Washington, D.C. Over the last thirty years I have worked as a war correspondent, radio news broadcaster and television commentator for CBS, as well as a newspaper reporter and editor for the Paris *Herald* and the United Press.

2. I am engaged chiefly in broadcast commentary, as distinguished from factual news reporting. In the course of this work which is of a highly personal nature, I regularly talk with government officials, former officials, military people and a wide spectrum of others who possess special information or expertise on public issues.

3. A great deal of this talk is of the "off the record" or "not for attribution" kind. It is for my own information. Many people feel free to discuss sensitive matters with me in the knowledge that I can use it with no necessity of attributing it to anyone. This relationship has always been particularly the case for columnists or commentators.

4. Should a widespread impression develop that my information or notes on these conversations is subject to claim by government investigators, this traditional relationship, essential to my kind of work, would be most seriously jeopardized. I would be less well informed, myself, and of less use to the general public as an interpretor or analyst of public affairs.

(S) ERIC SEVAREID.

Sworn to before me this 31 day of March 1970.
(S) (Illegible),
Notary Public.

AFFIDAVIT OF MIKE WALLACE

STATE OF NEW YORK,
County of New York, ss:

MIKE WALLACE, being duly sworn, deposes and says:

1. I am a staff correspondent for CBS News, a division of Columbia Broadcasting System, Inc. I have been employed in that capacity since 1963. Prior to 1963, over a period of approximately 20 years, I worked as a news reporter and commentator for the Chicago Sun, The Chicago Sun-Times, Station WMAQ in Chicago, for various television and radio news organizations in New York and as a columnist for the New York Post.

2. My chief assignment at present is to the CBS News television "magazine" program "60 Minutes." That assignment has involved coverage of politics, civil rights, the defense industry and other subjects of national interest as well as travel to South Vietnam, Israel, Egypt, Nigeria, Northern Ireland, and other countries. I have participated in various news special and CBS Reports, including "Marijuana" (1968), "The Homosexuals" (1967), and "Black Power—White Backlash" (1966).

3. In my experience in investigative news gathering the ability to establish and maintain the confidence of people who may be willing to suggest leads and divulge facts and background information to me has been essential. If such people believed that I might, voluntarily or involuntarily, betray their trust by disclosing my sources or their private communications to me, my usefulness as a reporter would be seriously diminished.

4. The reasons informants want their communications kept confidential are many and various: fear of incurring the wrath of a superior, fear of losing a job, fear of losing a contract and unwillingness to submit to the censure of colleagues for the expression of unpopular or unorthodox views. People in politics are frequently unwilling to show their hand in matters they deem newsworthy but sensitive. Government agencies, including the State Department and the Defense Department, frequently supply background information, public attribution or publication of which might jeopardize the careers of the officials involved as well as the foreign policies and programs of the United States.

5. A few examples will illustrate the critical role played by confidential sources in the development of news stories on matters of great public importance.

(a) I recently participated in the preparation of a report for "60 Minutes" relating to the cost overrun on the Mark-48 Torpedo. Some of the most important and revealing information that we obtained came in confidence from subcontractors, suppliers and men employed by Government agencies. Without that information we could not have constructed the story of how a torpedo project originally scheduled to cost $680,000,000 had risen to a projected $4,000,000,000. Thus, data from confidential sources enabled us to reveal a case of monumental mismanagement, inefficiency and waste.

(b) Another recent broadcast included a report on the production of the motion picture "Tora, Tora, Tora," the story of the Japanese attack on Pearl Harbor. The filming of that picture involved the use of large numbers of ships, airplanes and personnel—all supplied by the United States Navy at great cost. In preparing my report I obtained a list of ten particularly embarrassing questions which certain officials within the Defense Department believed the Navy should have been prepared to answer satisfactorily before permitting the use without charge of its facilities and equipment by the movie's producer. Those questions, which could not have been published without a breach of confidence, were nonetheless of great value in interviewing the officials responsible for that decision. The interviews in turn were critical in developing a report on the use of public property and funds for private purposes—a story which resulted in a congressional investigation and remedial action by the Naval Department.

(c) As indicated above, the State Department and other departments and agencies of the government frequently conduct background conferences at which information and opinions are presented, but not for publication. Frequently, such views are in conflict with present public positions or policies of the government. Access to such information, however, provides the reporter with the ability to interpret information from other sources, anticipate changes of policy and analyze developments. My associates and I have also received background information from sources in the Federal Bureau of Investigation, the Central Intelligence Agency, the General Accounting Office and the staffs of the chairmen of various congressional committees. Much of that information has been important to the development of reports that we have broadcast or which are in preparation.

(d) In the course of my assignment to cover Richard M. Nixon in the early stages of the 1968 campaign, I was present at non-public conversations and conferences and was able to talk informally with the candidate and some of his advisers, including the present Attorney General. Although it was seldom explicitly stated, it was understood that some of what was said on those occasions was not for publication. Because of the informality of such discussions the language used was more casual than the candidate would use in public. Moreover, ideas were discussed which were tentative and would later be refined or rejected. Had there been any thought at the time that I could be compelled to divulge a full report of some of those meetings, my presence would never have been permitted. As it was, I was able in the course of those sessions to acquire an understanding of the candidate which contributed significantly to my coverage of the campaign and, perhaps more important, an understanding of the President which has been invaluable in attempting to assess and analyze the present Administration.

6. In each of the foregoing instances, I was able to do my work because people felt assured that their confidences would be respected. If I were now forced to reveal such confidential information, I could never again count on the cooperation of those people or anyone else in developing similar material in the future. In my opinion the public would be the loser in the long run.

MIKE WALLACE

Subscribed and sworn to before me this 31st day of March 1970.

ANTHONY MAGGIO
Notary Public

AFFIDAVIT OF DAN RATHER

DISTRICT OF COLUMBIA, *ss.*:

DAN RATHER, being duly sworn, deposes and says:

1. I am White House Correspondent for CBS News, a division of Columbia Broadcasting System, Inc. I have been a reporter for newspapers, wire services, local radio and television stations, and broadcast networks for more than 20 years. In addition to serving as White House Correspondent, I have been news director of KTRH in Houston, Texas, director of news and public affairs at Station

KHOU-TV in Houston, Texas, and chief of CBS News bureaus in Dallas, Texas, New Orleans, Louisiana, London, England and Saigon, South Viet Nam. My assignments have included city halls, county court houses, state legislatures and police stations in this country and wars, natural disasters and politics, both at home and overseas. I reported on the riots accompanying James Meredith's enrollment at the University of Mississippi in 1962, civil rights demonstrations in Birmingham, Alabama, the integration of the University of Alabama and the assassination of President Kennedy in 1963, President Johnson's Asian tour in 1966, the assassination and funeral of Dr. Martin Luther King, Jr., and the Democratic and Republican national conventions in 1968. I have also worked as a reporter on various in-depth CBS Reports, including "The Legacy of the Thresher" in 1964, "Abortion and the Law" in 1965 and "The Warren Report" in 1967.

2. My work, and that of reporters generally, requires more than merely assembling facts. A reporter can know all the facts and still not know the truth. In order to understand the facts, reporters must constantly appraise the accuracy and meaning of words and the significance of deeds. In that effort, reporters require a background of confidential judgments and observations obtainable only in privacy and in trust.

3. Furthermore, even the bare facts themselves are frequently obtainable only through confidence. For example, in the mid-1950's certain police officers of Houston, Texas, were stealing narcotics from arrested suspects and selling the narcotics for large amounts of money. The facts came out because honest police officers discussed them in confidence with a reporter who had an impeccable reputation for never revealing confidential sources. A great many other examples of the importance of confidential communications in the work of the news media could be cited; they are daily fare.

4. The fear that confidential discussions may be divulged, as a result of grand jury subpoenas or otherwise, would curtail a reporter's ability to discover and analyze the news. This is not mere speculation on my part. In recent weeks, a long-time friend and news source, who has dealt in confidence with me for more than a dozen years, has declined to do so. He has, on many occasions in the past, been responsible for truths, otherwise unobtainable, appearing in my reporting on civil rights, government and politics. This decent, honest citizen, who cares deeply about his country, has now told me that he fears that pressure from the Government, enforced by the courts, may lead to violations of confidence, and he is therefore unwilling to continue to communicate with me on the basis of trust which formerly existed between us. This incident is representative of the loss that reporters and those who depend upon them for truth will suffer if reporters can be forced to disclose confidential communications and private sources. The very possibility of such forced disclosure is, in my experience, sufficient to foreclose important channels of communication.

/s/ DAN RATHER.

Sworn to before me this 31 day of March 1970.
/s/ Robert W. Center
Notary Public

AFFIDAVIT OF MARVIN KALB

DISTRICT OF COLUMBIA, *ss.;*

MARVIN KALB, being duly sworn, deposes and says:

1. I am Diplomatic Correspondent for CBS News, a division of Columbia Broadcasting System, Inc. I have held that post since February 1963. I have worked for CBS News since 1957 in various capacities, including three years as CBS News Moscow Bureau Chief, and have covered stories in Southeast Asia and eastern and western Europe. Prior to 1957 I served for two years as Press Attache to the United States Embassy in Moscow.

2. In the course of reporting on diplomatic affairs, I depend extensively on information which comes to me in confidence from sources whose anonymity must be maintained. Diplomacy is conducted as a private business. In my experience, diplomats detest publicity. Recently, one foreign ambassador slipped out of the garage exit of the State Department after a meeting with Secretary of State Rogers just to avoid the press and, thus, any public comment on his meeting. The information about that meeting, and many others, has to come from private talks with American and foreign officials, not one of whom would allow himself to be quoted or in any way identified with the news report.

3. Privacy and discretion are the very essence of my work as a reporter. Most of the information from which stories of diplomatic developments emerge comes from private talks. Secrecy, privacy, off-the-record, background, deep background—these are the words which describe the kind of work involved in the reporting of diplomatic nuance and detail and the building of a pattern which ultimately emerges as a story.

4. If my sources were to learn that their private talks with me could become public, or could be subjected to outside scrutiny by court order, they would stop talking to me, and the job of diplomatic reporting could not be done.

/s/ Marvin Kalb.

Sworn to before me this 31 day of March 1970.
/s/ Illegible
Notary Public

SUPREME COURT OF THE UNITED STATES

(No. 70–57—October Term 1971)

United States of America, petitioner, *v.* Earl Caldwell, respondent.

On Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

Brief of The Washington Post Company and Newsweek, Inc., as *Amici Curiae*, in support of Respondent

Attorneys for The Washington Post Company and Newsweek, Inc.:
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PRELIMINARY STATEMENT

Pursuant to the written consent of all parties, The Washington Post Company and Newsweek, Inc. submit this brief as *amici curiae* in support of respondent Earl Caldwell ("Caldwell").

This brief is directed to the central issue on this appeal, namely, the extent to which the First Amendment affords to newsmen a privilege to withhold information obtained in the course of their professional newsgathering activities.

INTEREST OF THE AMICI

The Washington Post Company ("The Washington Post") is a Delaware corporation which publishes a major newspaper in Washington, D.C. The Washington Post also has interests in other media of mass communication, including radio and television stations. One of its wholly-owned subsidiaries, Newsweek, Inc. ("Newsweek"), publishes the weekly news magazine, NEWSWEEK.

Almost two years ago, prosecutors throughout the country, both federal and state, began to issue subpoenas to newsmen on an almost routine basis for the purpose of requiring the disclosure of information acquired by them in the course of their newsgathering activities. After almost a year of unremitting controversy, the Attorney General of the United States finally issued Guidelines which were apparently intended to assure the media that, at the federal level, at least, the indiscriminate use of such subpoenas would be curtailed because of their "limiting effect on the exercise of First Amendment rights." Address by Attorney General Mitchell, *American Bar Association's Annual Meeting*, 39 U.S. L.W. 2110, 2111 (August 25, 1970).

Among those subjected to such subpoenas were The Washington Post and Newsweek. Although subsequent negotiations led to satisfactory accommodations. The Washington Post and Newsweek continue to be deeply concerned about the constitutional issues raised by the issuance of such subpoenas. The *amici* do not believe that vindication of the First Amendment rights which such subpoenas obviously imperil should repose in the unrestricted discretion of the Attorney General (as now provided by the Attorney General's Guidelines which, in any event, are not binding on the states), or be left to an *ad hoc* bargaining process between prosecutors and the media after subpoenas have been issued.

Because of the particular interest of the *amici* on this appeal, we do not here address ourselves in detail to the procedural question, whether Caldwell should have actually appeared before the grand jury to claim his First Amendment privilege. We note, however, that, since the scope of the proposed grand jury interrogation of Caldwell so clearly involves matters relating only to his professional activities and sources. Caldwell's appearance would constitute a mere formality insofar as the Government is concerned—albeit with a strikingly detrimental effect on his First Amendment rights. Indeed, this obvious fact was the cornerstone of the Ninth Circuit's holding that Caldwell need not appear before the grand jury at all.

The *amici* believe, and urge upon this Court, that the First Amendment grants to newsmen a constitutional privilege, absolute and unqualified, to refuse in all circumstances, without penalty, to divulge to anyone any information or source, confidential or otherwise, which they obtain in the course of their professional newsgathering activities.

SUMMARY OF ARGUMENT

Our courts have long recognized that the Constitution assigns to the press a unique and vital role in the functioning of our democracy. It is precisely because a free press is a precondition to the exercise of all our freedoms that the constitutional guarantee of a free press is so highly prized and so zealously protected and why rights of free speech and press are generally held to prevail over conflicting rights and interests.

It is obvious that the well-established First Amendment freedom to write, publish and disseminate the news is illusory if gathering the news is not also within the ambit of constitutional protection. It is equally obvious, and, indeed, conceded by the Government, that the issuance of subpoenas to newsmen can have a significant, adverse effect on their ability to obtain information and thus upon the exercise of their First Amendment rights.

The fundamental question on this appeal, therefore, is whether the production of compulsory testimony from newsmen is so important in our governmental scheme as to justify impairment of First Amendment freedoms. We respectfully submit that it is not. The production of compulsory testimony, though important, is by no means paramount. Thus, our courts have often protected, at the expense of compulsory testimony, relationships and privileges which, though also important, are by no means as vital to the proper functioning of our government as the maintenance and preservation of a free press.

The need for some protection is obvious. The Attorney General has issued Guidelines which are intended to assure the media that the constitutional problem will at least be given advertent attention before the federal government acts. The courts below have also exhibited a sensitivity to these needs and have attempted to devise substantive tests, hedged by procedural safeguards, which assure and preserve First Amendment rights. We submit, however, that these steps are impractical and inadequate. These constitutional rights cannot be protected where their vindication is left to the discretion of a Government prosecutor, even one as highly placed as the Attorney General. And it has become increasingly clear that so-called qualified privileges, such as those devised below, are also insufficient to vindicate such rights.

We believe that nothing less than an unqualified, absolute First Amendment newsman's privilege is sufficient to preserve the First Amendment right of newsmen to gather and report the news without fear or favor.

ARGUMENT

The First Amendment requires an absolute and unqualified newsman's privilege.

Introduction

At the very outset, we endorse the holdings of the courts below insofar as they seek to assure to newsmen, on First Amendment grounds, the right to engage in their professional activities without the fear of being forced, on pain of contempt, to disclose information obtained in the course of such activities.[1]

The courts below held, however, that the privilege which they themselves had fashioned could be defeated on a showing, in the words of the district court, of a "compelling and overriding national interest which cannot be alternatively served" (*Application of Caldwell*, 311 F. Supp. 358, 360 (N. D. Cal.), *rev'd* *nom. Caldwell* v. *United States*, 434 F. 2d 1081 (9th Cir. 1970)), or, as restated the Ninth Circuit with reference to attendance, where the Government has de onstrated "a compelling need for the witness' presence. . . ." 434 F. 2d at 1089.

We submit that these qualifications emasculate the constitutional protection that any limitation on the right of newsmen to keep in confidence informati obtained in the course of their newsgathering activities will have a serious and detrimental effect on First Amendment freedoms. Indeed, as we shall hereafter demonstrate, our contentions are validated by the various judicial proceedings arising out of the investigation here involved.

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[1] The right of newsmen to gather the news without fear of compelled disclosure, as stated, has commended itself to a number of courts which have considered the proble since Judge Zirpoli first rendered his decision. *People* v. *Dohrn*, Crim. No. 69–3808 (Il Cook County Ct. May 20, 1970); *Illinois* v. *Tomashevsky*, Crim. No. 69–3358–59 (Il Cook County Ct. April 7, 1970); *Air Transport Ass'n* v. *Professional Air Traffic C trollers Organization*, Nos. 70-C-400, 410 (E. D. N. Y.) Tr. April 6, 1970 at 18–24, 36; T April 7, 1970 at 21, 38–39, 149–51; *People* v. *Rios*, No. 75129 (Cal. Super. Ct. July 1 1970). Such recognition has not, however, been uniform, as witness the decisions *Branzburg* v. *Meigs* (not officially reported) (Ky. 1971); *Branzburg* v. *Pound*, — K —, 461 S.W. 2d 345 (1971), *appeal docketed sub nom. Branzburg* v. *Hayes* (No. 70- October Term 1971) and *In the Matter of Pappas*, — Mass. —, 266 N.E. 2d 297 (197 *appeal docketed*, (No. 70–94, October Term 1971).

A. The Role of the First Amendment

The First Amendment to the Constitution reads in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ."

The basic freedoms thus protected have long held a preferred position in our hierarchy of legal values. *See, e.g., Thomas* v. *Collins*, 323 U.S. 516, 529–32; *Murdock* v. *Pennsylvania*, 319 U.S. 105, 115. This Court has recognized many times that freedom of speech and press is the very cornerstone of free government by free men. *See, e.g., Marsh* v. *Alabama*, 326 U.S. 501, 509; *Schneider* v. *State*, 308 U.S. 147, 161; *De Jonge* v. *Oregon*, 299 U.S. 353, 364.

It is well settled that the First Amendment proscribes not only legislative action inconsistent with its command, but also action by the federal executive and judiciary, including, specifically, the issuance of subpoenas in connection with federal investigations and proceedings. *Watkins* v. *United States*, 354 U.S. 178, 187–88.[2]

The Government's suggestion (*Br.* at 15)[3] that the Constitution protects the freedom to write, publish and disseminate the news, but that all these rights are illusory because the right to gather the news is not similarly protected, borders on the frivolous. Obviously, the First Amendment must protect, not only the dissemination of news, but all activities incidental thereto, including, specifically, the gathering of news. *Griswold* v. *Connecticut*, 381 U.S. 479, 482–83; *Lamont* v. *Postmaster General*, 381 U.S. 301, 308 (Brennan, J., concurring); *Garland* v. *Torre*, 259 F. 2d 545, 548 (2d Cir. 1958), *cert. denied*, 358 U.S. 910; *Associated Press* v. *KVOS, Inc.*, 80 F. 2d 575, 581 (9th Cir. 1935), *rev'd on jurisdictional grounds*, 299 U.S. 269; *Providence Journal Co.* v. *McCoy*, 94 F. Supp. 186, 195–96 (D. R. I. 1950), *aff'd on narrower grounds*, 190 F. 2d 760 (1st Cir. 1951), *cert. denied*, 342 U.S. 894. *See also* Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L. J. 317, 326–9 (1970), and authorities there cited.

The fact that the Government has chosen to make this argument in the face of the Attorney General's own Guidelines, which recognize that "compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights," is reason enough for not relegating the protection of such highly prized rights to the unfettered discretion of the Executive.[4] *See Br.* at 47 n. 42.

In light of the controlling importance of the First Amendment to the proper function of our governmental system, we submit, at the outset of this discussion, that the appropriate inquiry is not (as has been sometimes suggested) whether the right of a newsman to gather the news is of sufficient importance to overcome the general duty of all persons to give compulsory testimony. It is, instead, whether the need for compulsory testimony is so compelling in our scale of legal values as to justify an intrusion on the First Amendment right of a newsman to gather news—an intrusion so serious and substantial that it would, as a practical matter, seriously impair or even destroy the ability of the news media to fulfill the unique role assigned to them in the functioning of our democratic society.

B. The Constitution Assigns to the Press a Unique and Vital Role in the Functioning of our Democracy.

It has long been recognized that the news media play a uniquely vital role in the proper functioning of our system of government. Indeed, the media are in a very real sense the ombudsmen of our constitutional system, and have long been recognized as such. This special role and function of the free press is no evolutionary accident: it is part and parcel of the grand design conceived by our Founding Fathers. In *Near* v. *Minnesota*, 283 U.S. 697, 716–18, Chief Justice Hughes, in reviewing the genesis of the First Amendment, quoted from a letter sent by the Continental Congress (October 26, 1774) to the Inhabitants of Quebec (p. 717):

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[2] The mandate of the First Amendment applies equally to all branches of state government by virtue of the due process provisions of the Fourteenth Amendment. *See, e.g., New York Times Co.* v. *Sullivan*, 376 U.S. 254 (state court); *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (state executive); *Sweezy* v. *New Hampshire*, 354 U.S. 234 (state legislature). Thus, whatever rule is developed here should apply equally to *Branzburg* and *Pappas*, *supra*, note p. 5.

[3] The citation "*Br.*" refers to the Brief on the Merits for the Government in this case.

[4] Equally frivolous is the Government's suggestion (*Br.* at 11–12) that no First Amendment issue is presented by this appeal and that the only issue is whether Caldwell should be required to appear before a grand jury. It is obvious from the opinion of the Court of Appeals that the procedural ruling which the Government here attacks is based exclusively on the premise that Caldwell had a First Amendment right which required protection.

> " 'The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.' "

The Chief Justice then quoted with approval James Madison,[5] whom the Chief Justice characterized as the leading spirit in the formulation of the First Amendment. Madison, in describing the reasons why our state constitutions included guarantees of freedom of the press, said (p. 718):

> " 'In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands. . . . Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficient source the United States owe much of the lights which conducted them to the ranks of a free and independent nation. . . .' "

In *Grosjean* v. *American Press Co.*, 297 U.S. 233, this Court described the role of our press in the following terms (p. 250):

> "The newspapers, magazines and other journals of the country, it is safe to say, have shed and continued to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern."

And further (*Id.*):

> "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

In *Associated Press* v. *United States*, 326 U.S. 1, this Court, describing the function of the press in our governmental system, made the following pertinent observation (p. 20):

> "[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."

In *Craig* v. *Harney*, 331 U.S. 367, Mr. Justice Murphy, concurring, said (p. 383):

> "A free press lies at the heart of our democracy and its preservation is essential to the survival of liberty. Any inroad made upon the constitutional protection of a free press tends to undermine the freedom of all men to print and to read the truth."

More recently, in *Estes* v. *Texas*, 381 U.S. 532, this Court noted (p. 539):

> "The free press has been a mighty catalyst in awakening public interest in government affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings."

As noted in *Mills* v. *Alabama*, 384 U.S. 214, 219:

> "The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, see *Lovell* v. *Griffin*, 303 U.S. 444, to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a power-

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[5] *Report on the Virginia Resolutions*, MADISON'S WORKS, vol. iv, 544.

> ful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free."

Most recently in *New York Times Co.* v. *United States*, 91 S. Ct. 2140, Mr. Justice Black said (p. 2143):

> "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government."

The unique role which the press is called upon to play in our system of government has been acknowledged, not only by the courts, but by other knowledgeable observers of our legal and constitutional system. *See generally* H. Bruckner, Freedom of Information (1949); W. Chenery, Freedom of the Press (1955); P. Freund, The Supreme Court of the United States, ch. III (1961); W. Lippman, Liberty and the News (1920); A. Meiklejohn, Free Speech and its Relation to Self-Government (1948); C. Swisher, The Growth of Constitutional Power in the United States, ch. VII (2d ed. 1963); Meiklejohn, *The First Amendment is Absolute*, 1961 Supreme Court Review 245. A. Meiklejohn.

The vital role of a free press to a free society is so well-recognized that further proliferation of authority is unnecessary. As Mr. Justice Brennan observed in *Time, Inc.* v. *Hill*, 385 U.S. 374, 389:

> "Those guarantees are not for the benefit of the press so much as for the benefit of all of us."

C. Where First Amendment Rights Conflict with Other Rights and Interests, First Amendment Rights Normally Prevail.

We are cognizant of the holdings of this Court to the effect that, in some circumstances, First Amendment rights must give way to other rights where the preservation of our society or its orderly functioning is vitally at stake; but this Court has also made clear that such rights give way only in the most limited, extraordinary circumstances.

As stated in *Thomas* v. *Collins*, 323 U.S. 516, 529–30:

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. *Schneider* v. *State*, 308 U.S. 147; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Prince* v. *Massachusetts*, 321 U.S. 158. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions."

And further (p. 530):

> ". . . whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, indangering paramount interests, give occasion for permissible limitation."

In *Bates* v. *Little Rock*, 361 U.S. 516, Mr. Justice Stewart made the following comments (pp. 522–24):

> "Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty. U.S. Const., Amend. I.

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> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449. *See also Jacobson* v. *Massachusetts*, 197 U.S. 11; *Schneider* v. *State*; 308 U.S. 147; *Cox* v. *New Hampshire*, 312 U.S. 569, 574; *Murdock* v. *Pennsylvania*, 319, U.S. 105; *Prince* v. *Massachusetts*, 321 U.S. 158; *Kovacs* v. *Cooper*, 336 U.S. 77."

Ordinarily, where First Amendment rights conflict with rights, powers, and privileges of the Government in general, or with other non-First Amendment rights, the rights protected by the First Amendment prevail.

In *Murdock* v. *Pennsylvania*, 319 U.S. 105, this Court struck down a city ordinance which required the licensing of all persons soliciting orders for merchandise within the city because that ordinance had been applied to the sale of religious books and pamphlets by Jehovah's Witnesses. In so holding, Mr. Justice Douglas said (p. 115):

> "The fact that the ordinance is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not to restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position."

As stated in *Bridges* v. *California*, 314 U.S. 252, 263:

> "[T]he First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

And further (p. 265):

> ". . . the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society."

These principles were most recently applied in *New York Times Co.* v. *United States* and *United States* v. *Washington Post Co.*, 91 S. Ct. 2140.[6]

D. The Compulsory Production of Testimony by Newsmen Will Have a Substantial, Adverse Impact on the First Amendment Right to Gather the News

As we have observed, gathering the news is as much protected by the First Amendment as is its dissemination. It is obvious that newsgathering depends in large part upon information given to reporters in confidence, as the Government now concedes.[7] It is equally obvious that, if a newsman is compelled to testify as to his sources or other confidential matters, the inevitable consequence must be a deleterious effect, not only on his own newsgathering activities, but on newsgathering activities, generally. This self-evident fact plainly appears from the affidavits of newsmen which have been submitted in this proceeding, and has also been accorded gruding recognition in the Attorney General's Guidelines. As noted by the the Government in *Branzburg* and *Pappas* (*Am. Br.* at 6):

> "It has, of course, long been recognized that many newsworthy stories would never have reached the public if the sources had been unable to rely on anonymity."

But we need not rely merely on the newsmen's affidavits or the Government's concessions: The courts themselves—even those which have rejected a First Amendment newsman's privilege—have taken judicial notice of the fact that the compulsory testimony of newsmen will "dry up" their sources of information. As the Supreme Court of Pennsylvania acknowledged in *In re Taylor*, 412 Pa. 32, 41, 193 A. 2d 181, 185 (1963):

> "We would be unrealistic if we did not take judicial notice of another matter of wide public knowledge and great importance, namely, that important information, tips and leads will dry up and the public will often be

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[6] Any suggestion that the position of the media in those cases is inconsistent with their position here is, we believe, ill-founded. In those cases, as in this, the position urged by the media was designed to insure public access to the free flow of information. Both positions rest squarely on the furtherance of the purposes of First Amendment freedoms.

[7] The Government noted in its Brief as *amicus curiae* in *Branzburg* and *Pappas*:

> "Since the early lays of the Republic, the newsgathering process has depended in large part on information given to reporters in confidence." (*Am. Br.* at 4).
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> * * * * * * *
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> "As revealed by a 1968 study of all major newspapers in the United States, an 'absolutely staggering' number of news stories are developed from information given to reporters in confidence." (*Am. Br.* at 7).

> deprived of the knowledge of dereliction of public duty, bribery, corruption, conspiracy and other crimes committed or possibly committed by public officials or by powerful individuals or organizations, unless newsmen are able to *fully and completely* protect the sources of their information. It is vitally important that this public shield against governmental inefficiency, corruption and crime be preserved against piercing and erosion.
>
> "The District Attorney points out that such a construction of 'non-disclosure of source' will enable newsmen to conceal or cover up crimes. This is correct. However, we are convinced that the public welfare will be benefitted more extensively and to a far greater degree by protection of all sources of disclosure of crime, conspiracy and corruption than it would be by the occasional disclosure of the sources of newspaper information concerning a crime!" (footnotes omitted) (emphasis in original text).

In *Garland* v. *Torre*, 259 F. 2d 545, 548 (2d Cir. 1958), *cert. denied*, 358 U.S. 910, Mr. Justice Stewart, then sitting as a Circuit Judge, said:

> "As to the Constitutional issue, we accept at the outset the hypothesis that compulsory disclosure of a journalist's confidential sources of information may entail an abridgement of press freedom by imposing some limitation upon the availability of news." (footnote omitted).

In *In re Goodfader's Appeal*, 45 Hawaii 317, 327–28, 367 P. 2d 472, 479 (1961), the Supreme Court of Hawaii acknowledged:

> "Appellant contends that the freedom to gather news is inseparable from the freedom to print news, that both are equally indispensable to a free press and therefore a restraint on gathering news (such as would occur in the absence of a reporter's ability to assure the confidentiality of his news sources) is, in itself, an infringement of the free press clause of the First Amendment. We readily perceive the disadvantages to a news reporter where his desire to remain silent under a pledge of confidentiality is not accommodated. . . ."

This Court has repeatedly emphasized, in a variety of contexts, the value of anonymity in the collection and dissemination of information. Conversely, this Court has also recognized that identification of the source of information or ideas has served to stifle First Amendment freedoms because of fear of retaliation or punishment. *See, e.g., Gibson* v. *Florida Legislative Comm.*, 372 U.S. 539; *Talley* v. *California*, 362 U.S. 60, 64–65; *Bates* v. *Little Rock*, 361 U.S. 516; *N. A. A. C. P.* v. *Alabama*, 357 U.S. 449. Similarly, the Court has recognized an informer's privilege to remain anonymous on the ground that the government could thus obtain confidential information otherwise unavailable to it. *See, e.g., McCray* v. *Illinois*, 386 U.S. 300; *Scher* v. *United States*, 305 U.S. 251.

Pertinent, here, are the comments of James Hagerty, formerly Press Secretary to President Eisenhower and presently a corporate officer of the American Boadcasting Company, who said at a Symposium on the very day this case was argued before Judge Zirpoli:

> "At the present time there has been a considerable amount of controversy. I suppose it bubbled to the front with two speeches by the Vice President. Speaking for my industry, although I may be a minority voice in my industry, I think we overreacted like hell. This was nothing, again, new. One thing, however, that I personally have considerable questions on is the attempt to use the power of subpoena by the Attorney General to undermine the news sources of the newsmen.
>
> "If you start to destroy the confidence of news reporters by opening their notes and the traditional standards of confidence between a reporter and his sources to subpoena, then you are going to destroy the freedom of the press, indeed, the integrity of the press. You are going to destroy the information that you as the public get."[8]

In view of the obvious fact that compulsory disclosure jeopardizes the ability of the press to gather news, the question naturally presents itself: Why has the free flow of news not dried up long before now? The answer, we submit, is relatively simple: Until recently, government prosecutors, government officials and others in a position to compel testimony have for the most part recognized, at least *de facto*, the privilege so long and consistently asserted by newsmen;[9]

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[8] Mr. Hagerty's comments are reported in R. HOXIE, THE WHITE HOUSE: ORGANIZATION AND OPERATIONS 20 (1971).

[9] *See, e.g.*, Governor Thomas E. Dewey's statement as reported in 35 NEB. L. REV. 562 n. 4 (1956):

> "The governor has had ten years experience as a prosecutor of crime. In all experience, he has never found it necessary or desirable to attempt to com

and in those instances where an interrogator has sought to breach the privilege, the newsman has almost invariably accepted fine or imprisonment rather than disclose his sources or other confidential information—a fact of which the public has long been aware.[10]

E. The Compelling Need for a Newsman's Privilege is Entitled to Greater Constitutional Protection than the Need for Compulsory Testimony, a Need which is Far from Supreme in our Scale of Values.

Inasmuch as a free press is essential to the fulfillment of what was described in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 as ". . . a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . ." any application of governmental power which has, or may have, the effect of curtailing the newsgathering activities of the press must be "subject to the closest scrutiny." *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 461. Such scrutiny is particularly apposite where, as here, the subject is the application of the power of compulsory process and the criminal sanctions which penalize non-compliance. As was said in *Sweezy* v. *New Hampshire*, 354 U. S. 234, 245:

> "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas . . ."

More specifically, we inquire whether, under our system of government, the compulsory disclosure of relevant evidence is of such paramount importance as would justify substantial impingement upon the freedom of the press to gather and disseminate the news. We respectfully submit that it is not; that the preservation of an institution as important to our form of government as a free press should not and must not depend upon the willingness of newsmen to go to jail rather than violate their covenants of confidence. Rather, the responsibility for preserving a freely functioning press rests with our courts, as the ultimate guardians of our constitutional liberties.

In arriving at the conclusion that compulsory testimony, important though it is, must be subordinate to freedom of the press, we rely upon the value judgments expressed in statutes and court decisions, both federal and state, which have held, in a wide variety of circumstances, that the importance of other protectible interests transcends that of any right to compel testimony.

We are all familiar with a vast variety of so-called privileges, recognized by federal or state law or both, which deprive our courts of testimony which is relevant, materials, and in some instances decisive, and are thus accorded an importance greater than that of the need of our courts and other institutions to compel testimony. These privileges include the attorney-client privilege, the doctor-patient privilege, the priest-penitent privilege, the husband-wife privilege, the accountant-client privilege, and, indeed, such esoteric statutory privileges as the "registered psychologist-client" and "certified social worker-client" privileges. *See, e.g.*, N.Y. C.P.L.R. §§ 4507–08 (McKinney Supp. 1970).

The attorney-client privilege can, perhaps, be equated in importance with the right to compel testimony, since both relate to, and are designed to promote, the orderly function of the judicial system; and the priest-penitent privilege may, perhaps, be justified as protecting freedom of religion. But the physician-patient privilege, the husband-wife privilege, the accountant-client privilege and the registered psychologist and certified social worker privileges, though designed to protect relationships of a personal nature to which the states ascribe social im-

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newspaperman to reveal the source of his information. He has a deep understanding of problems of the men of the press and the need to protect their sources of information. *See also* STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION FOR 1949 at 143-46 (1949), setting out statements from various Attorneys General and police chiefs in those jurisdictions having a reporter's privilege that the existence of that privilege has not interfered with law enforcement or the prosecution of criminals, and has, in fact, on occasion provided valuable assistance.

[10] The Government's two-pronged suggestion, in ***Branzburg*** and ***Pappas***, that this Court should not now recognize a newsman's privilege because our courts have not until recently found it necessary to do so, and that, in any event, the creation of such privilege should be left to Congress and the legislatures of the fifty states, is fatuous. If these arguments had any validity, they would apply whenever this Court acts to protect constitutional rights in any area in which such rights have not theretofore been judicially recognized. But in *New York Times* v. *Sullivan*, 376 U.S. 254, for example, this Court did not abide legislative action when it overruled almost two hundred years of American libel law to erect a far-reaching constitutional principle for the purpose of protecting First Amendment rights, and this in the face of repeated *dicta* by this Court that libel was not within the ambit of constitutional protection.

portance, can hardly be deemed on a parity, as to objective, with the preservation of a free press, where the interest relates to the proper functioning of a free society. As noted in Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L. J. 317, 343:

> "The newsman-informer relationship is different from that of other relationships whose confidentiality is protected by statute, such as the attorney-client and physician-patient relationships. In the case of other statutory privileges, the right of nondisclosure is granted to the person making the communication in order that he will be encouraged by strong assurances of confidentiality to seek such relationships which contribute to *his personal well-being*. The judgment is made that the interests of society will be served when individuals consult physicians and lawyers; the public interest is thus advanced by creating a zone of privacy that the individual can control. However, in the case of the reporter-informer relationship, society's interest is not in the welfare of the informant per se, *but rather in creating conditions in which information possessed by news sources can reach public attention*." (footnotes omitted) (emphasis added).[11]

Our reference to statutory privileges which to varying degrees impinge on the right to compel testimony would be incomplete without mention of the seventeen states—including California, where this case arose—which, by adopting newsmen's privilege statutes, have expressed the legislative judgment that, in their courts, at least, the protection of a newsman's relationship with his informants is more important than compulsory testimony and will not interfere unduly with judicial process.[12] This judgment has been followed by at least one federal court sitting in one of those states. *Ex Parte Sparrow*, 14 F. R. D. 351, 353 (N. D. Ala. 1953).[13]

Other privileges, created and recognized by our courts, are premised on the proposition that society's interest in the production of compulsory testimony is of less importance than various other interests deemed desirable to a society. The informer privilege, for example, places the interests of law enforcement ahead of explicit constitutional rights of confrontation and the disclosure of truth unless "essential" to the defense, and this in the face of an equally explicit right of a criminal defendant, under the Sixth Amendment, to compulsory process. *See McCray* v. *Illinois*, 386 U.S. 300; *Roviaro* v. *United States*, 353 U.S. 53; *Sher* v. *United States*, 305 U.S. 251.

This Court has long applied the rule which excludes relevant and material evidence obtained in the course of an illegal search and seizure, *Weeks* v. *United States*, 232 U.S. 383, and has required the application of the exclusionary rule in federal and state courts alike. *Mapp* v. *Ohio*, 367 U.S. 643. Here, also, we are prepared to forego often determinative evidence in order to protect a constitutional right deemed of greater social importance.

More recently, in *Miranda* v. *Arizona*, 384 U.S. 436, this Court held that voluntary confessions to crimes were inadmissible where the suspect had not first been apprised of his right to counsel under the Sixth Amendment. Thus, this Court has required our trial courts to forego otherwise relevant and competent evidence in order to preserve and protect what this Court deems the paramount right of a criminal suspect to the advice of counsel, a right created under the Sixth Amendment.

This Court has also held that the Fifth Amendment privilege against self-incrimination must deprive grand juries, investigative bodies and the courts of testimony concerning criminal conduct from the person most knowledgeable about the matter under investigation because, under our system, the right of a criminal suspect to remain silent transcends in importance the production of compulsory testimony. *Watkins* v. *United States*, 354 U.S. 178, 188; *Hale* v. *Henkel*, 201 U.S. 43, 66.

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[11] Dean Abraham S. Goldstein of the Yale Law School developed the same point in an article advocating a newsman's privilege which was published in *Newsmen and Their Confidential Sources*, THE NEW REPUBLIC, March 21, 1970, at 13–15.

[12] Ala. Code tit. 7, § 370 (1960); Alas. Comp. Laws Ann. §§ 09.25.150, 160 (Supp. 1970); Ariz. Rev. Stat. Ann. § 12–2237 (Supp. 1970); Ark. Stat. Ann. § 43–917 (1964); Cal. Evid. Code § 1070 (West 1966); Ind. Ann. Stat. §2–1733 (1968); Ky. Rev. Stat. Ann. § 421.100 (1969); La. Rev. Stat. tit 45, §§ 1451–53 (Supp. 1971); Md. Code Ann. art. 35, § 2 (1967); Mich. Comp. Laws § 767.5a (1968); Mont. Rev. Codes Ann. tit. 93, ch. 601–1, –2 (1947); Nev. Rev. Stat. § 48.087 (1969); N.J. Rev. Stat. § 2A:84A–21 (Supp. 1970); N.M. Stat. Ann. § 20–1–12.1 (1970); N.Y. Civ. Rights Law § 79-h (McKinney Supp. 1970); Ohio Rev. Code Ann. § 2739.12 (Anderson 1954); Pa. Stat. Ann. tit. 28, § 330 (1958).

[13] Studies have substantiated the validity of this legislative judgment. *See, e.g.*, Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing their Sources*, 64 Nw. U. L. Rev. 18, 38 (1969).

In short, in a variety of contexts, this Court has repeatedly recognized that the production of evidence is less important than various rights, constitutional and otherwise, none of which surpass or even equal in importance the preservation of a free press.

Finally, there is the judgment of Congress, as evidenced by nearly a hundred federal statutes, that the compulsory disclosure of confidential communications must be limited or proscribed in order to facilitate the free flow to governmental agencies of information concerning various matters, most of which, though important, can in no sense be treated as vital to the preservation of our democratic society. As was observed in Note, *Privacy and Efficient Government: Proposals for a National Data Center*, 82 HARV. L. REV. 400, 409 n.46 (1968):

> "There are nearly 100 federal statutes which provide protection of this character for given disclosures related to personal life, *see, e.g.*, 13 U.S.C. § 9(a) (1964) (census data); 38 U.S.C. § 3301 (1964) (Veterans' Administration records), or financial interests, *see e.g.*, INT. REV. CODE OF 1954. § 6103(a) (tax returns); 15 U.S.C. § 46(f) (1964) (trade secrets and names of customers). H.R. REP. No. 1497, 89th Cong., 2d Sess. 10 (1966). Other data, not specifically restricted by statute, has been declared to be confidential and its circulation limited by regulations issued under the rule-making power of an agency. *See, e.g.*, 32 C.F.R. §§ 1606.31–42, 1670.5–.8 (1968) (Selective Service records). Finally, some information is treated as confidential by an agency because it is received under an informal pledge of non-disclosure. Some 97% of all personal disclosures are given some measure of confidential protection. *See* STAFF OF SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 90TH CONG., 1ST SESS., GOVERNMENT DOSSIER 26–29 (Comm. Print 1967) [hereinafter cited as GOV'T DOSSIER]. *See generally id.*
>
> "In varying degrees this confidential status may immunize the disclosure from public access, *see* 5 U.S.C.A. § 552(b) (1967); 8 J. WIGMORE, EVIDENCE § 2377, at 781 (McNaughton rev. ed. (1961); from judicial process, *see id.*; and from intra-agency transfer, *see* 44 U.S.C. § 423(b) (Supp. II, 1967)."

F. A Limited or So-called Qualified Privilege for Newsmen is Insufficient for First Amendment Purposes.

We are not unaware of the reluctance of bench and bar alike to expand recognized privileges at the expense of compulsory testimony. Nor are we unaware of arguments to the effect that, if a newsman's privilege is to be recognized at all, it should apply only in certain specified circumstances, although it is evident that there exists a disparity of opinion as to what those circumstances should be.

It has been suggested, for example, that the privilege should exist except as to information which goes "to the heart" of the inquiry, and which is unavailable or not readily accessible elsewhere. Others have suggested that any newsman's privilege be expressly inapplicable to information concerning future illegal conduct or confessions of the commission of serious crimes or communications related vitally to the national security. Still others have suggested that, if the privilege is to be judicially recognized at all, it should apply only to the identity of a newsman's confidential sources, or to information imparted to him under express promise of confidence, or to information which has been published, or, alternatively, only to information which has not been published.

Finally, we advert, of course, to the rulings below that the privilege applies only "until such time as a compelling and overriding national interest which cannot be alternatively served has been established to the satisfaction of the Court." 311 F. Supp. 358, 360.

All of these suggestions and tests have their merits and demerits, as well as a special appeal to those who are traditionally opposed to the creation of privileges against compulsory testimony, but who nevertheless recognize the merit of extending some protection to newsmen in order to facilitate a primary function of the free press.

There is, however, one underlying reason for rejecting all half-way measures: *Nothing less than a full and unqualified privilege to newsmen, empowering them to decline to testify as to any information professionally obtained, will provide* *the certainty necessary to preserve and protect the newsgathering activities of the media.*

Our reasons for conducing that nothing less will do are:

1. Any attempt to solve the problem on a case-by-case basis, where existence of the privilege is dependent upon an *ad hoc* assessment of such circumstances as the relevancy or importance of the newsman's information and its availability from other sources, must necessarily have a repressive effect upon the willingness of all informants to make disclosures to newsmen. An informant would have no way of determining, in advance, whether a particular piece of information went "to the heart" of any prospective judicial or legislative proceeding, or might become a matter of "compelling and overriding national interest," or whether such information, at the time of such proceeding, might be available through other sources. Thus, the mere possibility that a court or a legislative or administrative body may find, in a particular case, that the importance of the information it seeks outweighs the value of preserving a particular confidence must necessarily leave informants uncertain as to whether their confidences will in any instance be respected. Thus, in this First Amendment area, as in others, vagueness and uncertainty must inevitably have a chilling effect.

2. Any real attempt, in the context of a grand jury investigation, to determine whether a particular inquiry involves "compelling need" or a "matter of compelling and overriding national interest which cannot be alternatively served" will inevitably destroy the traditional secrecy of grand jury proceedings, with all the ills attendant upon that destruction. As the courts have so often noted, the secrecy of grand jury proceedings is preserved, not only to prevent the guilty from fleeing the jurisdiction, but also to prevent the visitation of publicity on those whom the grand jury conclude are innocent and determines, therefore, not to indict. If, as a prerequisite to obtaining testimony from a newsman, it becomes necessary to disclose the objectives of the investigation and the efforts which have been made to obtain the information from others, that secrecy will have irrevocably been breached, perhaps under circumstances which would endanger the reporter's very life. The absolute privilege we urge would eliminate any need to breach the traditional secrecy of grand jury proceedings, since the relevant inquiries would be limited to the status of the reporter and whether he obtained the information in his professional capacity.

3. Any rule which were to exclude from the privilege certain classes of communications, such as information related to future illegal conduct, would likewise result in a "drying up" of disclosures outside (and perhaps even within) the ambit of the privilege. While such information could obviously be of importance, either in the prevention of future crimes or in the detection and punishment of crimes already committed, the salient fact is that a partial disclosure, through publication, is better than no disclosure at all.[14]

4. There is also the risk that engrafting exceptions onto the privilege will breed yet further exceptions, so that, ultimately, even the limited value of a so-called qualified privilege could for all practical purposes become non-existent. It would be hazardous even for the legally sophisticated to predict, in many given instances, whether particular information, if disclosed, would be privileged as to content or source if the privilege were riddled with qualifications and exceptions; and to expect newsmen or their sources to make any such prediction would be less than realistic. Moreover, if no existing qualification were squarely in point, who could say that a particular case would not give rise to the creation of a new qualification or exception, and thus weaken further the foundation of the privilege?

5. In order to encourage sources to reveal to the press information of value to the common weal, any privilege granted the media must be as broad as possible, and simple enough for any one to understand. A privilege, the scope and applicability of which is determined on a case-by-case basis, or which is limited to certain classes of information, will not readily be comprehended or appreciated by laymen, and will surely lead informants to err on the side of silence.

6. Any privilege which applies only to confidential communications will inevitably prove uncertain or inadequate:

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[14] By way of example, the Government asserts that the grand jury which issued the subpoena to Caldwell was investigating threats by David Hilliard on the life of President Nixon (*Br.* at 3-4). For all that appears, the publication of Caldwell's story may have been responsible for non-judicial steps taken by the Government to frustrate that very threat. We ask: Is it not more desirable to allow the free flow of even such information than, by the use of compulsory process, to dry it up, so that responsible officials may no longer get advance warning of such matters?

(a) Much information is revealed under circumstances where the element of confidentiality, though present, is elusive of proof in a court of law. The record here, for example, shows that Black Panther sources gave information to Caldwell on only an unspoken, nebulous understanding that he would sense what was nonconfidential and intended for publication and what was not. And in *Garland* v. *Torre*, 259 F. 2d 545, 547 n.3 (2d Cir. 1958), *cert. denied*, 358 U.S. 910, the court noted with respect to the claim of confidentiality there asserted:

> "3. This confidentiality was apparently not explicit: 'Q. Did this network executive ask you to withhold giving his name? A. No, he did not. It is just that having worked in the business so long, in cases like this you don't mention the man's name.'"

(b) In the course of their duties, reporters are frequently in a position to obtain information under circumstances not actually involving assurances of confidence. Yet to require the reporter to testify with respect to such information may well diminish or destroy his effectiveness. It is commonplace, for example, for a reporter, photographer or TV cameraman to operate amidst demonstrations, race riots, campus confrontations, workers' strikes and similar events which coulld later give rise to criminal or civil inquiry. If the participants become convinced that the media representatives are, albeit unwillingly, "spies for the establishment" or FBI or police informants or may some day be called as witnesses against them in court proceedings, the net result may be—and has been—broken cameras, if not broken heads.[15]

7. The suggestion that the privilege attach only to published information is also inadequate. Obviously, the reporter himself, much less his informant, has no way of knowing, at the time of disclosure, whether the information about to be disclosed will thereafter be published. The reporter receiving information may not submit it for publication because his subsequent investigation convinces him that there is no substance to what he has been told. The reporter's employer may decide for legal or editorial reasons that portions of a story must be excised or that the story should be "killed." Other reasons which might lead a newspaper or magazine to decline to publish information submitted for publication could be founded in patriotism or taste or lack of space or news value or a variety of other reasons unnecessary to enumerate.

8. A privilege limited to non-published information is also inadequate, since it, too, would be subject to the same element of uncertainty.

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It is for reasons such as these that a privilege developed on a case-by-case or situation-by-situation basis will not do; why the Government's suggestion (*Br.* at 16–34) that any constitutional problem has here been obviated by Judge Zirpoli's protective order is unsound; why anything less than complete and unqualified assurances of confidentiality in all circumstances will inevitably "dry up" a reporter's sources of information and thus impinge upon freedom of the press and the public's "right to know."

It is precisely because of considerations analogous to those enumerated above that this Court has in recent years tended to abandon attempts to apply on a case-by-case basis statutes which would likely impinge upon constitutionally protected areas. Instead, in recognition of the "chilling effect" the very existence of such a statute could have upon constitutionally protected activities, this Court has held such statutes unconstitutional *in toto*, even where the application of the statute to the particular case would not be constitutionally invalid. *See Brandenburg* v. *Ohio*, 395 U.S. 444; *United States* v. *Robel*, 389 U.S. 258; *see also* the authorities collected and discussed in Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970) and Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

It is also for reasons such as these that the State of New York and some commentators, in the approximately two years which have elapsed since this problem came to the forefront of public consciousness, have however reluctantly been drawn to the conclusion that nothing less than a full and unqualified First Amendment reporter's privilege (or something close to it) will do. N.Y. Civ.

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[15] The treatment given to NEWSWEEK reporter Min Yee in Cuba, when it was suspected that his information and photographs might some day be subpoenaed by the Government, is typical of this situation. See Affidavit of Min S. Yee, verified March 23, 1970 (App. pp. 48–50).

Rights Law § 79–h (McKinney Supp. 1970); Note: *Constitutional Protection for the Newsman's Work Product*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 119, 138 (1970); Note, *Reporters and their Sources: the Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317 (1970).

Because the privilege attendant upon confidential disclosures must be predictable with *certainty*, there has come an increasing recognition of the fact that any attempt, on an *ad hoc* basis, to resolve the constitutional issue raised by the newsman's dilemma will not and cannot serve the avowed aim of preserving a free press and an informed citizenry.

G. The Circumstances of This and Related Proceedings Themselves Demonstrate the Need for an Absolute Privilege.

It is singularly significant that Caldwell, the person subpoenaed in this proceeding, found it necessary to retreat from his original position that he would, if necessary, appear before the grand jury for the purpose of authenticating his story. This change in position was not grounded on doctrinaire considerations or an attempt to frustrate any proper governmental purpose. Rather, as the record establishes, Caldwell's shift was prompted by his belated recognition of the pragmatic consideration to which we have referred to support our position that nothing less than an absolute privilege will do. Caldwell came to realize that his mere appearance behind the closed doors of a grand jury room would destroy beyond redemption those very confidential relationships which he had so carefully cultivated and maintained, and the Ninth Circuit agreed.

The news article giving rise to the Caldwell subpoena quite obviously dealt with matters which were innocuous, or exculpatory of the Black Panthers, or, where incriminating, were of such widespread public knowledge that they could almost be the subject of judicial notice. Yet, the Government sought to cloak the grand jury investigation with an "overriding national interest" by asserting that it encompassed such matters as an attempt to assassinate the President, even though the Government did not claim—and does not claim even now—that Caldwell could provide the grand jury with evidence pertaining to any such matters.[16]

Moreover, it is obvious that, if Caldwell had appeared before the grand jury and had then asserted his privilege, he might have been faced with the claim that the information sought from him was not otherwise available because all others who had direct knowledge of the facts had pleaded the Fifth Amendment or had otherwise declined to testify. Furthermore, if Caldwell, once before the grand jury, had done nothing more than identify and authenticate his story, he would probably have been faced with the claim that he had "waived" his privilege. *Cf., e.g., Rogers* v. *United States*, 340 U.S. 367.

Considerations such as these are not merely the product of some brief writer's imagination; they are real and practical and, indeed, are forshadowed by the Government's statement (*Br.* at 12 n.9) that the constitutional arguments should here be deferred and dealt with at the district court level after Caldwell has been forced to appear. The result of following this suggestion is plainly predictable in the light of what happened in Judge Zirpoli's court when two other reporters, armed with a protective order similar to that granted Caldwell, actually appeared before the grand jury and invoked their "qualified privilege." *In re Grand Jury Witnesses*, 322 F. Supp. 573 (N. D. Cal. 1970).[17] Without even attempting to ascertain whether the evidence sought by the Government was otherwise obtainable. Judge Zirpoli held that the grand jury was engaged in an investigation of matters involving an overriding national interest and that the witnesses, therefore, were required to testify (*Id.* at 578). In short, as soon as witnesses whom the court itself recognized were entitled to a newsman's privilege sought to invoke that privilege before the grand jury, their claims were summarily rejected because their testimony fell within a purported exception. It is obvious that if this Court adopts the procedures which the Government urges here, and Caldwell appears before the grand jury, he, too, will be faced with an order to answer all questions, and, as the Government knows full well, his so-called privilege will evaporate.

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[16] The Government (*Br.* at 3) refers to threats by David Hilliard, Chief of Staff of the Black Panther Party, to kill President Nixon: threats which were repeated on a number of occasions in a weekly periodical of the Black Panther Party. But the Government makes no claim that Caldwell can authenticate or testify to any of such threats, or that he was called before the grand jury for any purpose related to those threats. As appears from the Government's Brief (pp. 3–4 and 46), the statements which Caldwell was called to authenticate were generalized statements of the well-known position of the Black Panthers that they intended to engage in an armed struggle to overthrow the government by force and violence. Inasmuch as the grand jury is not bound by the hearsay rule, to the extent that these generalized, widely publicized views of the Black Panther Movement added anything to the Government's case against Hilliard, the Government needed only to offer to the grand jury the newspaper articles themselves.

[17] The two witnesses were also members of the Black Panther Party who had received a grant of immunity from prosecution, so that the Fifth Amendment privilege against self-incrimination was no longer available to them. Judge Zirpoli specifically found, however, that the witnesses were also "professional journalists" employed by the Black Panther newspaper and that they, like Caldwell, were entitled to assert the First Amendment newsmen's privilege.

In short, any attempt to apply Judge Zirpoli's formula—liberal though it may be by pre-*Caldwell* standards—will inevitably lead to grave practical difficulties and to the "drying up" of the reporter's sources of information. Unquestionably, if the holdings of the courts below represent the outer perimeter of protection afforded newsmen by the First Amendment, no newsman will ever be in a position to assure an informant with certainty that his confidence will not some day be disclosed. There is always the risk that some court may hold at a future date (a) that a matter under investigation involves some issue of "compelling and overriding national interest" or (b) that the reporter waived his privilege of nondisclosure by failing to assert it at the earliest opportunity. And what we have noted with respect to Judge Zirpoli's test applies equally to any other formulation we have seen of a limited or qualified newsman's privilege.

CONCLUSION

As this Court is well aware, the question, whether the First Amendment erects a privilege excusing newsmen from disclosing information under compulsion of subpoena, has never been passed upon here, and the lower court decisions are by no means consistent, either in result or rationale. One thing, however, is clear: Unless this Court puts a stop to the practice of compelling newsmen to testify with respect to information obtained by them in the course of their calling, sources of information heretofore available will dry up and First Amendment freedoms will suffer.

In summary, we submit that, under the First Amendment, newsmen must be accorded a privilege, absolute and unqualified, to refuse in all circumstances and without penalty to divulge to anyone any information or source, confidential or otherwise, obtained in the course of their professional newsgathering activities. The inhibiting impact of anything less—whether no privilege at all or a privilege which in any circumstance is subject to defeasance—is so patent, and the chilling effect upon freedom of the press is so plain, that this Court should not, consistent with the First Amendment, sanction anything less than the absolute, unqualified privilege we urge.

Respectfully submitted.

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AFFIDAVIT OF SERVICE

State of New York
County of New York, ss.:

Stephen R. Froling, being duly sworn, deposes and says that he served the foregoing Brief upon the attorney for Petitioner herein, on September 17, 1971, by mailing three true and correct copies thereof, airmail postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, and upon the attorneys for Respondent, on September 17, 1971, by mailing three true and correct copies thereof, airmail postage prepaid, to Charles Stephen Ralston, Esq., 1095 Market Street, Suite 418, San Francisco, California 94103 and to Anthony G. Amsterdam, Esq., Stanford Law School, Stanford, California 94305.

/s/ Stephen R. Froling
Stephen R. Froling

Sworn to me before this 17th day of September, 1971.

Notary Public

SUPREME COURT OF THE UNITED STATES

(No. 70-57—October Term, 1971)

UNITED STATES OF AMERICA, PETITIONER, *v.* EARL CALDWELL, RESPONDENT

On Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

Brief of American Society of Newspaper Editors, Sigma Delta Chi, and Dow Jones & Company, Inc., as Amici Curiae, in Support of Earl Caldwell

Attorneys for The American Society of Newspaper Editors, Sigma Delta Chi, and Dow Jones & Company, Inc.
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STATEMENT

The American Society of Newspaper Editors ("ASNE"), the national professional journalistic society Sigma Delta Chi, and Dow Jones & Company, Inc. ("Dow Jones"), a Delaware Corporation, pursuant to the written consent of petitioner (United States) and respondent Earl Caldwell, hereby submit this Joint Brief as *amici curiae* in support of the position taken by Earl Caldwell in this litigation.

This brief will be directed to the principal issue here involved, *i.e.*, the necessity for this Court to affirm that the First Amendment affords to journalists a constitutional privilege to refuse to submit to compulsory process when such submittal would force journalists to disclose confidential information obtained in the course of their professional journalistic activities.[1]

II

INTEREST OF AMERICAN SOCIETY OF NEWSPAPER EDITORS, SIGMA DELTA CHI, AND DOW JONES & COMPANY, INC.

The American Society of Newspaper Editors is a nationwide professional organization of more than 740 persons holding positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded fifty years ago, include the maintenance of "the dignity and rights of the profession,"[2] and the continuing duty to improve the manner in which the journalism profession carries out its responsibility of providing a free and unfettered press in the service of the American people.

Sigma Delta Chi is the society of students and practitioners of journalism. It has over 100 student chapters, over 100 professional chapters, and more than 21,000 members, among whom are included the most distinguished journalists in the United States.

Dow Jones & Company, Inc. is the publisher of *The Wall Street Journal, Barron's Business and Financial Weekly, The National Observer*, and *The Dow Jones News Services*, all with circulation throughout the United States.

Members of ASNE, Sigma Delta Chi, and Dow Jones, as individuals and as members of these institutions, have become increasingly alarmed at the unprecedented use by local, state and federal prosecutors of compulsory process to attempt to obtain information acquired by journalists in the course of their news gathering activities. The increasing issuance of *subpoenas ad testificandum* and *duces tecum* to working newspapermen is an abrupt departure from over a century and a half of practice, and directly threatens the ability of journalists to fulfill their professional responsibility. More important, the use of compulsory process to force journalists to disclose information given them in confidence can, if unchecked, quickly reduce the guaranties of the First Amendment to illusory promises.

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[1] The government urges (Br., pp. 8-9) that *United States* v. *Caldwell* (No. 70-57) does not raise the question of the existence of a First Amendment protection for newsmen but, rather, the "much narrower" issue of whether a reporter can refuse to appear before a grand jury about matters concededly nonconfidential. The amici do not agree with this characterization. As the Court of Appeals recognized below, the issue before it rested "upon the same First Amendment foundation" as did Judge Zirpoli's protective order since before it could decide the question of whether a more protective order was required, "we must first decide whether it requires any privilege at all." The same considerations apply here.

Moreover, as will be discussed below, the absence of an authoritative decision by this Court on the broad question of First Amendment rights has led to inconsistent opinions in the courts below, and to understandable confusion on the part of the public and newsmen as to the scope of protection afforded, all of which has resulted in instances where the public's right to know may well have been compromised because of the uncertainty of the law. The amici recognize that this Court has agreed to consider the *Pappas* (No. 70-94) and *Branzburg* (No. 70-85) cases, which also involve the scope of First Amendment protection, so that it is obvious that the Court desires to treat the matter in a comprehensive and authoritative fashion.

[2] Preamble to the Constitution of ASNE.

The affidavits alreday submitted by Earl Caldwell, and by the other journalists in the proceeding below, demonstrate quite effectively the chilling effect which this practice has had upon the journalistic profession.[3] The views expressed in these affidavits, and the chilling effect shown therein which they have already had upon the ability of newspapermen to gather and publish relevant information, are neither singular nor *sui generis*. The Association has collected similar affidavits from other journalists throughout the country which fully affirm the experiences of the affiants below.[4]

The experiences of the reporters already in the record, and the experiences of members of ASNE, Sigma Delta Chi, and Dow Jones, indicate that the rights of journalists (and *a fortiori* the right of the public to a free press) are all too often bartered piecemeal in frenzied negotiations between prosecutors, newspaper, and newspapermen in an atmosphere of broadly drawn subpoenas, contempt citation threats, and hastily convened legal proceedings seeking protective orders, all attended by the bluff and bluster which sometimes surround such maneuverings. The tyranny of time, the press of other matters, and the depth of the commitment to a free press of the particular participants involved, have all combined to create a chaotically inconsistent nation-wide pattern of response. In some cases, government attorneys have voluntarily redrawn such subpoenas if resistance is encountered from either the newspaper or the journalist. In other cases, newspapermen have arrived at an accommodation with the government, voluntarily yielding certain information in return for the government dropping other demands. On still other occasions, journalists who did not have the resources or the time to combat subpoenas, have acceded to such demands, often much against their will and to the detriment of their future ability to gather and report news. All these events have taken place in a legal framework which lacks specific direction through an authoritative opinion of this Court indicating the limits of the government's power in the area.

The amici are deeply disturbed that the serious and substantial constitutional problems underlying this issue must be handled in such an *ad hoc* and unsatisfactory manner. The ultimate loser in such contests is the public, whose right to a free flow of information is thus often bartered away under circumstances least conducive towards protecting First Amendment rights. The amici believe and urge upon this Court that, in general terms, the First Amendment grants to newsmen constitutional protection, absolute and unqualified, to refuse to divulge under compulsion any information that newsmen believe would compromise their ability to carry out their professional news gathering activities. For reasons which appear below, the amici believe that any lesser protection cannot afford the press or the public the constitutional rights to which they are entitled.

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[3] See, particularly, affidavits of journalists Caldwell, Kifner, Knight, Proffitt, Ripley Turner and Lukas. Similar affidavits have been filed below in amici briefs for Newsweek, Inc. (journalists Lowell, Morgan and Yee) and the Columbia Broadcasting System, Inc. (broadcast journalists Cronkite, Sevareid, Wallace, Rather and Kalb). All of these affidavits demonstrate the importance of maintaining confidential sources of information, and all stress that any constriction of the scope of the confidential relationship will have (and has already had) devastating consequences on journalists' ability to present the news.

[4] The practice of wholesale issuance of subpoenas, the protracted legal proceedings which often follow thereafter, and the chilling effect which these subpoenas have already had (even in those instances where the subpoenas were later withdrawn or quashed) has been demonstrated by affidavits collected by ASNE from reporters in Providence, Rhode Island (*The Providence Journal* and the *Evening Bulletin*); Los Angeles, California (*Los Angeles Times*); St. Louis, Mo. (*St. Louis Post-Dispatch*); and Chicago, Ill. (*Chicago Daily News* and *Chicago Sun-Times*). For example, over the past three years it is a matter of record that more than 30 subpoenas have been served on newspapers published by Field Enterprises, Inc., two-thirds of which were issued on behalf of the government. One *Chicago Sun-Times* reporter (Duane Hall) was subpoenaed to testify in eleven separate proceedings in the space of eighteen months.

III

THE FIRST AMENDMENT REQUIRES THE PROTECTION OF NEWSMEN FROM COMPULSORY DISCLOSURE OF CONFIDENTIAL INFORMATION

A. The Primacy of the First Amendment Protection for the Press

There is little disagreement that the press in the United States has been assigned a unique and vital role in the ongoing dynamic of American democracy a role whose singular nature has been repeatedly recognized by the courts, and a role given life through the adoption of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech or of the press." That this Amendment, and the freedom of speech and press protected thereby, is the very foundation of free government by free men has been so oft-emphasized that it has become a cliche.

The special role and function of the press, and the protection which it requires if it is to carry out its projected function, was recognized at the creation of the Republic. It was described by Mr. Madison thusly:

> In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands. . . . Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation. . . .[5]

As Chief Justice Hughes pointed out in *Near* v. *Minnesota*, the role of the press envisioned by the founders was as the vigilant protector of the liberties of the people and the instrument "whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs." (*supra*, at p. 717.) This characterization has been repeatedly emphasized. In *Grosjean* v. *American Press Co.*, 297 U.S. 233. 250 (1936), the Court described the role of the press:

> The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.
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> * * * * * * *
>
> A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

In *Bates v. Little Rock*, 361 U.S. 516, 522 (1960), Mr. Justice Stewart pointed out:

> Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty. U.S. Const.. Amend. I.

In *Garrison v. Louisiana*, 379 U.S. 64, 74–5 (1964), the Court stated:

> [S]peech concerning public affairs is more than self-expression; it is the essence of self-government.

And in *Red Lion v. Federal Communications Commission*, 395 U.S. 367, 390 (1969), this Court recognized that:

> It is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail. . .

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[5] See *Near* v. *Minnesota*, 283 U.S. 697, 718 (1931).

The primacy of press freedom was given transcending eloquence in the oft-quoted language of *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945):

> [The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.

Moreover, it is not merely the right of the individual journalist to follow his profession which is here at stake. Rather, the rights which the amici seek to vindicate "are not for the benefit of the press so much as for the benefit of all of us."[6] As Justice Stewart so cogently indicated in *Red Lion, supra*, the First Amendment is concerned less with the reporter than with his audience (395 U.S. at 390):

> It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here.

Thus, the focus of the issues in the instant case is not upon the reporter's right to exercise his own free speech. The issue, rather, is the protection of the public's right to know and its right to receive information through a free and untrammeled press.

B. First Amendment Protection of Confidentiality Is Essential if the Press Is To Fulfill Its Constitutional Role

We submit that it is no longer open to serious doubt that the protection of the confidential sources and confidential relationships of journalists is a *sine qua non* if the press is to exercise the viligant role envisioned by the writers of the Constitution. As the reporter-affiants below have demonstrated, cultivation of, and reliance upon, "off-the-record" information is essential for proper reporting, and this is true not only in the case of unpopular or militant groups, but holds true for reporting of political, military and diplomatic information at the highest government levels. Unless newsmen are free to obtain "background information" of a confidential nature, it is difficult, if not impossible, for them to accurately report the meaning of events, or even themselves to understand and interpret events as they unfold. Unless official and unofficial sources can feel free to meet reporters in confidence, it is unlikely that they will feel free to tell reporters of official derelictions in high quarters, or of bureaucratic inefficiency, or of the myraid facts which a reporter must know if he is to act as a vigilant ombudsman. We know, as newsmen, that reporters can get valuable information only because informants know and understand that their confidences will be respected, and the affidavits below (see particularly the affidavits of Kifner, Knight, Ripley, Noble, and Yee) bear testimony to the debilitating impact of compulsory disclosure on a reporter's ability to cover the news. Unless newsmen are free to meet in confidence with members of dissident groups who espouse unpopular ideas, the public may never have the opportunity of hearing these ideas set forth in an objective setting so that the public itself may evaluate their potency and validity.[7] If the press ceases to be an independent institution seeking truth, but, instead, becomes an unwilling extension of the State's prosecutorial power, there is little likelihood that the cause of freedom of information will be served.

As the reporter-affiants below testified in their uncontradicted affidavits, the ability of the press to cover dissident or militant groups has been severely hampered, if not destroyed, by the proclivities of overzealous prosecutors to substitute the fruits of investigative reporting for police legwork. This testimony led District Judge Zirpoli to specifically find that "compelled disclosure of information received by a journalist within the scope of . . . confidential relationships jeopardizes those relationships and thereby impairs the journalist's ability to gather, analyze and publish the news." This finding was adopted by the Ninth Circuit, and it has not been contested by the government either in the District Court, in the Court of Appeals, or here.

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[6] *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967).

[7] As Judge Merrill indicated in the opinion of the Ninth Circuit below (434 F. 2d 1081, 1084 (9th Cir. 1970):

> "It is not enough that the public's knowledge of groups such as the Black Panthers should be confined to their deliberate public pronouncements or distant news accounts of their occasional dramatic forays into the public view."

It would be wasteful of space to enumerate all the now accepted concepts which at one time were unpopular or even forbidden by the powers of society, including, it should be noted, the once very unpopular idea that the Colonies should declare their independence of King George III.

But we need not rely only upon the affidavits of newsmen or the findings of the Courts below in the instant case. The importance of the protection of confidential sources and the need for limits upon compulsory process on journalists was recognized by Attorney General Mitchell who acknowledged the need for some protection of news sources.

> The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights.[8]

Even those courts which have refused to recognize a common law or First Amendment right limiting compulsory process on journalists, have nevertheless understood that their refusals placed serious constrictions upon the ability of newspapers to perform their functions. The Supreme Court of Pennsylvania candidly conceded in *In re Taylor*, 412 Pa. 32, 193 A.2d 181, 185 (1963) that:

> We would be unrealistic if we did not take judicial notice of another matter of wide public knowledge and great importance, namely, that important information, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public duty, bribery, corruption, conspiracy and other crimes committed or possibly committed by public officials or by powerful individuals or organizations unless newsmen are able to *fully and completely* protect the sources of their information. It is vitally important that this public shield against governmental inefficiency, corruption and crime be preserved against piercing and erosion.

Similar perceptions were voiced by Mr. Justice Stewart (then Circuit Judge) in *Garland* v. *Torre*, 259 F.2d 545, 548 (2d Cir. 1958):

> . . . [W]e accept at the outset the hypothesis that compulsory disclosure of a journalist's confidential sources of information may entail an abridgement of press freedom by imposing some limitation upon the availability of news.

Thus, it must be recognized that allowing compulsory process to force newsmen to reveal either confidential information or confidential sources, *is a direct and explicit violation of First Amendment freedoms.* The real issue here is whether a case can be made by the government which would justify a conceded violation of the precise language of the First Amendment. We believe that the government certainly has not made out such a case in the instant circumstances, and that it is unlikely that it can ever do so.

C. The Government has Not Established that the Convenience of, or even the Necessity for, Compulsory Testimony Overcomes the Explicit Command of the First Amendment

The government certainly did not establish a "compelling need" for Mr. Caldwell's testimony before the grand jury simply because, as indicated in the opinions below, the government never believed it necessary even to attempt to do so. The United States Attorney never came forth with any evidence to demonstrate the need for ignoring the plain language of the First Amendment.[9]

The government's utter failure to support its demand for compulsory process on witness Caldwell by a requisite showing of need has, in a narrow sense, made this case rather easy of decision. This Court has held innumerable times that abridgement of First Amendment freedoms can be allowed, if at all, only upon a showing of the most compelling urgency and need. Although phrased in varying formulations, this Court has never wavered from the principle that the limitation of First Amendment rights can be justified only in the name of "compelling and subordinating governmental interest"[10] or a showing of "paramount" need.[11] or a demonstration of "controlling justification"[12] or "subordinating interest."[13]

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[8] It is gratifying that Attorney General Mitchell has now adopted guidelines which give newspapermen at least a modicum of protection, and which the government asserts now insures that cases such as those at bar will not again occur in the Federal courts. The difficulty, however, with these "guidelines" is that they have no binding validity on state courts or indeed upon any investigative body, Federal or state, other than those supervised by the Federal judiciary. As the *Branzburg* and *Pappas* cases indicate, the issuance of subpoenas to newsmen and newspapers is at least as prevalent a practice in the state courts as in the Federal courts. Moreover, the Attorney General's guidelines contain a saving clause whereby the Attorney General reserves the right to violate the guidelines in a particular instance if "emergencies and other unusual situations" develop. This caveat re-introduces the very uncertainty and ambiguity which has plagued newspapermen during the recent past and which impels the amici to urge the adoption of an absolute and easily understood rule.

[9] There is no doubt, of course, that the strictures of the First Amendment apply to all government action, including issuance of subpoenas, as well as compulsory process issued by any governmental body, whether federal, state, or local, administrative, executive or judiciary. See *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965) (State Statute); *Reed Enterprises* v. *Corcoran,* 354 F. 2d 519 (D.C. Cir. 1965) (Federal Criminal Prosecution); *Liveright* v. *Joint Committee,* 279 F. Supp. 205 (M.D. Tenn., 1968); *Stamler* v. *Willis,* 371 F. 2d 413 (7th Cir. 1966) (Federal Legislative Investigation).

The insistence of District Judge Zirpoli and the Ninth Circuit that the government, at the very least, make a showing of need for the issuance of compulsory process is fully consonant with, and supported by, prior judicial opinions on the scope of newsmen's protection, even those opinions which ultimately refused to accord protection in the particular case. Thus, for example, Mr. Justice Stewart (then Circuit Judge) in *Garland* v. *Torre*,[14] implicitly recognized the limits upon the State's ability to require compulsory process on newsmen, and recognized, we believe, that a showing of necessity is required before compulsory process can be supported. In *Garland*, the court recognized the First Amendment issues at stake and allowed compulsory process only after closely examining the facts of the case and noting that the case did not involve "wholesale disclosure of a newspaper's confidential source of news," concerned the "heart of the plaintiff's claim" and that the plaintiff had demonstrated the unavailability of the information sought by any means other than compulsory process. The tenor of the opinion makes clear that under different circumstances, and without a compelling showing of need, the court might well have found compulsory process to be improper.[15]

The failure of the government here to demonstrate in any way that the information sought from Caldwell was essential to the government's interests, or was even particularly relevant or material to the grand jury's purpose, is a defect which, under *Garland*, is sufficient to defeat its claim.[16]

We urge, moreover, that under recent developments of the law, and by analysis of similar protections accorded other analogous confidential relationships, it would indeed be impossible for the government ever to demonstrate the type of "compelling need" which would justify the explicit violation of the First Amendment which compulsory process upon journalists would entail. Simply stated, the amici do not believe that the need for compulsory process outweighs the explicit commandment of the First Amendment to protect and nurture a free and untrammeled press.

The basis for the government's claim lies in the oft-quoted admonition that the law is entitled to every man's evidence, and that reporters have no special dispensation to avoid the requirement of testifying in judicial proceedings.[17] In general, of course, the proposition is correct. But, as with most generalities, it cannot be taken literally. Indeed, the very case (*Blair* v. *United States*) which cemented the proposition into law made clear that there were significant exceptions to this rule which have been crafted out of recognition that the transcendental requirements of justice make it necessary to protect certain relationships from compulsory process.[18]

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[10] *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 547 (1963).

[11] *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945).

[12] *Bates* v. *Little Rock*, 361 U.S. 516, 527 (1960).

[13] *NAACP* v. *Alabama*, 357 U.S. 449, 463 (1958); *cf. New York Times Co.* v. *United States* (No. 1873) and *United States* v. *The Washington Post Company* (No. 1885), decided June 30, 1971, 39 U.S.L.W. 4879, where the per curiam opinion of this Court adverted to the "heavy burden of showing justification" in the case of a prior restraint on the exercise of free speech.

[14] 259 F. 2d 545 (2d Cir. 1958), cert. denied 358 U.S. 910 (1958).

[15] Most later cases on the point rely upon *Garland*, either allowing or refusing a journalist's claim to protection essentially upon a balancing process. The opinions of Judge Zirpoli and the Ninth Circuit are in the tenor of *Garland*, as are other lower court opinions limiting the right of the government to compulsory process of newsmen. See *People* v. *Dohrn*, Crim. No. 69-3808, Cook County Circuit Court, Chicago, Ill.; *Wisconsin* v. *Knops*, Supreme Court of Wisconsin, State No. 146; *Alioto* v. *Cowles Communications, Inc.*, Civil Action 5210, N.D. California.

Although the Supreme Court of Pennsylvania in dictum in *In re Taylor*, 412 Pa. 32, 193 A. 2d 181 (1963) did not recognize the existence of a First Amendment right to protection, nevertheless, the Court broadly construed the Pennsylvania newsman's exemption statute as granting protection for the materials there involved. The Court broadly construed the statute to confer a wide scope of protection precisely because of First Amendment considerations.

We are cognizant that other jurisdictions have refused to recognize the existence of a First Amendment right to protection and have allowed compulsory process in the absence of any showing of need. See, *e.g.*, *In re Goodfader's Appeal*, 45 Hawaii 317, 367 P. 2d 472 (1961), *State* v. *Buchanan*, 250 Oregon 244, 436 P. 2d 729 (1968), cert. denied 392 U.S. 905. For reasons described in the instant brief, we believe these cases to have been erroneously decided, and submit that they should not be followed by this Court.

[16] The government asserts (Br. pp. 34–38) that the traditional secrecy and purpose of grand jury proceedings make it improper to disclose the specific purpose of the investigation, the topics to be covered, or (except in the most general way) the relevance or materiality of the material sought in the investigation. But this argument only demonstrates the impropriety of using grand jury subpoenas to force newsmen to disclose the confidential sources of their confidential information. That the government cannot meet the standards of *Garland* with respect to grand jury subpoenas is certainly not the fault of journalists.

[17] *Blair* v. *United States*, 250 U.S. 273, 281 (1919):

> . . . [I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned.

The clearest examples of such exceptions, of course, are those of the so-called "evidentiary privileges." Thus, a client has a privilege to keep from disclosure confidences given to his attorney,[19] a patient has a privilege to shield from disclosure confidences given to his physician,[20] at common law a spouse could keep from compulsory process disclosures to a spouse,[21] similar rules at common law and/or by statute protect disclosures between priest and penitent,[22] between a client and his accountant, and between a "registered psychologist" and his client.[23] And, of course, the courts have long recognized the necessity of an "informer" privilege whereby the government need not ordinarily reveal the source of an informant's testimony, even in a criminal prosecution.[24]

In all of the above instances, courts have recognized the existence of values which transcended the otherwise applicable requirement that each citizen give testimony. The administration of justice, not to mention the protection of the rights of individuals, are better served by protecting the confidentiality of the attorney-client privilege than by the short term and fleeting advantage which the disclosure of such confidences may have in an individual case. The well-being of society as a whole is better served by the allowance of confidences between a priest and a penitent than by forcing disclosure. The importance of maintaining an informer's anonymity to the long term administration of justice, and to the protection of the "flow of information" to the government (*Roviaro, supra*, 353 U.S. at 62), are recognized as generally (though not always) superseding the requirement of compulsory process, even in the defense of a criminal prosecution, and in the face of the Sixth Amendment's assurance to a criminal defendant of compulsory process.[25]

But the so-called evidentiary "privileges" do not by any means exhaust the areas of exception to compulsory process. The courts have often surrendered accessibility to otherwise relevant evidence when other considerations require their unavailability. The Federal Rules of Criminal Procedure, and the decisions thereunder, require suppression of confessions obtained without the necessary judicial prerequisites.[26] The courts have long excluded otherwise relevant and material evidence obtained through illegal search and seizure.[27] The government has unquestioned power to withhold relevant and material evidence if it reasonably believes that disclosure would expose matters "which, in the interest of national security, should not be divulged." [28] And, of course, the most massive exclusionary rule ever devised is embodied in the Fifth Amendment which deprives not only courts but every government agency of testimony from the most potentially fruitful source of information because the drafters of the Constitution deemed the right to remain silent more important than the ability of the government to administer justice through self-incrimination.[29]

More significantly, however, the law does not require that a particular witness possessing these protections make a threshold showing of "necessity" in order to invoke his right to protection. Nor does the right to protection depend upon a balancing of the nature of the confidence sought to be protected against the effect which exclusion would have on the long range public interest. Thus, a client need not demonstrate that release of a particular piece of confidential information which passed between himself and his attorney would "irreparably injure him" if disclosed, nor in a criminal prosecution would the government be allowed to plead that the attorney-client confidence should be breached because in the particular case the interests of "national security" or "administration of justice" or whatever so required.[30] The government could not so plead with respect to any of the so-called evidentiary "privileges", or any of the other exclusionary rules deriving from the Fourth or Fifth Amendments. On the contrary, once the witness claims his right to protection (or in the case of the exclusionary rules, the applicability of the exclusionary rule becomes apparent), the matter is foreclosed. The courts do not countenance further investigation into the nature of the confidences for the simple reason that to do so would, in practical effect, vitiate the protection intended to be conferred.[31] The courts do not engage in *ad hoc* "balancing" considerations simply because the law has already balanced the accounts and has found the scales to be weighted on the side of protection.

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[18] *Blair, supra* at 281:

> The duty . . . is subject to mitigation in exceptional circumstances; there is a constitutional exception from being compelled in any criminal case to be a witness against oneself . . .; some confidential matters are shielded from consideration of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.

[19] *Alexander* v. *United States*, 138 U.S. 353 (1891).

[20] *Connecticut Mutual Life Insurance Co.* v. *Union Trust Co.*, 112 U.S. 250 (1884).

[21] *Wolfle* v. *United States*, 291 U.S. 7 (1934).

[22] See 8 Wigmore, Evidence ¶¶ 2394–95.

[23] See, generally, 8 Wigmore, Evidence, ¶ 2286.

[24] See *Roviaro* v. *United States*, 353 U.S. 53 (1957).

[25] We wish to emphasize that we do not claim a "privilege" for newsmen, although the newsmen's protection commanded by the First Amendment is often loosely termed a "privilege." The right which we seek to vindicate is not the personal right of a newspaper man to any "privilege." It is the right of the public to receive information which is here involved.

[26] See *McNabb* v. *United States*, 318 U.S. 332 (1943); *Mallory* v. *United States*, 354 U.S. 449 (1957); see, also, *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

[27] See *Weeks* v. *United States*, 232 U.S. 383 (1914); *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Silver Thorpe Lumber Co.* v. *United States*, 251 U.S. 385 (1920).

[28] *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953).

[29] See, e.g., *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892).

We believe that the protection of journalists from compulsory disclosure of confidential information is a right of such enduring importance to the preservation of our democratic system that it falls within the constellation of interests protected by the evidentiary privileges and exclusionary rules cited above. In view of the undoubted (indeed, conceded) importance of confidential relationships to the gathering and dissemination of news and information, and in view of the fact that compulsory disclosure of such confidence directly trenches upon the First Amendment, we cannot believe that any of the privileges or the exclusionary rules referred to above stand on a higher footing than protection of a newsman in the fulfillment of his constitutional role as ombudsman of the democratic system. That First Amendment freedoms are delicate and precious rights which need "breathing space" to survive,[32] "strong medicine" for protection,[33] and are to be protected even to the point where newspapers are accorded protections not accorded to individual citizens,[34] are propositions now well established in constitutional law. If any doubt remained, it was dissipated by this Court's opinion in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny[35] expanding the protection accorded to the press. The Court recognized in *New York Times* (376 U.S. at pp. 269–70):

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U.S. 476, 484. . . . The First Amendment, said Judge Learned Hand "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (D.C.S.D.N.Y. 1943).

The protection accorded in *New York Times* has been given expensive interpretation, and now includes newspaper coverage of private individuals as well as blic figures, and electronic journalism as well as print journalism.[36] These deci- ons are, we believe, the culmination of a maturing and sensitive recognition by e Court that, in an increasingly complex and interrelated world, where the verage citizen necessarily can know by personal knowledge only the smallest action of the events which affect his life, the role of the free press is even more sential to the maintenance of American democracy than in the past. Unless e First Amendment guarantee of press freedom is protected to the fullest tent, the role which it has played will inevitably be diminished. If this happens, will be the public, and not merely the press, which is the loser.

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[30] See *Alexander* v. *United States*, *supra*, note 19.

[31] As this Court noted in *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951), "if the witness, upon interposing his claim [to protection], were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee." It might be thought that an exception to this rule exists by virtue of the Supreme Court's holding that the government was not entitled to maintain its "informer" privilege in circumstances where the overwhelming interest of justice required disclosure. *See Roviaro*, *supra*. However, it should be noted that even here the government would not be forced to disclose in all circumstances. It could avoid disclosure by dropping the litigation. We suggest that similar considerations could apply to newspapers, so that if newspapers and journalists voluntarily initiate court proceedings, the courts could, if the circumstances so warranted, require that the journalists be required to choose between maintaining the suit or voluntarily disclosing their sources.

[32] *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433 (1963).

[33] *Sheridan* v. *Garrison*, 415 F. 2d 699, 706 (5th Cir., 1969); *Dombowski* v. *Pfister*, 3 U.S. 479 (1965); *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958); *Freedman* v. *Maryland*, 3 U.S. 51 (1965).

[34] *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

[35] *See Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967); *Rosenbloom* v. *Metromedia, Inc.*, 39 U.S. L.W., 4694 (June 7, 1971).

III

HE EFFECTUATION OF THE FIRST AMENDMENT'S MANDATE REQUIRES ABSOLUTE, NOT LIMITED OR QUALIFIED PROTECTION, AND MUST INCLUDE THE RIGHT TO REFUSE TO APPEAR BEFORE ANY STATE INVESTIGATOR OR JUDICIAL BODY, INCLUDING THE GRAND JURY

The amici believe that for newspapers to obtain the full protection to which hey are entitled by the First Amendment, journalists must be accorded an bsolute and unqualified right to protection from compulsory process, including he right to refuse to appear or testify before any governmental investigative or udicial body, including the grand jury.

We recognize the reluctance with which courts generally view the establish- nent of absolute and unqualified protections, particularly where these protections perate to deprive the courts of what otherwise might be relevant or material vidence. We also recognize that it is impossible, as a practical matter, to envision ll possible future situations in which the protection might be invoked, so that he judiciary generally is reluctant to establish absolute requirements which may ater have to be set aside when the unforseen and unusual instance occurs. Never- heless, we believe that nothing less than the establishment of unqualified protec- ion would, as a practical matter, comport with the First Amendment's require- nents. Our reasons for this position are:

1. As the government recognizes, the focus in this case is not the effect which denial of protection has upon the individual newspaper or journalist. Rather, it s the "degree of chill being generated on the conduct of others" (Government Brief, p. 27). The danger we face is not that reporters will cease attempting to eport news, for this will not happen. What will happen (and what indeed has already happened in the instances discussed by the reporter-affiants below)[37] is hat groups or individuals will refuse to discuss their activities with reporters ecause they fear that journalists may be forced by compulsory process to divulge heir identity and their confidences. We thus deal as much with appearances and reactions, as with the activity of reporters.

The District Court recognized the legitimacy of these fears, and the importance of appearances, by a protective order limiting disclosures only to "non-confiden- tial" matters. The Ninth Circuit was even more sensitive to the fact of appear- ances and went beyond the District Court's protection, correctly (in our judgment) deciding that even the mere *requirement* of witness Caldwell's physi- cal presence in the grand jury room is sufficient to vitiate the public's confi- dence.[38]

We believe the Ninth Circuit's perceptive appreciation of the dangers to free expression of compulsory appearance before the grand jury is fully warranted and accords with the amici's practical experience in reportage. Indeed, we believe that the Ninth District's decision, bold as it is, should be even further expanded and that under no circumstances (even in the face of an assertion or demonstration of "compelling need") should a newsman be required to appear before any investigative body.

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[36] See note 35, *supra*.

[37] See affidavits of journalists Kifner, Ripley, Noble, Lowell and Yee.

[38] The Ninth Circuit astutely observed that the witness Caldwell had established a relationship of trust and confidence which rested "on continuing reassurances" of confidentiality (Appendix 123):

> This reassurance disappears when the reporter is called to testify behind closed doors. The secrecy that surrounds Grand Jury testimony necessarily introduces uncertainty in the minds of those who fear a betrayal of their confidences. These uncertainties are compounded by the subtle nature of the journalist-informer relation. The demarcation between what is confidential and what is for publication is not sharply drawn and often depends upon the particular context or timing of the use of the information. Militant groups might very understandably fear that, under the pressure of examination before a Grand Jury, the witness may fail to protect their confidences with quite the same sure judgment he invokes in the normal course of his professional work.

The reason is simply that no one, even those most sophisticated in the law, can predict with any certainty what the courts will deem a "compelling need," or what would be considered "confidential" or "non-confidential" at a period in time much later than the events themselves. The uncertainty introduced by anything other than an absolute and unconditional protection may (and indeed already has) constricted the free flow of information to reporters which is essential to their function. This uncertainty with respect to rights directly conferred by the First Amendment brings the newsman's protection within the scope of the constitutional doctrines of "vagueness" and "overbreadth":

> Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.[39]

Protection, the scope or existence of which is uncertain and made to depend upon what courts in the future may decide, will not easily be understood or appreciated by the average citizen and will inevitably have the "chilling effect" which this Court has already proscribed.[40]

In *Dombrowski* v. *Pfister*, 380 U.S. 479, 487 (1965) this Court pointed out the necessity, in the First Amendment area, of avoiding "making vindication of freedom of expression await the outcome of protracted litigation." We do not believe that the statute at issue in *Dombrowski*, or in other cases where the Court has struck down vague statutory language,[41] would have been saved from constitutional infirmity merely by the insertion that the statute would become operative only upon a showing of "compelling need" or "supervening necessity." Such concepts are as illusive of definition as they are incapable of the precision which is required when free speech considerations are involved. What is required here, if the First Amendment protection is to have any meaning, is the promulgation of an absolute rule, simple of discernment, precise as to scope, and easy of application.

2. It might be urged that affording subpoenaed journalists a protective order, plus requiring their appearance only upon a showing of compelling need, is sufficient protection because the journalists will be required to divulge little, if anything, which they deem confidential. But requiring the appearance of the journalists at the grand jury proceeding only to have them invoke their protection is commanding an essentially useless act (from the government's point of view), while at the same time requiring an act which per se has debilitating effects upon the public's confidence in the scope of protection. And, of course, if the government at any point challenges whether or not the invocation of confidentiality in the grand jury room is warranted (or, if a protective order has been issued, if the government challenges whether the order reaches the particular matter involved) further judicial proceedings will be required. At this point the court either has the option to accept at face value the claim of confidentiality (which, as noted, is the course often taken in the case of the evidentiary privilege rules) or to subject the witness to further hearing under circumstances whereby the very confidentiality sought to be protected is vitiated. In these circumstances the protection is hardly any protection at all.[42]

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[39] *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963). See, *e.g.*, *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *U.S. v. Robel*, 389 U.S. 258 (1967); *Coates v. City of Cincinnati*, No 117, October Term, 1970.

[40] The government urges that the reporter-affiants below do not contend that their mere appearance before the grand jury will have harmful effects. The government reads the reporters' affidavits as asserting only a demand for protection for material and sources obtained in confidence. The amici do no so read the affidavits. The gist of these affidavits *in toto* demonstrates a desire to protect any loss of confidence in reporters by citizens and they demonstrate an awareness that even the appearance of journalists' submission to compulsory process would have that effect. See, particularly, affidavits of journalists Kifner, Ripley, Noble, Lowell and Yee.

[41] See, *e.g.*, *Thornhill v. Alabama*, 310 U.S. 88 (1940); *N.A.A.C.P. v. Bumon*, 371 U.S. 415 (1963); *Baggett v. Bullitt*, 377 U.S. 360 (1964).

[42] The government in its Brief is concerned that the secrecy of grand jury proceedings be protected. Indeed, the necessity of such protection is the basis upon which the government urges that requiring a showing of compelling need is improper since it might vitiate such secrecy. (Br. pp. 42–44.) The government's position, we believe, is precisely the reason why reliance upon special showings of need (or limitations on confidentiality only to matters which are "essential" to the case) are more dangerous to the long term interests of justice than would be the adoption of an absolute rule, easy of discernment, precise as to scope, and easy of application.

3. As noted above, courts do not require showings of "compelling need" or indulge in *ad hoc* balancing considerations when dealing with the so-called "evidentiary privileges" or with other exclusionary rules which have been fashioned in order to protect transcendent or overriding considerations of public policy. Why should such requirements be imposed here, where the government has *not* shown any historical evidence that the unavailability of journalists testimony has had a detrimental effect upon the administration of justice?

It is quite true, of course, that the law does not ordinarily allow a witness to refuse even to appear in response to a subpoena. The witness ordinarily must appear and then, in response to specific questions, invoke whatever protection the law allows. But in the ordinary case, a witness appears only in his proper person and can invoke the rules only with respect to his own protection. The role of the journalists is quite different, since we are concerned less with the impact of disclosure upon the journalist himself, than upon the public generally, and with the very appearance of compliance having precisely the detrimental effect which the First Amendment forbids.

There might be force to the government's argument if it could demonstrate that the unavailability of journalists' evidence has hampered law enforcement in the past. The government has not done so, however, nor indeed did it demonstrate even in the instant case that the unavailability of witness Caldwell to the grand jury unduly impeded its investigations. The relative paucity of cases on the point (until very recently) indicates that prosecutors have not sought compulsory process on journalists in the past, nor does the historical literature indicate that they have felt hampered by their failure to do so. The lack of necessity for journalist testimony can be discerned from the fact that numerous jurisdictions[43] have enacted statutory bars to compulsory process against newsmen, some absolute and some conditional. As indicated in the reports of the New York Law Review Commission,[44] statements from law enforcement officials in those jurisdictions having a so-called reporter's privilege make it clear that the existence of the privilege has not impeded law enforcement and may have aided it. The experience of these jurisdictions, and the fact that their number has steadily increased over the years[45] indicate a growing recognition that protection of journalistic confidences has a long range beneficial effect on the administration of justice which far transcends any fleeting short term gain which may appear possible in a particular prosecution.

4. Dilution of newspapermen's protection by limitations or qualifications is apt to be most damaging to the exercise of First Amendment freedoms, and to the public's ability to comprehend affairs, precisely at the time when such protection is most required. It is no accident or coincidence that the recent spate of investigatory subpoenas arises during a period of social turmoil, when many groups in our society (throughout the political spectrum) feel the need to protest and to challenge what, in other times have been almost universally accepted maxims. Yet, it is precisely at these times when governments feel most threatened in their security and are most likely to overact through open-end investigations,[46] broad range subpoenas, electronic and other surveillance, and the like. It is also at these times when deviant or aggressive political behaviour is prone to be characterized by diligent prosecutors as a threat to "national security," or as an apt subject for pervasive investigation. During such times, courts must often assess such governmental claims in the absence of concrete evidence with advocates' hyperbole as the only guide. There is an inescapable temptation to accept prosecutorial assertions as a showing of "compelling need" sufficient to overcome a newsman's protection if a "balancing" test is to be applied.

And it is precisely in these times when the public must have the fullest access to the views of dissident groups so that their claims and their tactics can be understood and evaluated. It does no service to the cause of democracy to silence these groups or drive them underground. Because the public requires the newsman's protection most particularly in times of stress, we believe an absolute and unqualified protection is required. Anything less may sacrifice the public's right to know at a point in time when the right is most necessary.

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[43] See Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 Yale L. J. 317, 321 (1970).

[44] New York Law Revision Commission, 1949 Report, *Recommendations* and *Studies*, pp. 113–146.

[45] See Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 Yale L.J. 317 (1970).

[46] See *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963), and *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965).

We concede the possibility that there may exist a situation where a particular crime will go unpunished, or a potentially dangerous activity go uninvestigated, if this Court grants the relief here sought by Caldwell. While this, indeed, may be the case, we believe it a price which must be paid if the First Amendment is to be respected, in the same way as we pay the price for such constitutional protections as the Fourth, Fifth and Fourteenth Amendments. And the absence of any convincing demonstration by the government that recognition of journalists' protection has in fact in the past, or has in fact in the cases at bar, proven an insurmountable obstacle in criminal prosecution, serves to further assure this Court that recognition of journalists' protection as embodied in the First Amendment will fully serve the public interest.

CONCLUSION

WHEREFORE, in view of the above, it is respectfully requested that this Court affirm the recognition of the newspapermen's First Amendment protection as announced by the Ninth Circuit, and modify that decision only to provide the absolute protection described above.

Respectfully submitted.

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September 13, 1971.

SUPREME COURT OF THE UNITED STATES

(No. 70-57—October Term, 1971)

UNITED STATES OF AMERICA, *Petitioner*, *v.* EARL CALDWELL, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF: Office of Communication, United Church of Christ; United Church Board for Homeland Ministries; Commisison for Racial Justice, United Church of Christ; Division of Television, Radio and Film Communications, The United Methodist Church; The Division of Human Relations of the General Board of Christian Social Concerns of the United Methodist Church; The Board of National Missions of the United Presbyterian Church in the United States of America; The American Jewish Committee; The African Methodist Episcopal, Zion Church; African Methodist Episcopal Church; Broadcasting and Film Commission, National Council of the Churches of Christ in the U.S.A., as *amici curiae*.

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CASES CITED

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PRELIMINARY STATEMENT

Pursuant to the written consent of all parties, the organizations listed on the cover submit this brief as *amici curiae* in support of respondent, Earl Caldwell ("Caldwell").

While representatives of the print and electronic media, as fellow *amici curiae*, are submitting in separate briefs their views of the issues presented by this case, particularly with regard to the newsman's qualified or unqualified privilege not to testify or appear before a Grand Jury, these *amici*, as groups representing many millions of American citizens of all faiths, ethnic and economic backgrounds, and organizations serving racial and religious minorities, wish to present to this Court what they see as the paramount issue—the protection of *freedom of expression* for all of our people, guaranteed by the First Amendment to the Constitution to encourage communication among the citizenry and thereby bring about a better society.

The Office of Communication of the United Church of Christ conducts a ministry in mass communication in behalf of the Church, a denomination formed in 1957 by merger of two historic Protestant denominations—the Congregational Christian Churches and the Evangelical and Reformed Church. In recent years, the Office of Communication has carried on community action programs to encourage broadcasters to serve minority needs, to maintain equal employment opportunity programs, and to provide full coverage of controversial issues of public importance in their service areas.[1]

The United Church Board for Homeland Ministries is the instrumentality of the United Church of Christ established to handle domestic mission programs. For more than a century, the Board has supported higher education for minorities, including six predominantly black colleges in the southern part of the United States. It is also engaged in voter registration, voter education, race relations and emploment programs and other community activities on behalf of minorities.[2]

The Commission for Racial Justice is an instrumentality created by the United Church of Christ to help secure the legal rights of minorities, to give them a voice in community affairs, to assist them to get education, and to combat racism within the Church.

The Division of Television, Radio and Film Communications of the Program Council of the United Methodist Church works for the denomination in mass media. The General Conference of the United Methodist Church, the denomination's policy making body, acted in 1968 on freedom of expression: "We affirm our adherence on the principle of freedom of expression as a right of every person." The United Methodist Church has a membership of 10,842,000 persons throughout the United States.

The Board of National Missions of the United Presbyterian Church in the United States is the instrumentality of the church charged by its General Assembly to act on social issues. It has a specific mandate to work in problems involving mass communications in this country, and has been particularly active in promoting racial justice.

The American Jewish Committee was incorporated by Act of the Legislature of the State of New York in 1911. Although the chief reason for being of this organization is to prevent the infraction of the civil and religious rights of Jews, the American Jewish Committee has from its very inception been devoted to the preservation of the rights and liberties of Americans of all faiths. It is deeply concerned, therefore, with maintaining the integrity of freedom of the press, as enshrined in the First Amendment, as a traditional bulwark of American liberty.

The African Methodist Episcopal, Zion Church is a predominantly black denomination with 4500 churches and a national membership of 940,000 persons. It is an independent body formed in 1796 after a withdrawal from the John Street Methodist Church of New York City.

The African Methodist Episcopal Church began in 1787 in Philadelphia when persons in St. George Methodist Episcopal Church withdrew as a protest against color segregation. The denomination started in 1816 and today continues to work for racial equality on behalf of its primarily black membership.

The National Council of Churches is an agency of Protestant and Greek Orthodox communions in the United States, which together have a total membership of about 42,000,000 persons. Its member communions have charged the N.C.C. "to study and to speak and act on conditions and issues in the nation and the world which involve moral, ethical, and spiritual principles inherent in the Christian gospel." The Broadcasting and Film Commission is a department in the Central Division of Communication within the National Council of Churches. It has a Board of Managers which determines policy in communication matters within the purposes of the National Council of Churches.

BACKGROUND

The news media in the United States today have pervaded our culture to a degree unmatched by any other social institution. There exist some 750 daily newspapers; 575 Sunday papers; more than 8,000 weekly newspapers; more than 22,000 periodicals, including nearly 150 magazines of "general editorial" content. Americans are able to choose programming content from among 4,200 AM and 2,200 FM radio stations, and from more than 840 television stations. Approximately 95% of American homes include at least one television set, and nearly all at least one radio.[3] Notwithstanding the pervasiveness of such mass communication in the United States, a Media Task Force, in its Report to the National Commission on the Causes and Prevention of Violence in November, 1969, pointed out that a serious communications gap stretched wide between the black and white communities in the United States. The Report stated that:

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[1] See e.g. *Office of Communication of the United Church of Christ* v. *F.C.C.*, 359 F. 2d 994 (D.C. Cir. 1966); *Office of Communication of United Church of Christ* v. *F.C.C.*, 425 F. 2d 543 (D.C. Cir. 1969).

[2] The activities of the instrumentalities of the United Church of Christ are typical of those of the other Protestant denominations appearing as *amici*. In the interest of brevity, detailed discussion of each of these *amici's* programs has been omitted.

> "Much of the antipathy of militant blacks toward the white news media centers on the unwillingness of the press to explore the nature of black power in depth. In reporting on the advocates of black pride or black power, the news organizations have shown a greater willingness to accept the radical statements and simply to repeat them than to explore their significance and to place them in proper perspective."[4]

The consequent misrepresentation, confusion and lack of knowledge about black and minority peoples in this country is understandable, but not inevitable.

> "The press functions not only to survey, but also to criticize, and responsible criticism has understanding as its prerequisite. If the media do not make the effort to understand the black community, they cannot intelligently criticize it. If they do not criticize, they are abdicating another of their obligations to the people. But criticism without understanding becomes a hit-or-miss proposition and leads to black animosity toward the media and a consequent drying up of news sources. Yet, much of the sting from critical editorials lessens if the subject of the editorial believes he has had at least a fair opportunity to be understood."[5]

The corollary of this belief is a pervasive mistrust, creating a "dilemma" which has been described as "a widening gap between human needs and public resources and a growing cynicism regarding the commitment of community institutions and leaders to meet these needs."[6]

In further outlining the failure of the mass media to achieve intergroup communication, the Media Task Force Report went on to say:

> "But the impact of the of the imagined slights can be reduced if the media initiate, and the black community responds to, a closer association between the reporters and their black news sources."[7]

Daily events in America today, including riots in our prisons, on our campuses and in our cities indicate that a failure of communication and absence of regular contacts with minority group citizens prevent state and city leaders and agency administrators from learning about problems and grievances as they develop. As a result, tensions which could have been dissipated if responded to promptly, mount unnecessarily, and often culminate in unnecessary violence and death. The development of closer and more frequent contacts was suggested by the Media Task Force. It called for "the kind of regular surveillance of minority group activities which . . . [the media] . . . applies to other segments of the community," the training and "use of ghetto 'stringers' " and "[m]ore background and in-depth stories dealing with facets of the American scene with which the majority of the audience have little experience."[8]

Routinized contacts with the press are needed to help minorities develop the talents necessary to tell their own story to the public.

> "Many organizations, both political and private, exploit the news media to achieve their particular ends. More white organizations than black know how to prepare and distribute a press release, know whom to contact if they have a story they want told, know how to present a story they want told, know how to present a story to the news organization, know what deadlines must be met, and know the terms on which they can deal with the news media. Because of the heritage of segregation and the past practice of the white press to ignore blacks, however, this kind of public relations capability has not developed in the black community to the same extent that it has in the

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[3] *Mass Media and Violence*, Vol. XI. A Report to the National Commission on the Causes and Prevention of Violence, November, 1969, pp. 1–2.

[4] *Ibid.*, p. 56.

This is not to say that those who speak loudly should not be heard. "[P]ersistent trouble makers are the only men with sufficient courage to conflict with the law. . . . But the governmental attack on the loud-mouthed few frightens a multitude of cautious and sensitive men, who do not dare to imperil their wives and children. . . . The agitator's contest is waged on behalf of these thoughtful men as well as for his own sake. . . ." Chaffee, *The Blessings of Liberty* 113 (1956).

[5] *Ibid.*

[6] Report of the President's Commission on Civil Disorders 285 (1970).

[7] *Mass Media and Violence, supra,* at p. 58.

[8] *Ibid.,* at p. 160.

> white community. Yet the media rely on such efforts by non-media organizations. Black coverage deserves the same advantages."[9]

In its chapter concerning "The Marketplace Myth: Access To the Mass Media," the Task Force Report makes its most significant statement, particularly relevant to the case presented here. It states:

> "In 1790, The United States had a total of eight daily newspapers and 8 weeklies. When the Constitution was adopted, 97 percent of the population lived in places so small that they were not even called towns. Of the remaining three percent, most lived in towns whose populations were under 25,000—most only a few thousand. Under these conditions, the individual could make his opinions known by giving a speech on Sunday outside the local church or by getting a printer to put up a broadside and by posting it in taverns and in other public gathering spots around town. With relative ease he could have an impact."[10]

Technological change has diluted the power of the soapbox orator. Once, it was possible to garner the "benefits from press freedom without . . . owning printing plants or running newspapers. . . . Early newspapers were primarily collections of letters written by citizens who did not share at all in the ownership of the publications for which they wrote."[11]

"Today, unless the individual has access to formal channels of communication, it is almost impossible for him to have an impact."[12] His power, according to Federal Communications Commissioner Nicholas Johnson, is measured "in terms of access to the mass media."[13]

> "His ability to communicate widely is extremely limited. As a minimum, an effective marketplace requires access on approximately equal terms by all those with messages. Long ago, perhaps, a newspaper might have been started with relatively little capital by one whose views were strong enough to demand that they be aired. Even today, it is probably possible to blanket a city the size of Washington, D.C., with a four-page broadside for about $1,500. Sometimes, television, radio, and newspaper advertising space can be purchased to carry a non-commercial message. These are communication outlets, but obviously they are not available to all; for many, they would be less than adequate.
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> "Access to the American public for the message bearer is limited by both mechanical and human constraints. Present mechanical limitations of the media make it impossible for more than a fraction of the potential communications to be carried to society at large. Existing newspapers, magazines, radio and television stations, and other media in this country could not possibly simultaneously accommodate the individual views of the 125 million Americans over the age of eighteen. Obviously, there is neither sufficient space nor time.
>
> "Mechanical limitations lead to human limitations. Because the media cannot carry all of the messages, someone must select and reject. The process of selection thus becomes a limitation of critical importance, and the media owners and gatekeepers are the first barriers to media access.
>
> "Under the traditional view of the First Amendment, the role of the gatekeeper and the right of the owner to choose, are plenary. It makes no difference whether the choice is representative or honest, or whether it meets the public's requirements for information.
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> "The nation's broadcasters, publishers, and editors decide who shall have the opportunity to be heard—an understandable and pragmatically necessary process. But, with the present structure of the communication business, it results in a marketplace far different from the 18th century concept of a marketplace for ideas. The ultimate barrier to communication is, of course, the audience. The significance of that barrier depends in part on how media operators choose to present the news. That the media print or broadcast a

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[9] *Ibid.*, p. 58.

[10] *Ibid.*, p. 68.

[11] Wiggins, *Freedom or Secrecy* 170 (Rev. ed. 1964).

[12] *Mass Media and Violence*, *supra*, at p. 68.

[13] Quoted in Columbia Journalism Rev., Fall 1970, p. 3.

> message does not guarantee that the audience will pay attention or will retain the message. Yet here, too, the media have some control."[14]

The Statement of this case presented in the Brief for the United States has one very serious omission. Although the Government refers to the rash of threats by Black Panthers against the President of the United States preceding and coincident with the publication of an article by respondent Caldwell about the Black Panther Party published on December 14, 1969, in *The New York Times*, the Statement does not refer to the many years of oppression of the black people in the United States preceding these events, the frustration of minority groups in this country in striving to obtain a modicum of economic achievement and security, the broad gap in communication between the black and white communities, or the problems of the Black Panther Party in adequately presenting its views of the American people.

America in the 1960's was a place of violence. A President had been assassinated, as well as a revered leader of the black people. Whole sections of our cities had been destroyed as a result of racial and political unrest. Presidential commissions were established to seek some answers to the problems of civil disorder, crime, political uprising and civil disobedience, as well as the causes and prevention of violence. Against this background, it is a matter of historical fact that during the later 1960's the Black Panther Party had refused to provide information or grant interviews to many of the reporters who sought to inquire behind its official front. Earl Caldwell, a black staff reporter for *The New York Times*, was able over a period of several months to develop a close relationship with Party officers and members in the Los Angeles, California, area. As a result of this relationship, the officers and members of the Black Panther Party were able to convey to Caldwell information which he developed into a number of stories published in *The New York Times* dealing with various aspects of the organization. When Caldwell, who had continued to report on the Black Panthers, was called, in March, 1970, to testify before a Federal Grand Jury investigating the Party, he refused to appear and testify, claiming that his very appearance at the secret proceedings would be interpreted by the Black Panthers "as a possible disclosure of confidences and trusts" which would destroy the confidential relationship established by him over a period of time and his effectiveness as a newspaperman. Notwithstanding the protective order issued by the District Court in denying Caldwell's motion to quash the subpoena served upon him, Caldwell continued to refuse to appear before the Grand Jury for the same reasons, and he was found in contempt. The Court of Appeals for the Ninth Circuit reversed and remanded with instructions that the order directing Caldwell's appearance before the Grand Jury be vacated. The Court of Appeals held:

> "If any competing public interest is ever to arise in a case such as this (where First Amendment liberties are threatened by mere appearance at a Grand Jury investigation) it will be on an occasion in which the witness,

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[14] *Mass Media and Violence, supra,* at pp. 68–69. While this discussion has addressed itself to blacks, it is equally applicable to racial and religious minorities of many kinds. "The emergence of new occasions for differences of interests or belief has led to various forms of interference. At one time it was the 'Native American' wave of violence against Irish Catholics, . . . at another it was the Mormons who were mobbed. . . .

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The Civil War and later the World War led to public and private efforts to suppress all spoken or written disapproval. . . .

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doctrine of evolution by teachers and writers roused the religious fears and opposition of many. . . .

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There is no doubt that freedom of speech has been widely denied to university and college professors and high school teachers.

The growth of trade unions . . . brought up problems of freedom of speech. . . . The courts have sometimes prohibited discussion. . . .

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The dark history of lynching, though not primarily a chapter in the history of freedom of expression or its denial, has involved refusal . . . to give to the victim the opportunity *to state his case openly in court*. . . .

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The agitation for women's suffrage, . . . provided abundant examples of interference with freedom of speech. . . ."

Cheyney, *Freedom and Restraint: A Short History*, in 2 Shramm, *Mass Communications*, 212–215 (1960). (Emphasis supplied.)

> armed with his privilege, can still serve a useful purpose before the Grand Jury. Considering the scope of the privilege embodied in the protective order, these occasions would seem to be unusual. It is not asking too much of the government to show that such an occasion is presented here.
>
> "In light of these considerations we hold that where it has been shown that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand Jury interrogation, the Government must respond by demonstrating a compelling need for the witness' presence before judicial process." (A. 125).

SUMMARY OF ARGUMENT

The process through which new or unpopular ideas are accepted or rejected by the American public depends on free and frequent exposure to public scrutiny. Such access turns on the ability of reporters to gain the confidence of those who harbor these ideas. Only when there is mutual trust and confidence can the source "open up" to a reporter and *freely express* his life history of thoughts, fears, hopes and dreams. When this state of open exchange is achieved, a good reporter can translate his source's words into language which his readers can understand and from which they can learn.

Those advocating change use demonstrations, boycotts, marches, public assemblies and other activities which skirt the border of First Amendment protections. Prosecution often follows. The effectiveness of protest as a tool of social change depends on cooperation with the press. If the press are forced to become police informers, the members of such groups will be forced into a hopeless dilemma, either to so limit their contact with the press as to cut off effective communication with their countrymen or to summon the witnesses against themselves and give the testimony which may cause their incarceration.

Seen in this context, the compulsion of reporters' testimony contravenes the First Amendment guarantee to those harboring unpopular thoughts. Stripped of anonymity and privacy, and legitimately fearing misinterpretation; declarants such as the Black Panthers will forfeit their opportunity to speak fully rather than risk the consequences of frank conversation with reporters who might later be subpoenaed.

The make-up and nature of the Grand Jury further intimidates political or social dissidents into silence—or worse. The secrecy of this prosecutorial body adds uncertainty to the reporter-informant relationship. A source can never be sure of the unintended uses to which his disclosures may be put. The most sincere promises of confidentiality are rendered moot by the slamming of the Grand Jury door. Furthermore, the conditions of Grand Jury testimony—no counsel present, isolation and powerful, locally prominent interrogators—magnify the fear that reporters will "break down" and reveal the most personal confidences.

The ultimate loser in this process is the American public. Deprived of desperately needed original source material, the public must draw conclusions by inference from misleading secondary data. Escalation of misunderstanding into open—and, sometimes, violent—conflict is the inevitable byproduct of incomplete exchange of ideas.

ARGUMENT

(*Point I*)

The first amendment to the Constitution requires protection of the public's freedom of expression.

In determining the meaning of the first amendment rights of freedom of speech and freedom of the press, this Court has recognized that it is not the carrier of the idea that is paramount in our democratic system, but the idea itself, whatever its popularity or unpopularity, and whether or not those who set forth such ideas reveal themselves to the public or choose to remain anonymous. In speaking of the purpose of the first amendment, this Court has recently indicated that it is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." [15] The right to engage in free expression of ideas takes precedence over any rights of those who may be licensed to disseminate the ideas so that the dissemination is at all times protected and fostered. "It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here." [16]

The right to engage in *political* expression, even though remaining anonymous, is just as well enshrined in the First Amendment.[17]

Accordingly, while respondent Caldwell claimed to be utilizing his "newspaperman's privilege" as a basis for refusing to appear before the Grand Jury investigating the Black Panther Party, even under a qualified protective order, what he was in fact doing was protecting the freedom of expression right of the Black Panther Party's officers and members with whom he had talked and whose statements had served as a basis for his articles in *The New York Times*. Those officers and members must be assumed to have believed at the time that they communicated with Caldwell that their First Amendment rights were guaranteed by the Constitution, that they could speak freely to Caldwell, a member of the press, not only about their specific activities and their expected actions, but about their own lives, their communities, their people and anything else they thought might be relevant and to afford Caldwell the opportunity to prepare an accurate report of a large segment of the American people. This information allowed Caldwell to write as he did and afforded the American public greater insight into the Black Panther Party, but most of all it permitted the officers and members of the Black Panther Party to utilize effectively their freedom of expression. It permitted Caldwell to take confidential material, as well as material that his sources might have deemed non-confidential but which they would never have expressed if they knew it might be related elsewhere, and to shape such facts into informative stories. In short, it is the public right to know which is ultimately at stake here.

This Court, in *Talley* v. *California*, 362 U.S. 60, recognized the interest of society in anonymous publications and struck down an ordinance requiring that all handbills bear the name of the sponsors, authors or distributors, where the State had advanced no sufficient governmental interest in the regulation, saying:

> "There can be no doubt that such an identification requirement did and would continue to restrict freedom to distribute information and thereby freedom of expression." [18]

It certainly must follow that if persons wishing to submit ideas and information to the media know that the person to whom they may communicate such ideas and information may be required to appear before a Grand Jury without any governmental demonstration of a compelling need of the witness' presence, the person holding the idea or information has had placed upon him a restriction of his freedom of expression. Such an inhibition must of itself be violative of the Constitution.

Certainly it is difficult to ascertain to what extent there may be an inhibition on the part of issuers of ideas and information to reveal such solely because there may be an awareness that the reporter may be called into a Grand Jury room, even though he may only be required to testify as to "non-confidential" material or may not testify at all. Empirical studies on this are unavailable. However, the record in this case is replete with affidavits of media personnel including some of our most renowned reporters, indicating the chilling effect they believe such actions may have on those who might otherwise give free expression to their ideas and information. Balanced against the apparent lack of significant inconvenience to the government caused by the requirement that it show an interest prior to Caldwell's appearance, it would seem obvious that such opinions must be given greater credence in support of the paramount interest of freedom of expression.

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[15] *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 390.

[16] *Ibid.*

[17] *Sweezy* v. *State of New Hampshire*, 354 U.S. 234.

[18] 362 U.S. at p. 64.

This Court put the matter well in the recent case of *Cohen v. California*, in which it said:

> "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. See *Whitney v. California*, 274 U.S. 357, 375–377, 47 S.Ct. 641, 648–649, 71 L.Ed. 1095 (1927) (concurring opinion of Brandeis, J.)."[19]

The Government argues that the basis for Caldwell's refusal to appear before the Grand Jury may be linked with some form of "paranoia" on the part of the Black Panthers, or from "mere speculation" that they and other dissident groups, solely as a reaction against the reporter's appearance, will refrain from exercising protected expression. We submit that this terrible social reaction to the harassing tactics of governmental agencies cannot be so simply discounted. It would appear that to insure their constitutional rights, dissident groups must openly state that such is their fear *before* their rights are guaranteed. This Court has clearly indicated that this is not a requirement, saying:

> "Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom."[20]

One of the most interesting comments made in the Task Force Report, although referring to the black-white relationship, would seemingly have applicability to all of our racial and religious groups. It says:

> "The only way the white media can hope to understand the black community is by becoming involved in the black community. . . . The white community cannot listen unless someone carries the message, a message based on understanding the black man."[21]

The Task Force Report refers to significant questions proposed by a former member of the Justice Department's Community Relations Service:

> "Have you ever wondered what it's like to be seven years old, and black, in a slum school? Have you ever tried to find out how a young, unskilled Negro husband tries to provide for his family? Have you ever thought about the aspirations of a Negro teenager? Do you know what soul food is? What do you know about the myriad of block clubs and organizations in the ghetto community? What really goes on in ghetto pool rooms? Do attitudes of Negro youngsters about sex differ from those of whites? What is the meaning of the ritual of those storefront churches? What does a young Negro father tell his son about being Black in America? Why are there seemingly so many taverns in Negro neighborhoods? What are the latest in-group jokes in the ghetto? There is a fascinating world of humor, pathos, aspirations, frustrations, toil, heartbreak, violence, and joy right under your nose."[22]

What is made clear is that in these troubled times these are questions that news organizations must know the answers to so that they can perform their jobs properly. The public reading or viewing the media must be aware of these answers. But most important of all, the black community must be able to fully express their ideas and give forth information to provide these answers. Perhaps then we will not have such a significant gap between our respective communities. Perhaps then, with greater understanding, violence in our nation will be reduced.

Earl Caldwell, though black himself, was writing for a predominantly white-controlled newspaper and for a largely white readership. He wanted to express

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[19] *Cohen v. California*, —— U.S. ——, 91 S.Ct. 1780.
[20] *Tinker v. Des Moines Independent Com. Sch. Dist.* 393 U.S. 503, 513.
[21] *Mass Media and Violence, supra,* at p. 53.
[22] *Ibid.*

the thoughts of a segment of the black community, and he believed that he had reached a point of such confidence that he could fully do so. He was not an agent of the Government and the Black Panthers knew this. Perhaps in some way he was instrumental in diminishing the intergroup communications gap. If he felt that going into the Grand Jury room without any showing of compelling need for his presence would inhibit his activities, clearly his position was correctly honored. What Caldwell did and what others after him may do in the same vein was and will be to foster the expression of ideas and to reduce the level of violence in our society, but in any event to bring about its advancement in some manner.

The obligation of members of the press not to appear before a Grand Jury pursuant to subpoena without the showing by the Government of a compelling need is not just the privilege of the newspaperman. The newspaperman is recognizing the constitutional right of the public when he refuses to make such an appearance. Those with whom he may have a relationship could never waive the "privilege." Thus this case may not present the question of whether or not a newspaperman's "privilege" should be qualified or unqualified.[23] The issue presented here is whether or not there is a restriction of the freedom of expression of members of the public where a newspaperman is required to appear before a Grand Jury without a demonstration by the Government of a compelling need where information is sought concerning the newspaperman's knowledge gained through his relationship of confidence with those members of the public. Viewed in this perspective, the issue, therefore, is not so much one of how much of a reduction of the flow of information to the public might occur as a result of compelled presence in the Grand Jury room as it is of how much of an inhibition there will be on the part of the public to express themselves, through the media, to other members of the public. Obviously, if there is an inhibition at one end of the flow of ideas and information, there would have to be a resultant reduction at the other end. Although the issues may become clouded in referring to questions of divulging sources of information, degrees of privilege, or breaches of confidences, that does not appear to be the case at hand. Most essential is the matter of actual loss to the public of information because compelled appearance by reporters reduce a confidant's likelihood of communicating through the press. Clearly, some information will be communicated even in the absence of any "privilege." Many of those who are the sources of information would prefer that their identities or certain information not intended for the public remain confidential; they are willing to rely for confidentiality on the possibility that the reporter will never be subpoenaed to testify or, if subpoenaed on the likelihood that the reporter would suffer a contempt citation before testifying. But as a matter of contitutional law, what the sources of information may or may not do may depend upon a qualified or unqualified newsman's privilege not to appear before a Grand Jury.

It must be recognized that there may be a conflict between governmental and private interests, and the Court below recognized and difficulty in striking the appropriate balance between these interests. Finding that compelling disclosures would restrict the flow of information to the public, the Court adopted the District Court's requirement that Caldwell need not testify unless the Government could show a "compelling and overriding national interest" in his testimony. The District Court had said:

> "When the exercise of the Grand Jury power of testimonial compulsion so necessary to the effective functioning of the Court may impinge upon or replace the First Amendment rights of freedom of speech, press, and association . . . such power shall not be exercised in a manner likely to do so until there has been a clear showing of a compelling and overriding national interest that cannot be served by any alternative means."[24]

Although the Court did not make clear just what kind of governmental interest would satisfy the requirement, this Court did appear to have outlined the standard in clear language in *United States* v. *O'Brien*, 391 U.S. 367, in which it said:

> "This Court has held that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must

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[23] We do not quarrel with the points presented in the briefs submitted by our fellow *amici curiae*. We simply view the matter from a different perspective.

[24] 311 F. Supp. at 360.

> appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever impression inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest: *if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.*" (emphasis supplied) [25]

Most significant is the requirement that the governmental interest be unrelated to the suppression of *free expression*. It would seem, therefore, that in cases where the Government wishes to require a newspaperman to appear before a Grand Jury with respect to any inquiry concerning communications between him and sources of information, the "compelling need" of the witness' presence must be evidenced so strongly as to show that the restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest. Clearly, the Government did not make such a showing in the Court below.

(*Point II*)

Because of the Grand Jury's composition, function, procedure and atmosphere, the action of this body in questioning Caldwell would have a chilling effect on freedom of speech.

While the effectiveness of the Grand Jury system in our democratic society must be recognized, as with all things there are rare occasions when even such effective instruments become the tool of those who may wish to use them for improper purposes, and thus power is abused. In referring to the power of the Grand Jury system, this Court has stated:

> "Doubtless abuses of this power may be imagined . . . (b)ut were such abuses called to the attention of the court, it would doubtless be alert to repress them." [26]

Little use has been made of this power to control the Grand Jury system, however, but this would seem to be an appropriate instance for the utilization of such repression.

Historically, the purpose of the Grand Jury was to stand as a buffer between the citizen and the government. It was never supposed to perform executive functions; it is, rather, a mechanism to protect the people from abuse of the sovereign power. All too often it appears, in the eyes of its targets, to be an instrument used to attack the fundamental rights of an entire class. This is, in large measure, a result of the composition of the Grand Jury. Selection practices for Grand Juries vary, of course, according to jurisdiction. Nevertheless, a nationwide pattern is discernible: Grand Juries are made up of a small-self selected and unrepresentative elite.[27]

Far from protecting the accused's rights, these groups tend to be unknowledgeable about the problems of one likely to be arrested. Rather than identifying with the accused, these jurors are likely to consider him an enemy and are likely to develop a defensive attitude towards the efforts of a demonstrator or political dissident whose case is brought before them.

For example, in New York,

> "grand jury service, unlike petit jury service, was entirely voluntary. Citizens were invited rather than summoned to participate. Solicitations to place one's name on the grand jury list, which in 1964 numbered approximately 2,000, were periodically mailed to persons selected at random from the county petit jury list. In 1964, however, no grand jury invitations were sent to potential petit jurors under 35 years of age, or over 65. . . . It

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[25] 391 U.S. at pp. 376–77.

[26] *Hale* v. *Henkel,* 201 U.S. 43, 65.

[27] Although the 1968 Jury Selection and Service Act, 28 U.S.C. § 1861 *et seq.* applies uniform and random selection methods to Federal grand and petit juries, this does not mean that the criterion now used—voter registration—will yield representative panels. Historic patterns of intimidation of would-be voting registrants have not stopped. Congress has been compelled to extend the special protections of the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.* for a second 5-year period. 42 U.S.C. § 1973 aa. See H.R. Rep. No. 397, 91st Cong., 2d sess. (1970). Minorities who do not register out of fear or despair are underrepresented even on Federal panels. Furthermore, no such reform has been undertaken in the various States whose Grand Juries would be affected by the outcome of the instant case.

> was, . . . the practice to exclude welfare recipients from both grand and petit jury service.[28]
>
> The names of persons accepted as grand jurors were then added to the grand jury list in the next annual cumulation . . . (T)he grand juror selection system resulted in the underrepresentation, when compared with the general population, of certain ethnic and economic groups. Thus, blacks comprised 1.65% of persons on the grand juror list from which the Second August 1964 Grand Jury was selected, although at the time approximately 24% of the total population of New York County between 21 and 70 years of age was black.[29] Puerto Ricans comprised 0.3% of the jury list, compared with approximately 12% of the population. 'Blue collar workers'—a loose classification based on petitioners' own statistical analysis—comprised 1.2%[30] compared with 47% of the New York County labor force."[31]

A California study showed that:

> "Fifty-one percent of the nominees were personal friends of the judges who nominated them. Another 42 percent were either professional acquaintances, fellow members of a social or service group, or recommended by a friend of the judge. The addresses of the nominees were clustered around the addresses of the judges in the more affluent areas of the county. Few of the nominees were selected from areas where minority groups were concentrated. Less than 5 percent of the nominees were Negroes or Mexican-Americans, who make up more than 35 percent of the county's population.
>
> Sixty-seven percent of the nominees were in occupations classified as professional, technical, managerial or proprietary, while only 23 percent of the county's work force was engaged in these occupations. There were no clerical personnel, skilled craftsmen or unskilled workers among the nominees, while these occupational groups made up 62% of the county's work force. The educational level of the nominees matched their occupational level; 74% had college backgrounds, with 20% having advanced degrees or some graduate work.
>
> Grand jury nominees tended to be predominantly middle-age and older persons. Forty-one percent of the nominees were over 65 years of age, while 48% were from 45 to 64 years of age. Only 11% of the nominees were below the age of 45, and none of these were under 35.
>
> In . . . [another case] . . . which attacked the grand jury as discriminatory against Spanish-surnamed persons, data was introduced to show that while Spanish-surnamed individuals made up 12.4% of the county's residents, only 1.3% of the grand jury nominees for a 10 year period from 1959–68 were of Spanish surname. Out of 1,501 total nominations during that time period, only twenty were Spanish-surnamed individuals, and eight of these nominations were by a single judge.
>
> . . . Generally, the judges' efforts, if any, to find qualified minority group persons consisted of asking a Negro or Mexican-American legislator, judge or bailiff whether he had any names to suggest."[32]

The Grand Juror and the minority newspaper informant, then, tend to come from different backgrounds and represent antithetical interests. *Amici* submit that the more intense the conflict in a jurisdiction, the more threatened the juror will feel. As the preceding section has explained, the gaps in understanding of the two groups are great, and even the most earnest attempt to understand another person's perspective is likely to fail. Destroying the newsman's relations with his informants can only complicate the problem.

Traditionally, the Grand Jury has been seen as a check on overzealous prosecutors. This historic role provided the title for Richard Younger's book length study, *The People's Panel* (1963). However, this role has been increasingly reversed during the twentieth century. Judge Melvin P. Antell of the Essex County District Court (New Jersey) described the typical Grand Jury practice in the American Bar Association Journal:

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[28] This practice, like the exclusion of potential jurors who were under 35 years of age, had no statutory basis, and was subsequently terminated.

[29] Negroes comprised 14 percent of the population between 35 and 65 with at least a high school education. All population statistics were based upon the 1960 census.

[30] Occupational statistics were gathered from the 1966 cumulation of the grand jury list.

[31] *United States ex rel. Chestnut* v. *Criminal Court of the City of New York*, September Term No. 717 (2d Cir. decided May 3, 1971). (Footnotes renumbered).

[32] Mar, The California Grand Jury: Vestiges of Aristocracy, 1 Pac. L.J. 36 (1970). (Footnotes omitted.)

"Though free to take part in the interrogation, the grand jurors must place enormous trust in the prosecutor's guidance. It is he, after all, who tells them what the charge is, who selects the facts for them to hear, who shapes the tone and feel of the entire case. It is the prosecutor alone who has the technical training to understand the legal principles upon which the prosecution rests, where individual liberty begins and ends, the evidential value of available facts and the extent to which notice may be taken of proposed evidence.

"In short, the only person who has a clear idea of what is happening in the Grand Jury room is the public official whom these twenty-three novices are expected to check. So that even if a grand jury were disposed to assert its historic independence in the interest of an individual's liberty, it must, paradoxically look to the very person whose misconduct they are supposed to guard against for guidance as to when he is acting oppressively.

"Actually, the concern of protecting the individual from wrongful prosecution is one about which grand juries in general show little interest . . .

"Thus, when a case is brought into the grand jury room the prevailing feeling is that the prosecutor wouldn't bring it there if he didn't think he could get a conviction . . ."[33]

In reality, then, the Grand Jury uses no initiative, exerts little independence and functions in an automatic, ministerial manner.[34] Stripped of its protective role, the Grand Jury is vulnerable to misuse by overzealous prosecutors.

Racial and religious minorities are among the first to fall victim to such abuses of power. As veterans of the Civil Rights movement, they have learned to fear the use of Grand Juries to obtain evidence about "offenses" which border upon—and often transgress into—constitutionally protected areas. Unfortunately, reporters are viewed as excellent witnesses to testify in investigations which rely heavily on oral evidence to show intent—those involving charges such as conspiracy, incitement to riot, breach of the peace, trespassing and the like. It is precisely this kind of prosecution which deprives the reporters' informant of his protected platform.

The conditions of Grand Jury testimony also serve to destroy the sense of trust needed to encourage frank discussion. The very tools which are said to provide the strength of the Grand Jury system—immunity powers, no counsel present, "prominent" community leaders, not to mention secrecy, provide a basis for legitimate concern when reporters are witnesses. A body of men (and occasionally, women) with a financial and emotional stake in the *status quo*, and which is subject to the unchecked influence of a prosecuting attorney is, in some circumstances, likely to drive a wedge between them and the reporters who usually carry their message.

An inherently unfair match is set up when the layman-reporter enters the Grand Jury room without counsel. Unlike his antagonist, the reporter may have no foreknowledge of the questions to be asked of him. He may not even be sure if he himself is under suspicion. Sitting across from powerful community leaders who may be friendly with his editor or publisher, the reporter is likely to feel strong pressure to reveal information especially if it seems innocuous. Under these conditions, an informant, who can never be certain about what the reporter will be forced to discuss, would be ill-advised to speak freely, the Bill of Rights notwithstanding.

The likelihood of abuse varies according to time and region. A specific event or a spectacular crime may trigger an emotionally outraged investigation. Or a single individual or group harboring a prejudice or a grudge may systematically

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[33] Antell, "The Modern Grand Jury," 51 Am. *Bar Association Journal* 153 (1965) at 154.

[34] An instruction booklet for Grand Jurors advises the following:

"Don't be too exacting. Wait until the District Attorney has finished before asking questions of a witness as it often happens that the evidence you are seeking may be brought out. Ask the District Attorney in advance and, off the record, if your question is legal."

• • • • • • •

"The District Attorney estimates as closely as possible the number of cases that can be disposed of daily. Try to dispose of each day's batch before closing the session.

• • • • • • •

"If a police officer's testimony indicates he did a good job, a word of commendation is in order."

Grand Jury Association New York County Fund Corporation, *Manual for Grand Jurors in the County of New York* 31–34 (1957).

misuse the Grand Jury. The constitutional protection of free expression is directed at these anomalies. Only by establishment of a privilege for a news source's revelations can there be adequate safeguards.

The record below contains numerous references to the use of the Grand Jury system in 1970 by the Government to carry out a systematic investigation into organizations in the United States, particularly in the black community. Even the Government points out in its Brief (p. 47) that while this litigation was underway, the Attorney General of the United States was required to take steps to minimize the possibility that this issue would reoccur in a Federal context, and that the Attorney General issued guidelines which are to govern the practices of the Department of Justice in summoning newsmen before Grand Juries in the future.

While we submit that the matter of protection of freedom of expression is the paramount issue in this case, it is clear that the power of the Grand Jury was exceeded by the Department of Justice with respect to the *subpoena* issued to Caldwell, and that this Court, having had such abuse called to its attention, must repress such an abuse by affirming the decision of the Court of Appeals.

CONCLUSION

For the reasons stated, the Judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted.

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September 20, 1971.

SUPREME COURT OF THE UNITED STATES

(Nos. 70-85 and 70-94—October Term, 1971)

PAUL M. BRANZBURG, PETITIONER *v.* JOHN P. HAYES, JUDGE, AND HENRY MEIGS, JUDGE

On Writ of Certiorari to the Court of Appeals for the Commonwealth of Kentucky

IN THE MATTER OF PAUL PAPPAS, PETITIONER

On Writ of Certiorari to the Supreme Judicial Court for the Commonwelath of Massachusetts

Brief for the United States as amicus curiae

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S. Misc. Doc. No. 278, 53d Cong., 2d Sess. (1894).

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THE INTEREST OF THE UNITED STATES

In *United States* v. *Caldwell*, No. 70-57, the United States brought before this Court the narrow question whether, assuming that a newspaper reporter is privileged to withhold information from a grand jury which he obtained confidentially in the process of newsgathering, the privilege would extend so far as to bar a grand jury, in the absence of a preliminary showing of particularized need, from calling the reporter to testify about matters not received in confidence, when the reporter, in published articles, has set forth information of obvious interest to the grand jury. It is our position there that, whatever may be the nature and scope of the newsman's privilege, it does not render a reporter immune from the necessity of at least appearing before a grand jury in response to a subpoena *ad testificandum* which has been limited by court order to matters that are of a non-confidential nature.

These cases present broader questions. In *Pappas*, where petitioner was allowed to visit the headquarters of the Black Panthers on the promise that he would not disclose what he heard or saw unless there was a police raid, the question presented is whether, in the absence of a statute, a reporter has a privilege to withhold from a grand jury investigating criminal acts information as to what he saw and heard during his visit. In *Branzburg*, where the reporter described and photographed the commission of a crime—the production of hashish—the constitutional question[1] is whether a reporter has a First Amendment privilege to withhold from a grand jury facts ascertained from his personal observation of the crime.

Whether a reporter's privilege is implicit in the First Amendment guarantee of a free press, and, if so, the scope of such privilege, are matters which concern the United States as well as the states. While, as a matter of policy, the Attorney General has issued guidelines designed to minimize friction between the prosecution and the news media,[2] it is important for the Executive and the Congress to know the extent of their responsibilities under the Constitution in this field. It is our basic position that the question whether there should be a reporter's privilege, and the extent of such privilege, is for Congress rather than for the courts, and that it is to the legislature, rather than to this Court, that the news media should address their arguments.

SUMMARY OF ARGUMENT

The claim of privilege by reporters and journalists is not new. It has been advanced repeatedly in the courts, in Congress, in state legislatures and before various rulemaking committees. It has been analogized to the traditional privileges at common law, proposed as a rule of evidence, and urged as a constitutional right implicit in the First Amendment guarantee of a free press. With minor exception—most notably in the area of state legislation—the efforts have been to no avail.

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[1] In the proceedings below, petitioner Branzburg also relied upon a Kentucky statute (Ky. Rev. Stat. 421.100 (1969)), which extends to newsmen a privilege of non-disclosure as to the source of any published information.

The statute provides: "No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected."

[2] The Attorney General's Guidelines are set forth in an appendix to our brief on the merits in *United States* v. *Caldwell*, No. 70-57, this Term, at pp. 49-51.

The news media have functioned effectively and efficiently in this country for almost two hundred years without a reporter's privilege. Since the early days of the Republic, the newsgathering process has depended in large part on information given to reporters in confidence. Despite the fact that anonymous informants have always been faced with the possibility that some days before some grand jury investigating criminal activity the reporter might be called upon to divulge his sources, the flow of confidential information to the media has increased significantly over the years.

Obviously, the vast majority of such information is unrelated to the fact that news reporters may be called upon to tell what they know about criminal acts. The area of potential clash between law enforcement agencies and the claimed reporter's privilege is a narrow one, confined largely to situations where newsmen have witnessed or may have witnessed events bearing on the commission of a crime. Recognition of a privilege in this area raises far-reaching questions of policy which cannot be adequately answered by such broad phrases as "the right to gather news." The reporters are claiming, not merely the right to gather news, but the right to withhold news on the basis of promises that they, in their sole discretion, make to their informants. This is not so clearly desirable nor so clearly necessary to effective news reporting that the Court should recognize the position of the news media as a matter of constitutional right.

The Attorney General and most states have recognized that this is a delicate area and that it is desirable to interfere as little as possible with the newsgathering activities of the news media. This, however, is different from according to the news media a privilege under the Constitution to be free of the duty imposed on all citizens to give testimony relating to a crime. The past two hundred years demonstrate convincingly that such a privilege is not essential to a meaningful exercise of the protected freedoms of the press to write, to publish, and to circulate the news. Whether or not it is desirable is a different question altogether. But, the desirability of according a privilege to news reporters and the scope of such a privilege are matters that should be left to the legislative process; it is, therefore, to the legislature, rather than to this Court, that the news media should address their arguments.

ARGUMENT

Whether or not the protection of a newsman's confidential associations is desirable as a matter of policy, there is no reporter's privilege as a matter of First Amendment right

1. The question before the Court in these cases is not, as the briefs of the petitioners and of the news media seem to assume, whether it is desirable for news reporters to have the privilege of withholding from grand juries and law enforcement authorities information which the reporters believe was received in confidence, even if such information relates to the commission of a crime. The issue presented here is a very different one: whether recognition of such a privilege is so essential to the existence of a free press that newsmen must be deemed to have that privilege as of right under the First Amendment. Unless that is so, questions relating to a claimed reporters' privilege are not issues for the courts, but for the legislative process.

Despite the efforts of respected news reporters, in the affidavits carefully prepared for the *Caldwell* case, to suggest that failure to recognize their claimed privilege as implicit in the First Amendment will result in the demise of a free press, the fact remains that the newsgathering process has functioned effectively and efficiently in this country for almost two hundred years without benefit of the special protections sought in these cases. It has, of course, long been recognized that many newsworthy stories would never have reached the public if the sources had been unable to rely on anonymity. Almost forty years ago, this point was made as forcefully as it is today (Siebert and Ryniker, *Editor and Publisher*, September 1, 1934, pp. 36–37):

> News channels which prove valuable in unearthing such examples of public scandals remain so only as long as the source remains secret. Honest officials, and occasionally dishonest persons, who can furnish necessary information cannot afford to jeopardize their freedom or their jobs by permitting their names to be used. * * * No information would be given if the informant did not have faith in the integrity of the reporter in the matter of withholding his name. The newspaper man would find his channels of news closed.

But, notwithstanding the Ninth Circuit's recent decision in *Caldwell*, the possibility that some day before some grand jury investigating criminal activity the reporter might be called upon to divulge his source of information—a possibility that has existed since the early days of the Republic—has apparently not in the past deterred the anonymous informant from communicating with the news media. As revealed by a 1968 study of all major newspapers in the United States, an "absolutely staggering" number of news stories are developed from information given to reporters in confidence. Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U. L. Rev. 18, 43–44, 60 (1969).

2. Obviously, news reporters obtain all sorts of confidential information, from personal gossip to opinions on affairs of state, which will not be affected by the fact that they may be called upon to tell what they know about criminal acts. The area of potential clash between law enforcement agencies and the claimed reporter's privilege is, therefore, a narrow one. It is largely confined, as the cases presently before this Court illustrate, to situations where reporters have witnessed or may have witnessed events which have a bearing on the commission of a crime. Recognition of a privilege in this area raises far-reaching questions of policy, which cannot be adequately answered by the broad generalizations offered by the media.

For example, is a press really free when it deliberately sets out to publicize a crime but refuses to disclose the criminal, as in the *Kentucky* case? Misprision of a felony is a crime of long standing. See generally 1 Stat. 112, 113; 15A C.J.S. §§ 2(2)–3. Without undertaking to decide whether a reporter who witnesses the crime is guilty of an affirmative act of misprision by refusing to disclose identities, it is clear that his act is violative of the basic principle sustaining that offense—that the state is entitled to the tesimony of all men with knowledge of facts disclosing crime. Cf. *Brown* v. *Walker*, 161 U.S. 591, 600. In the area of relationships with minority and dissident groups, there are also some basic questions which must be considered. Is a press really free when, as in the *Massachusetts* case, the minority group has it in its power to decide what the public will or will not be told by the conditions it imposes on permitting a reporter access to its headquarters? Is it more important than the press maintain a thread of relationships to such groups by acceding to their conditions, reasonable or unreasonable, or is it more important that the press report what they can manage to find out, untrammeled by the conditions imposed by their informants?

We raise the questions, not to answer them, but to suggest that the question whether there should be a reporter's privilege, and what its scope should be, is not a simple issue capable of resolution by such broad phrases as "the right to gather news." The reporters are claiming, not merely the right to gather news, but the right to withhold news on the basis of promises that they, in their sole discretion, make to their informants.[3] This, we submit, is not so clearly desirable nor so clearly necessary to effective news reporting that the Court should recognize the position of the news media as a matter of constitutional right.

The only privilege recognized by the Constitution is the privilege against self-incrimination (Fifth Amendment). Whether other privileges should exist is a matter to be decided by regular legislative means on the basis of the normal debate and full consideration of competing values that regularly enter into legislation. Some states have enacted statutes governing the newsman's privilege, only a few of them as broad as the privilege claimed in these cases.[4] If the present-day circumstances justify recognition of a privilege of broader scope and of nation-wide coverage, that determination ought to be made by Congress. That body is better suited to the task of developing the scope and limitations of such a privilege in a systematic way than are the courts as a function of interpreting the Constitution.

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[3] Petitioners and the news media liken the reporter's privilege to the privilege of the government informer. See *Roviaro* v. *United States*, 353 U.S. 53, 59; *McCray* v. *Illinois*, 386 U.S. 300. As this Court stated in *Roviaro* (353 U.S. at 59), however, the informer's privilege "recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." By contrast, the claimed reporter's privilege is designed to permit newsmen to withhold from law-enforcement officials their knowledge of criminal activity, and thus has precisely the opposite effect from the privilege accorded to government informers.

[4] Such legislation has been passed in seventeen states: Ala. Code Recompiled Tit. 7, § 370 (1960); Alaska Stat. § 09.25.150 (1967, 1970 Cum. Supp.); Ariz. Rev. Stat. Ann. §12–2237 (1969 Supp.); Ark. Stat. Ann. § 43–917 (1964); Cal. Evid. Code Ann. § 1070 (West 1966); Ind. Ann. Stat. § 2–1733 (1968)§ Ky. Rev. Stat. § 421.100 (1969); La. Rev. Stat. § 45:1451–54 (1970 Cum. Supp.); Md. Ann. Code Art. 35, § 2 (1971); Mich. Stat. Ann. § 28.945 (1) (1945); Mont. Rev. Codes Ann. Tit. 93), ch. 601–2 (1964); Nev. Rev. Stat. § 48.087 (1969); N.J. Stat. Ann. Tit. 2A, ch. 84A, § 21, 29 (Supp. 1969); N.M. Stat. Ann. § 20–1–12.1 (1953, 1967 Rev.); N.Y. Civ. Rights Law § 79-h (McKinney 1970); Ohio Rev. Code Ann. § 2739.12 (1953); Pa. Stat. Ann. Tit. 28, § 330 (1958, 1970 Cum. Supp.). For a discussion of the differences in the scope of coverage under these statutes, see Comment. *Constitutional Protection for the Newsman's Work Product*, 6 Harv. Civ. R.-Civ. Lib. L. Rev. 119, 121–122 (1970).

3. At the time that the Founding Fathers drafted the Bill of Rights, the common law recognized no privilege on the part of a news reporter to conceal his source of information or to withhold information received by him in confidence. 8 Wigmore, *Evidence* § 2286 (McNaughton Rev. 1961). Prior to the decision of the Ninth Circuit in *Caldwell*, courts in this country which have been called upon to recognize such a privilege have, with minor exception,[5] consistently refused to do so. See, *e.g.*, *Garland* v. *Torre*, 259 F. 2d 545 (C.A. 2), certiorari denied, 358 U.S. 910; *Rosenberg* v. *Carroll*, 99 F. Supp. 629 (S.D.N.Y.); *Brewster* v. *Boston Herald-Traveler Corp.*, 20 F.R.D. 416 (D. Mass.); *In re Goodfader's Appeal*, 45 Hawaii 317, 367 P. 2d; *People ex. rel. Mooney* v. *Sheriff of New York County*, 269 N.Y. 291, 199 N.E. 415.[6] Quite apart from any question as to the aptness of the analogy of the claimed reporter's privilege to the traditional privileges existing for certain personal relationships (*i.e.*, attorney-client, husband-wife, etc.),[7] the fundamental rationale underlying these decisions seems to be a disinclination to limit the duty imposed upon all to attend and give their testimony in a court of law by expanding the class of persons entitled to withhold evidence on the basis of some privilege.[8] See, *Garland* v. *Torre*, *supra*, 259 F. 2d at 550; *In re Goodfader's Appeal*, *supra*, 45 Hawaii at 333–335, 367 P. 2d at 482–483. As then Judge Stewart stated in *Garland* v. *Torre*, *supra*, 259 F. 2d at 550:

> The privilege not to disclose relevant evidence obviously constitutes an extraordinary exception to the general duty to testify. Even those few situations to which the law has long accorded this privilege have been seriously questioned. It has been emphasized that the tendency should be "not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege." * * * To recognize the privilege asserted here, assuming our power to do so, would poorly serve the cause of justice.

It is only recently that the First Amendment has been offered as a basis for the refusal by newsmen to testify. The decisions in this area appear to go three ways. There are cases which totally reject the claim that the First Amendment prohibits compelling a reporter to disclose a confidential source or information received in confidence. See, *e.g.*, *In re Taylor*, 412 Pa. 32, 193 A. 2d 181; *State* v. *Buchanan*, 250 Ore. 244, 436 P. 2d 729, certiorari denied, 392 U.S. 905. Second, there are a group of cases which assume, without so deciding, that disclosure in some circumstances might constitute an infringement of First Amendment rights, but find no First Amendment violation because the interest in disclosure, in the circumstances presented, outweighs any possible impingement on freedom of the press. *Garland* v. *Torre*, 259 F. 2d 545 (C.A. 2), certiorari denied, 358 U.S. 910; see also *State* v. *Knops*, 49 *Wis.* 2d 647, 183 N.W. 2d 93.[9] Only a few very recent decisions actually decide that compulsory disclosure invariably trenches on the First Amendment freedom of the press and requires that a special showing be made to justify disclosure. See *United States* v. *Caldwell*, 434 F. 2d 1081 C.A. 9), pending on certiorari. No. 70–57, this Term: and see cases cited at n. 5, *supra*. There thus is certainly no general recognition of an overriding need for the claimed reporter's rivilege in order for the media to continue providing the public—as they have or almost two centuries—with "the widest possible dissemination of information rom diverse and antagonistic sources" (*Associated Press* v. *United States*, 326 .S. 1, 20).

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[5] See, *e.g.*, *In re Nat Caldwell* (unreported opinion of Tennesse Criminal Court), New York Law Revision Commission, Report, 85–86 (1949); *Alioto* v. *Cowles Communications, Inc.*, N.D. Calif., C.A. 52150, decided December 4, 1969; *People* v. *Dohrn*, Cook County Cir. Ct., Crim. No. 69–3808, decided May 20, 1970.

[6] For a collection of cases dealing with the refusal of a newsman to disclose, see Annot. 7 A.L.R. 3d 591 (1966). See also New York Law Revision Commission, Report, *supra*, at 59–96.

[7] For a discussion concluding that such analogies are imperfect, see Note, *The Newsmen's Privileges: Protection of Confidential Associations and Private Communications*, 4 J.L. Reform 85, 89–93 (1970). Compare Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U. L. Rev. 18, 26–27 (196). And see n. 3, *supra*.

[8] Disinclination to expand privileges of non-disclosure, even those previously recognized, has been voiced by various commentators. See, *e.g.*, 8 Wigmore, *Evidence* § 2192 at 73, § 2286 at 536 (McNaughton Rev. 1961); Morgan, Foreword, Model Code of Evidence, 22–30 (1942); 2 Chafee, *Government and Mass Communications*, 495–499 (1947); Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information*, 36 Va. L. Rev. 61, 83 (1950).

[9] The *Knops* decision is reprinted in our Supplemental Memorandum to the petition for certiorari in *United States* v. *Caldwell*, No. 70–57, this Term, certiorari granted, May 1971.

4. That the absence of a privilege has not rendered the press ineffective in athering news is evidenced by its inability yet to convince Congress or a number f state legislatures that the reporter's privilege is essential to a free press in free society.[10] Although bills creating such a privilege have been proposed n several occasions, none has ever emerged from committee.[11] There is presently ending before the Judiciary Committee another bill which provides protection f the newsman's confidential sources and communications. See S. 1311, 92d ong., 1st Sess. (1970). In addition, the Committee on Rules of Evidence is in he process of formulating evidentiary rules for the federal courts.[12] It is in such forum, or in Congress, that the value judgments relating to recognition of a ewsman's privilege should be debated and resolved.

The Attorney General and a number of states have recognized that this is a elicate area, and that it is desirable to interfere as little as possible with the ews-gathering activities of the media (see nn. 2, 4, *supra*). This, however, is ifferent from according to the news media a privilege under the Constitution to e free of the duty imposed on all citizens to give testimony relating to a crime. The past two hundred years illustrate convincingly that such a privilege is not ecessary to a meaningful exercise of the protected freedoms of the press to rite,[13] to publish[14] and to circulate[15] the news. As Justice Holmes said, speaking f a related type of constitutional problem, in *Otis Co.* v. *Ludlow Manufacturing Co.*, 201 U.S. 140, 154:

> We are bound to be very cautious in coming to the conclusion that the Fourteenth Amendment has upset what thus has been established and accepted for a long time.

Whether or not such a privilege is desirable is, as stated at the outset, a different question altogether. The desirability of according a privilege to news reporters and the scope of such a privilege are matters, we submit, that should be left to the legislative process.

CONCLUSION

For the reasons stated, the judgments of the Court of Appeals for the Commonwealth of Kentucky in No. 70–85 and the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts in No. 70–94 should be affirmed.

Respectfully submitted.

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SEPTEMBER 1971.

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[10] Indeed, on several occasions Congress has, even in the face of an apparent claim of privilege, cited newsmen for contempt for refusing to answer questions before a congressional investigating committee. Thus, in 1857, the House of Representatives appointed a committee to investigate published charges to the effect that members of the House were accepting bribes. A newspaper correspondent, J. W. Simonton, appeared before the committee and refused to disclose names of members whom he claimed had approached him, inquiring whether, through him, they could procure money for their votes on certain bills. His refusal was based on the ground that a disclosure would violate a confidence. See Cong. Globe, 34th Cong., 3d Sess. 274–275, 277, 404. 411–413 (1857). For a complete report of the proceedings in this matter, see S. Misc. Doc. No. 278, 53d Cong., 2d Sess. 85–190 (1894). For a similar case in the Senate, see *id.* at 311–504 (1894).

[11] See, *e.g.*, S. 1851, 88th Cong., 1st Sess. (1963); H.R. 8519, 88th Cong., 1st Sess. (1963); H.R. 7787, 88th Cong., 1st Sess. (1963). See New York Law Revision Commission, Report, *supra*, at 88–95 (1949), for a listing of bills introduced in the 71st, 72d, 74th, 75th, 76th and 78th Sessions of Congress.

[12] As of now, the Proposed Rules of Evidence for the United States District Courts and Magistrates (46 F.R.D. 161) not only do not provide a newsman's privilege but sharply limit the number of personal-relationship privileges—even excluding a general physician-patient privilege. 46 F.R.D. 161, 249–269 (Rules 5–03 to 5–06).

[13] See, *e.g.*, *New York Times* v. *Sullivan*, 376 U.S. 254; *Time, Inc.* v. *Hill*, 385 U.S. 374; *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81.

[14] See, *e.g.*, *New York Times Company* v. *United States and United States* v. *The Washington Post Company*, Nos. 1873 and 1885, October Term, 1970 decided June 30, 1971.

[15] See, *e.g.*, *Winters* v. *United States*, 333 U.S. 507, 510; *Lovell* v. *Griffin*, 303 U.S. 444; *Grosjean* v. *American Press Co.*, 297 U.S. 233; *Near* v. *Minnesota*, 283 U.S. 697.

SUPREME COURT OF THE UNITED STATES

(No. 71-863—October Term, 1971)

COLUMBIA BROADCASTING SYSTEM, INC., PETITIONER *v.* DEMOCRATIC NATIONAL COMMITTEE, ET AL., RESPONDENTS

(No. 71-864)

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS *v.* BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, ET AL., RESPONDENTS

(No. 71-865)

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC., PETITIONER *v.* BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, ET AL., RESPONDENTS

(No. 71-866)

AMERICAN BROADCASTING COMPANIES, INC., PETITIONER *v.* DEMOCRATIC NATIONAL COMMITTEE, ET AL., RESPONDENTS

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief for Petitioner American Broadcasting Companies, Inc.

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JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 1971 (App. 492). Petitions for rehearing were denied by an order of the Court of Appeals (App. 494) entered on October 4, 1971. Petitions for certiorari were filed on January 3, 1972, granted by this Court on February 28, 1972, and a contemporaneous order of consolidation thereby entered. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First Amendment to the United States Constitution and Sections 3(h), 315(a) and 326 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 153(h), 315(a) and 326.

The First Amendment to the Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 3(h) of the Communications Act of 1934, 48 Stat. 1065, *et seq.*, as amended, 47 U.S.C. 153(h), provides:

> " 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 47 U.S.C. 315(a), provides:

> "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
> (2) bona fide news interview,
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Section 326 of the Communications Act of 1934, 48 Stat. 1091, as amended, 47 U.S.C. 326, provides:

> "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be

promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

QUESTION PRESENTED

Pursuant to the regulatory system established by the Communications Act of 1934, as amended, and administrative rules and policies formulated by the Federal Communications Commission, broadcast licensees are under a specific obligation to provide full and fair coverage of diverse viewpoints on controversial public issues. The question presented is whether, notwithstanding the foregoing obligation explicitly imposed by Congress and the Commission, the First Amendment additionally compels all broadcast stations to sell advertising time to individuals or groups for brief "spot" announcements asserting their particular views.

STATEMENT OF THE CASE

In these consolidated cases, this Court is asked to review a decision of the United States Court of Appeals for the District of Columbia Circuit holding that the First Amendment dictates that broadcasters be required—pursuant to a set of regulations to be devised by the Federal Communications Commission[1]—to sell advertising time for the presentation of individualized views on public issues. This ruling flatly overturned two separate opinions of the Commission which had found that broadcast licensees, who are required by the Commission's "fairness doctrine" to originate programs involving controversial issues of public importance, are not also required to sell time to individuals and groups for the advertising of their particular views. *Democratic National Committee*, 25 F.C.C. 2d 216 (1970);[2] *Business Executives' Move for Vietnam Peace*, 25 F.C.C. 2d 242 (1970).[3]

Petitioner American Broadcasting Companies, Inc. (hereinafter "ABC") participated in the *Democratic National Committee* case before the Commission and intervened in support of the Commission and the United States of America when the matter reached the Court of Appeals.

ABC, itself or through its subsidiaries, is the licensee of a number of radio and television stations and operates radio and television networks. In this capacity, both through the ownership of individual stations and the operation of broadcast networks, providing program material to hundreds of affiliated stations, ABC is a source for the production and transmission of significant amounts of news and public affairs broadcasts on a wide and ever-changing variety of public issues.

A. Agency Proceedings

The *Democratic National Committee* case[4] originated with a request by the Democratic National Committee (hereinafter "DNC") that the Commission issue a declaratory ruling that, as a general matter, broadcast licensees are required to sell broadcast time to "responsible entities, such as DNC, for the solicitation of funds and for comment on public issues."[5] Framed in this fashion, the DNC petition contained no assertions that any particular broadcast licensee either had failed to provide fair and full coverage of important public issues, or had refused to sell time for comment on controversial public issues. Indeed, the request contemplated that notwithstanding such coverage or any individual offers of paid time for controversial issue comment, a general obligation remained as to all broadcasters to sell time to DNC and similar groups to present their viewpoint.[6]

Since the relief requested was partially premised on what DNC viewed as the restrictive nature of then existing policies of the three national television networks, the Commission solicited comments from the network companies.[7] ABC's response[8] set forth a number of internal policy standards which, *inter alia*, recognize an abiding responsibility to utilize the broadcast facilities under its direction in a manner which both safeguards and promotes the opportunity for the full exposure of representative views and controversial issues of general concern to the American people.[9] However, in a concomitant recognition of the public interest detriments and practical impediments associated with a universal and absolute right by *any* "responsible entity" to purchase time to espouse a point of view or solicit funds, ABC advised the Commission that it proposed to continue to adhere to its general approach of not selling time for controversial issue programs and announcements[10] and solicitation of funds, absent special public interest considerations. ABC did indicate, however, that although it was opposed to any ruling which would require the sale of time to *all* "responsible entities," it was prepared to accept—consistent with its policy of taking into account special public interest considerations—such orders for time from major political parties as could reasonably be accommodated.[11]

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[1] Hereinafter the "Commission" or the "FCC".

[2] App. 247.

[3] App. 357.

[4] As noted, ABC was a party below only to the *Democratic National Committee* (Case No. 24,537 in the court of appeals) proceeding. Accordingly, in this Statement we concentrate on the *DNC* case and, for the most part, rely on the briefs of the Government and Post-Newsweek, Capitol Area, Inc. for a description of the agency proceedings in the companion *Business Executives' Move for Vietnam Peace* case (Case No. 24, 492 below).

[5] App. 247.

[6] App. 260.

[7] App. 35.

The ensuing Commission decision held that broadcasters must make time available "to significant political parties for the solicitaton of funds"[12] but that important statutory and policy considerations militated against granting DNC or any other particular individual or group an absolute right of access to broadcast time for the purpose of commenting on controversial issues of public importance.[13]

The Commission emphasized that although under prevailing policies a licensee was by no means precluded from selling time for controversial issue discussion, consistent with his fairness doctrine responsibilities, there were more compelling considerations that dictated the Commission's refusal to hold that a licensee is unyieldingly bound to sell time to particular persons or groups for the discussion of public issues over and above the exercise of his fairness doctrine responsibilities. A central element in weaving this conclusion was the Commission's recognition that the regulatory framework sanctioned by Congress in the Communications Act of 1934, as amended, deliberately avoided placing broadcasting in a "common carrier" mold. Thus, in contrast to common carriage, which is public in its availability but essentially private and passive in its communications function, broadcasting exists to simultaneously and indiscriminately communicate to the public at large.

As the Commission observed, this was the very role endorsed by this Court in *Red Lion Broadcasting Company* v. *FCC*, 395 U.S. 367 (1969)—a role which contemplates that broadcast licensees will perform in a "fiduciary" capacity for the entire public they serve. In this context, the Commission noted that in *Red Lion*, this Court had characterized the broadcaster's task as being oriented to the presentation of "representative community views on controversial issues."[14] This undertaking does not, however, comprehend the further dimension embodied in the DNC petition, that there is an obligation to sell time for the presentation of individual views which transcends the fairness doctrine right of the public to be informed. As the Commission remarked, a determination of this sort would entail a substantial reordering of the fairness doctrine and a direct assault upon the touchstone of broadcast regulation—i.e., the concept set in motion by Congress, and more recently sustained by this Court in *Red Lion*, that the public interest obligation of broadcasters is to devote a reasonable amount of time to issues of public importance and to do so in a fair manner. To *require* broadcast licensees to sell time for these purposes would mean that "the public's agenda for discussion of public issues would then be set substantively and increasingly by the affluent"—i.e., by those persons and organizations who have ". . . the financial resources and interest to purchase sustained access to the mass communications media. . . ."[15]

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[8] App. 42.

[9] Such views and issues are presented in a variety of program formats which not only affirmatively allow for the exposure of partisan spokesman and their views, but enable the presentation of such persons and groups on a free time basis—i.e., even in instances where the program may be wholly or partially sponsored, public issue spokesmen appearing thereon do not purchase this exposure.

[10] As the record reflects, ABC sells advertising time during both election and non-election periods to the major political parties for the solicitation of funds and for expression of views on public issues. In addition, during election campaigns, ABC sells advertising time to political parties, political candidates and their supporters, and to various spokesmen on public issues which are on the ballot.

[11] App. 46.

[12] The Commission found that the policies of three major networks (ABC, Columbia Broadcasting System, Inc. and the National Broadcasting Company, Inc.) were consistent with that portion of its holding. (App. 269).

[13] In a separate action on the same day, the Commission decided the companion case herein, *Business Executives' Move for Vietnam Peace* ("BEM") (App. 357). There, the Commission rejected the complaint of an anti-war group against Washington, D.C. Radio Station WTOP which had refused to sell spot advertising time to present that group's views on the Vietnam war. As in the DNC case, the central contention in the *BEM* proceeding was that the First Amendment required WTOP to sell BEM time for the presentation of its individual views, even though the station had fully complied with its fairness doctrine obligations with respect to the exposition of significant contrasting views on the Vietnam War issue. In its decision, the Commission found that the fairness doctrine had not been violated and, relying on its contemporaneous *DNC* decision, that the First Amendment did not require WTOP to sell advertising time to BEM to present its views (App. 368).

[14] The Commission also pointedly emphasized that the obligation to present "representative views" was clearly intended to include views not held by the licensee and views expressed by non-station "partisan voices" (App. 259).

The Commission's decision, it must be emphasized, was not unmindful of the critical First Amendment interests at stake. However, unlike the court of appeals, the Commission reasoned that the *public's* First Amendment rights are better protected by the traditional regulatory scheme.[16] Accordingly, the Commission concluded that the present system of regarding licensees as "trustees" with an affirmative duty to present contrasting viewpoints through representative spokesmen, was of greater public benefit than—and could not reasonably co-exist with—a regulatory standard based on an individualized right of access.

Finally, the Commission addressed the position of dissenting Commissioner Johnson that the operation of a broadcast station is analogous to the administration of public facilities such as parks and municipal transit systems, and that once such a facility is utilized for some speech purposes the First Amendment requires that access be granted on the same basis to all potential customers.[17] In the Commission's view, the dissent failed to adequately assess the limited availability of radio time and the obligation imposed upon broadcasters, but not upon other media, to fully and fairly inform the public on all significant positions involving controversial issues. The Commission also found the approach posited by the dissent to ignore or to blithely treat substantial practical as well as conceptual problems.[18]

B. THE COURT OF APPEALS DECISION

Upon petitions for review of both the *DNC* and *BEM* decisions, a divided court of appeals reversed the separate decisions of the Commission—holding that, despite Congressional or agency policy to the contrary, the First Amendment requires broadcast licensees who sell time for spot advertisements for commercial products and services to make such advertising time[19] available to individuals and groups wishing to present their particular views on controversial issue subject matter.

The court determined that action by broadcast licensees constituted "state action" through the following syllogism. First, it found that broadcasting was undoubtedly a suitable medium for the communication of ideas. Secondly, since broadcast stations are "fiduciaries" of the public and operate only pursuant to a government license, the court found the broadcast business to have a public character. Finally, as to the specific cases on appeal, the court determined that there had been "approval of or acquiescense in" the challenged actions of the broadcasters by the Commission.[20]

Pursuant to the majority opinion, the newly articulated constitutional right to purchase spot announcements for public issue discussion would obtain regardless of whether the licensee in question was in full compliance with the Commission's fairness doctrine. Indeed, the right could be invoked even in circumstances where the issue and precise viewpoint the individual or organization seeks to address has been specifically covered in prior broadcasts.[21] The court brushed aside contentions of the Commission and broadcasters that the agenda for public issue discussion would increasingly be established at the whim of those persons and organizations having the ready resources to gain exposure of their individual viewpoints.

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[15] App. 263.

[16] App. 263–64.

[17] App. 266.

[18] App. 268–69.

[19] The court of appeals first drew a specific contrast with and thereby exempted from its ruling what was termed regular programming time. (App. 464).

[20] App. 461.

[21] App. 469, 473.

The Court of Appeals was unpersuaded that issue discussion in this segment of broadcast time would be unduly influenced by those persons and groups having the financial wherewithal to purchase media access and that, in the process (1) licensees would face diminished control over program content and schedules and (2) the prevailing fairness doctrine principle that contrasting views be presented free of charge if sponsorship is unavailable[22] could, when applied to this form of editorial announcement, impair the broadcast industry's financial base. The court simply remanded the cases to the Commission for the purpose of developing "reasonable regulatory guidelines" to somehow accommodate these and other factors.[23]

Although the court suggested that stations could establish a quantitative limit on such "editorial advertising" and could regulate the placement of such advertisements within reasonable limits, clearly the licensee could not "exercise the same 'authoritative selection' in editorial advertising which he exercises in normal programming."[24] Furthermore, that the licensee would not be allowed to exercise his traditional journalistic role is emphasized in the court's assertion that a request to purchase time cannot be rejected for the reason that the viewpoint a person or group may wish to present has been repeatedly broadcast in the past.[25] Similar restrictions appear to exist in terms of the ability to reject such advertising time on the basis that the content has either a marginal level of public interest or is in some respects offensive or inappropriate.[26]

In a dissenting opinion, Judge McGowan characterized the Commission's task on remand as one of "heroic proportions", the complexity of which might undermine the basic premise on which it was founded. In Judge McGowan's view, the newly established First Amendment right announced by the majority could interfere and frustrate the right—so essential to this Court's prior ruling in *Red Lion*—of the public to be fully informed. The private licensee system of broadcasting provided by Congress, operating under "the obligation . . . to advance the public's right to know by devoting a substantial amount of time to the presentation of controversial views on issues of public importance," has proven to be an effective mechanism for implementing the desired public policy.[27] To now disregard this regulatory scheme for a new "system in which money alone determines what issues are to be aired" would, Judge McGowan concluded, represent an unwise and unnecessary course.[28]

Petitions for rehearing to the court below were denied.[29] This Court granted the several petitions for certiorari on February 28, 1972 and entered a stay of the mandate of the Court of Appeals.

SUMMARY OF ARGUMENT

The decision of the court below is erroneously premised on a finding that the existing system of broadcast regulation, formulated and periodically recast by Congress and regularly administered by the Commission, is constitutionally deficient. Proceeding from this assumption, the lower court directed the Commission to establish guidelines to govern a new-found constitutional requirement that broadcast stations sell advertising time to individuals and groups for partisan "spot announcements" on public issues. While the lower court reiterated that it was asserting a limited right, the unequivocal constitutional basis therefor defies this characterization and clearly charts a course that goes beyond any demonstrated necessity to preserve First Amendment rights and undercuts a regulatory system fashioned by Congress which adequately serves First Amendment interests. Placing the individualized right to use broadcast facilities on a constitutional mantle in turn unnecessarily shackles the performance of the public trustee role created for licensees and renewed by this Court in its landmark decision in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

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[22] First stated in *Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963).

[23] App. 449, 488.

[24] App. 485.

[25] App. 470–72.

[26] App. 469, 471–73, 477, 485.

[27] App. 490.

[28] *Ibid.*

[29] App. 495.

I.

It is now axiomatic that "unlike other media of expression, radio is inherently not available to all," *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943), and consequently, a mechanism for selecting *representative* spokesmen is essential. It is for this reason that the Constitution permits a licensing scheme which provides "for the use of such [radio] channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." Section 301 of the Communications Act of 1934, 47 U.S.C. § 301. This unique characteristic of the broadcast medium also underlies previous rejections by other courts of an individual right under the First Amendment to utilize broadcast facilities. *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3rd Cir. 1945), *cert. denied*, 327 U.S. 779 (1946); *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F. 2d 497 (1st Cir. 1950).

The holding of the lower court dramatically departs from these decisions while misreading the application of the First Amendment to broadcasting in this Court's opinions in *National Broadcasting Co.* and *Red Lion*. The cases relied upon by the lower court to construe broadcast operations as "state action" and to thereby transform broadcast advertising time into a common carrier type public "forum" are inapposite and irrelevant to a medium where designated licensees are required to act as trustees for the public interest—particularly in their affirmative obligation to maintain a full and fair flow of information, including contrasting and partisan views on public issues. Therefore, it is inappropriate to analogize broadcasting with municipal transit systems and other non-communications entities which, if they sell advertising space to commercial advertisers, do so without primary obligations for the dissemination of public information.

First Amendment objectives in broadcasting cannot be served by compelling individual stations—under guidelines devised by the Commission—to implement the kind of system of paid partisan access articulated by the lower court. The central constitutional concern in the area of broadcasting is "the First Amendment goal of producing an informed public capable of conducting its own affairs." *Red Lion, supra*, 195, U.S. at 392. Because of limited spectrum space that can be used for broadcasting, implementation of the essential rights at stake is necessarily shaped by this practical barrier. Consequently, First Amendment objectives in broadcasting are to be achieved, not by means of an individualized right of access, but in the form recognized by this Court in *Red Lion*—i.e., a collective right of the public "to receive suitable access to social, political, esthetic, moral and other ideas and experiences." 395 U.S. at 390.

II.

A comprehensive regulatory scheme governing broadcasting was formulated by Congress based on the principle that the public's interest in receiving full and fair information on significant public issues could best be achieved through a formula of licensee trusteeship. Out of this formula have developed a number of operational criteria to insure that the statutory mandate of public service is carried out. Among these principles is the obligation, under the fairness doctrine, to devote a reasonable amount of broadcast time to the presentation of conflicting (including those of a partisan character) views on controversial issues. To date, this objective has been accomplished by the exercise of licensee discretion as to the selection of the spokesmen to appear and the subject material to be broadcast, subject to review by the Commission. Clearly, the licensee in this scheme is not a common carrier and the Communications Act specifically provides that he should not be a common carrier with respect to any of his operations.

Nothing before the lower court in these cases suggests that the First Amendment interests of the public in vigorous debate and effective self-expression are not being met through the operation of the present regulatory system. Indeed, the record reflects quite the contrary. Moreover, in the event there was evidence that any significant issues or viewpoints were being stifled, the Commission and Congress have sufficiently flexible authority to fashion those modifications which appear necessary to attain the essential objective of the fairness doctrine and the First Amendment interests that policy is intended to serve. In this respect, Congress has recently seen fit to amend the Communications Act to facilitate the use of broadcast facilities by political candidates and the Commission is presently conducting a comprehensive inquiry which seeks to resolve whether present policies sufficiently foster the First Amendment goal of "uninhibited, robust, wide-open debate" on whether revisions or even new policies are appropriate.

III.

The practical ramifications of the lower court decision are actually fundamentally inconsistent with the First Amendment goals which it purportedly attempts to enhance. In designating broadcast advertising time as a quasi-public forum for the discussion of public issues at the initiative of private interests, the court of appeals severely inhibits licensee discretion so central to the proper vindication of the public's interests under the fairness doctrine. The requirement of an individual right of access actually diminishes the licensee's capacity to carry out his public trustee responsibility. Some of the factors contributing to this diminished capacity include weighting the initiation of public issue discussion in favor of those most able to afford the purchase of spot announcements, the need to select public issue programming to counter-balance the concentrated expression of views by private factions rather than on the basis of journalistic discretion as to newsworthiness, and the increased involvement of the government in the control of broadcast speech. In place of a public trustee system whereby broadcast licensees are accountable to the Commission as to which issues, views and speakers should be presented, the court of appeals would sanction a system of at random selection by those able to pay, expressing views on issues of self-interest and presented absent any standards of professional journalism.

In the final irony, if the "regulatory guidelines" that the lower court envisions as resolving some of the practical problems associated with the new constitutional right are ultimately effective, they would actually thrust the federal government more directly into the decision-making process of determining and scheduling such broadcast content as news, cultural and public affairs programming. Clearly, the consequences of this course can hardly be said to enhance in any significant way the First Amendment interests that broadcasting is capable of fostering. Rather than the arms-length relationship between the government and broadcasters envisioned in the Communications Act as to the selection of program content, this decision foreshadows and even encourages the precise involvement that was intended to be avoided.

ARGUMENT

Introduction

These cases highlight the critical role the broadcast media play in keeping contemporary American society adequately informed on important public issues. That broadcasting in general and electronic journalism in particular have become major sources of information to the American public is, therefore, an undeniable threshold premise.

Into the bundle of intricate and interwoven rights and responsibilities that give broadcasting its unique regulatory and journalistic character, a negative and incompatible concept has been interjected. This concept is embodied in a newly asserted First Amendment "right" which would compel a broadcast station to sell "spot" advertising time for the expression of views on a controversial public issue without regard to previous and/or continuing coverage of the same issue based on news value criteria exercised in a traditional journalistic fashion.

Accordingly, this Court is asked to review the foregoing Constitutional contention, carried forward and reshaped by the court of appeals over the opposition of the agency charged with administering the Communications Act, because of its inevitable and profound consequences for all broadcast programming. In essence, to accept the new-found Constitutional right articulated by the lower court would be to reject important regulatory concepts derivative from the basic legislative framework and administrative policy based thereon.

In marked contrast to this Court's seminal decision in *Red Lion*, where the decisional context was whether certain regulatory measures were permissible under the First Amendment, here the lower court has held that, despite policy guidance by Congress or the Commission, the Constitution *compels* a divergent approach.

In this brief, ABC seeks to highlight the dubious new path that has been judicially drawn as well as to emphasize the very real practical impediments it engenders. Foremost in this evaluation, we believe, must be the recognition that the public interest is far better served by methods for the dissemination of ideas and experiences other than the personalized "right of access" recognized for the first time by the court of appeals.

The first amendment does not compel the designation of broadcast advertising time as a common carrier type forum in which broadcast stations are required to sell announcements to individuals or groups for the presentation of their particular views on public issues.

Congress has established, the courts have interpreted, and the Commission has long administered a statutory system for the broadcast media wherein licensees are obligated to provide full and fair coverage of controversial public issues. As Judge McGowan correctly observed in dissenting to the lower court decision:

> "This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation of radio and television communications facilities. This approach has never been thought to be other than within the permissible limits of constitutional choice. . . ." [30]

Notwithstanding the order of events acknowledged by Judge McGowan, and irrespective of the Commission's determination that this scheme satisfactorily insures that the American public is adequately informed on significant public issues,[31] the Court of Appeals has ruled that the First Amendment dictates that broadcast advertising time should be placed on a common carrier type basis to permit individuals and groups to utilize spot announcements to espouse views on the same issues broadcasters are otherwise required to cover.

In determining that the First Amendment establishes a right of access to a particular segment of broadcast time, the lower court's decision is squarely in conflict with prior decisions on the matter. While cognizant of the well-established principle that the First Amendment applies to governmental and not to private actions,[32] the court below found that the interrelationship between the FCC and its licensees is such that broadcast station operation effectively represents "state action" to which First Amendment protections extend.[33] That basic finding, however—essential to the court's ultimate holding—as well as the consequent entitlements it implies, was specifically eschewed in *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d (3rd Cir. 1945), *cert. denied*, 327 U.S. 779 (1946).

In rejecting a religious organization's claim that it had a statutory and First Amendment right to purchase time on a station for the broadcast of its programs, the Third Circuit expressly pointed out that the broadcaster "is not an instrumentality of the federal government" for constitutional purposes. *Id.* at 601. Rather, the court recognized that under the regulatory scheme established by the Communications Act, a significant separation between the broadcaster and the state is evident in Congress' having "confided the selection of program material to be broadcast to the taste and discrimination of the broadcasting stations." *Id.* at 600. The court explained:

> "True, if a man is to speak or preach he must have some place from which to do it. This does not mean, however, that he may seize a particular radio station for his forum. . . . [A] radio broadcasting station is not a public utility in the sense that it must permit broadcasting by whoever comes to its microphones." [34]

Similarly, in *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950), the First Circuit adopted the District Court's view that the conduct of broadcast licensees did not constitute "state action" as to which the First Amendment right of access asserted and upheld below would apply.

Significantly, the Court of Appeals specifically acknowledged the inconsistency of its decision with the First and Third Circuit decisions, but dismissed those decisions as representing a "crabbed judicial view of 'state action'." [35]

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[30] App. 490.

[31] App. 269.

[32] See, *e.g.*, *United States* v. *Guest*, 383 U.S. 745, 755 (1966).

[33] App. 458–64.

[34] 151 F.2d at 600–01. See also *Avins* v. *Rutgers*, 385 F.2d 151, 153 (3rd Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

[35] App. 456. As noted, the *McIntire* court clearly rejected the view urged upon it that the respondent radio station was endowed "with the quality of an agency of the federal government", emphasizing that to so find "would be judicial legislation of the most obvious kind". *McIntire, supra*, 151 F.2d at 601. In rather dramatic contrast, the lower court in the instant cases not only found broadcast stations to be "agents of the government" but judicially inaugurated a sweeping reformation of the manner in which broadcasting is conducted—imposing completely new standards regarding the utilization of broadcast advertising time. See App. 448.

The lower court further found this Court's *Red Lion* decision—read to be "a clarion call for a new public concern and activism regarding the broadcast media"[36]—to clear the path of such "doctrinal impedimenta."

A. *The Relevant First Amendment Objective Is to Guarantee That the Listening and Viewing Public is Not Left Uninformed—Not to Guarantee an Individual Right of Access.*

This Court has, over the years, clearly emphasized that the essence of the First Amendment's protection of free speech and a free press is to protect the public generally, rather than particular private interests. See *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); *Red Lion, supra*, 395 U.S. at 390. The objective in this process has been to assure that the general citizenry will have the necessary information to make the informed judgments on which a self-governing society is dependent.[37] In brief, the essential spirit of the free speech guarantee of the First Amendment is the right of the public to hear a diversity of viewpoints, thereby creating an informed public, and is not primarily founded upon protection of an individual right of self-expression. "[W]hat is essential is not that everyone shall speak, but that everything worth saying shall be said." Meiklejohn, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1960).[38]

It is virtually undisputed that the First Amendment applies to radio and television. Whatever doubts might once have existed about the applicability of the First Amendment to mass communications media were dispelled in *United States* v. *Paramount Pictures*[39] where this Court stated that it had "no doubt" that radio, newspapers and moving pictures were covered by the First Amendment. However, the operating and technical nature of broadcasting—a simultaneous and indiscriminate communications technique utilizing a limited spectrum—dictates that the First Amendment objective of an informed public be implemented in a special way. As this Court emphasized in *National Broadcasting Co.* v. *United States*:[40]

> "Freedom of utterance is abridged to many who wish to use the limited familities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied."[41]

Such considerations were integral to this Court's analysis of the First Amendment's application to broadcasting in *Red Lion*. Acknowledging at the outset that the natural dearth of frequencies necessarily limits the individuals who can broadcast, the Court concluded that "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." 395 U.S. at 388. Accordingly, differences in the characteristics of particular media "justify differences in the First Amendments standards applied. . . ." *Id.* at 386. See *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952). As to the broadcast media, it is the right of viewers and listeners which is "paramount" under the Constitution and may not be abridged. *Red Lion, supra*, 395 U.S. at 390. The peculiar characteristics of broadcasting underscore that this is to be achieved in the form of a collective right of the public "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Ibid.*

The court of appeals has drastically departed from the principles underlying application of the First Amendment to broadcasting developed in the *National Broadcasting Co.*, and *Red Lion* cases. In insisting upon a personalized right of access, irrespective of the licensee's coverage of controversial issues, the lower court has raised an individual right of self-expression over the First Amendment interests of the public as a whole. It has, therefore, created an individual right of access in the face of past teachings that the broadcast medium is uniquely unsuited for such a concept. While a similar right of access may be adequate or constitutionally mandated for a public park or municipal transit system, it is neither adequate nor constitutionally mandated for a limited speech forum represented by the commercial radio spectrum.

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[36] App. 457.

[37] *Red Lion, supra*, 395 U.S. at 392. See also *Whitney* v. *California*, 274 U.S. 357, 375–377 (1927) (Concurring Opinion of J. Brandeis); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388–89 (1967); *Greenbelt Cooperative Publishing Assoc.* v. *Bresler*, 398 U.S. 6, 11 (1970). In *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966), this Court remarked that "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."

[38] See also *Banzhaf* v. *FCC*, 405 F.2d 1082, 1102 (D.C. Cir. 1968), *cert. denied sub nom. Tobacco Institute* v. *FCC*, 396 U.S. 842 (1969) where the District of Columbia Circuit remarked that "[d]ebate is not primarily an end in itself. . . ."

[39] 334 U.S. 131, 166 (1948). See also *Federal Communications Commission* v. *American Broadcasting Co.*, 110 F. Supp. 374, 389 (S.D. N.Y. 1953), *aff'd*, 347 U.S. 284 (1954); *Rosenbloom* v. *Metromedia, Inc.*, 415 F.2d 892 (3rd Cir. 1969), *aff'd*, 403 U.S. 29 (1971). In *Rosenbloom* v. *Metromedia*, the Third Circuit stated that "no rational distinction can be made between radio and television on the one hand and the press on the other in affording the constitutional protection contemplated by the First Amendment." *Id.* at 895.

[40] 319 U.S. 190 (1943).

[41] *Id.* at 226.

B. A Finding That Broadcast Operations Are "State Action" Is Fundamentally Inconsistent With the First Amendment Requirements for Broadcasting.

In reaching its conclusion that the First Amendment mandated a right of access to broadcast advertising time, the Court of Appeals found "state action" in the activities of broadcast licensees. In this analysis the court relied at least partially on prior holdings that transportation systems[42] and school newspapers[43] operated by a public authority, could not, if they accepted advertising at all, refuse paid editorials. However, broadcasting is not a "public authority" in the context that its normal use originates with at random individual members of the public. While broadcasting is specifically intended to be responsive to the needs of the public as a whole, it is not designed to be "held out" to the public at large for indiscriminate use by individual members of that public. Further, unlike public transportation systems, there is no question of excluding certain views or a particular form of speech in broadcasting, because the statutory and regulatory scheme will not permit such exclusion. With public buses the only speech format is the advertising; with broadcasting the primary speech format is non-advertising time. As to the newspaper cases cited by the lower court,[44] it is sufficient to note that they involved media actually owned by government institutions, whereas broadcasting is cast in a private enterprise pattern and is specifically insulated with First Amendment interests of its own in its relationship with the government.[45]

The lower court found state action under an even broader rationale. In this scenario, broadcasting is licensed and regulated in the use of designated spectrum space, and the airwaves "are 'a limited and valuable part of the public domain,' leased out temporarily by the federal government which retains ultimate control over them."[46] In essence, the court suggests that "state action" for First Amendment purposes stems from the circumstance that broadcasting is a regulated entity. But nearly every dimension of contemporary society falls either temporarily or permanently within the purview of some administrative agency at some level of government. It is also equally fruitless to suggest that the degree of regulation is determinative in this equation since this could comprehend qualitative factors and broadcasting connotes an enterprise where specific provision has been made to minimize "state" involvement.

In laying the legislative foundation for broadcasting, Congress deliberately elected to place primary responsibility for operational decisions with private licensees rather than the federal governments. Inherent to that design, moreover, was the creation of a relationship which would minimize direct interference by the licensing authority. Accordingly, the state is specifically forbidden to directly exercise programming judgments (47 U.S.C. § 326) and the non-common carrier status of broadcasting (47 U.S.C. § 153(h)) precludes detailed supervision of many operational facets.[47]

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[42] *Wirta* v. *Alameda-Contra Costa Transit Dist.*, 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Reptr. 430 (1967); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (S.D. N.Y. 1967); *Hillside Community Church, Inc.* v. *City of Tacoma*, 76 Wash. 2d 63, 455 P.2d 350 (1969).

[43] *Lee* v. *Bd. of Regents*, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971); *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D. N.Y. 1969).

[44] *Ibid.* See App. 472.

[45] See 47 U.S.C. § 326. The lower court also relied in this context on *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952) where this Court found that the activities of a bus company, which was privately owned but had operated under the regulatory jurisdiction of a government agency, amounted to "state action." Again, however, in this licensee situation the entity is one that normally holds itself out for the common carriage of the public, on demand, unlike broadcasting. Further, as noted, Congress has seen fit to fashion a specific regulatory regime in which, *inter alia,* a unique First Amendment relationship between government and private licensees has been forged.

[46] App. 460, quoting, in part, from *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966).

[47] For instance, under Title II of the Communications Act, which governs such common carrier activities as telephone and telegraph, the Commission is empowered to regulate rate and profits of carriers, as well as the conditions of service. No such authority exists over broadcasting which is regulated under Title III of the Act.

It is clear, therefore, that the statutory structure established by Congress for he regulation of broadcasting, as well as the medium's practical development n American society, defy a categorization of radio and television as public orums in the sense normally attributable to a finding of state action. The overiding factor of broadcast operations is that primary responsibility for broadcast naterial is lodged not with the federal government, but in private entities operatng as free from direct interference by the Commission as possible.

The most obvious thing about broadcasting is that it is unique as a communiations instrument and, as such, is neither analogous to public streets, parks nd facilities nor to regulated entities in the common carrier or public utility nold. Accordingly, such previous decisions of this Court as *Amalgamated Food mployees Union, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) and *larsh* v. *Alabama*, 326 U.S. 501 (1946), form an inadequate basis for so drasically transforming the function and role of the broadcast media. While those ases extended the "state action" concept to protect First Amendment rights rom infringement by persons and entities claiming a private function, the acivities and "forums" involved totally inapposite circumstances—a company own (*Marsh*) and a suburban shopping center parking lot (*Logan Valley*)—here, unlike broadcasting, the facilities had been dedicated to a previous at andom public use. For instance, the owners in these circumstances had allowed eneral public access to the facilities, but denied access for peaceful picketing r leafleting. To argue that there is no "state action" in a traditional sense is ot to say that broadcasting is not affected with a strong public interest charcter; rather, the point worthy of emphasis is that broadcasting simply cannot e equated with other speech forums in terms of its openness and ready availbility to the public. For example, a state controlled newspaper is both state irected and unlimited in its capacity to add lines of type and pages of print. imilarly, a public park is, in the normal course, entered at the discretion of the ublic, not a private gatekeeper.

It has long been acknowledged that application of the First Amendment urns on the purpose and function of the medium of communication involved. *oseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502-03 (1952). "The right to reedom of speech does not open every avenue to one who desires to use a paricular outlet for expression. On the contrary, each particular avenue for expression presents its own peculiar problems." [48] In point of fact, the ease and manner of access to a particular forum must vary with the nature and limitaion of that forum—conditions which must take into account the interests the forum is designed to serve beyond catering to individual requests. Accordingly, what is appropriate for a municipal park or bus terminal is not necessarily appropriate for a medium such as broadcasting that has journalistic responsibilities.

In the "state action" cases relied upon by the lower court, the person or entity required to permit access was engaged in no independent journalistic role, but served merely as a passive instrumentality for the speech activities of others. In other words, the function at issue was more traditionally one of common carriage where facilities are generally and principally publicly utilized. In broadcasting, licensees are charged with the duty to present the speech of others as well as their own with the ultimate responsibility for broadcast content resting with the stations.

In sum, by attaching a state action status to broadcast activities and creating a right of access to at least a portion of radio and television time, the Court of Appeals has misconstrued the previous decisions of this Court treating the relationship of broadcasting and the First Amendment. See, *e.g.*, *National Broadcasting Co.*, *supra*, 319 U.S. at 226. Indeed, in its more recent *Red Lion* opinion, this Court emphasized that "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." [49]

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[48] *Avins* v. *Rutgers*, 385 F.2d 151, 153 (3rd Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

[49] *Red Lion*, *supra*, 395 U.S. at 388. Perhaps the ultimate irony of the lower court opinion in this regard is that, upon a finding of "state action" in broadcast operations, and the establishment of a broad constitutional right of paid partisan access to the medium, the court concludes that this "right" is "abridgeable" and might not be given any effect if a broadcast station carried no commercial advertising. (App. 475). Therefore, although noncommercial educational stations are fully comprehended by the statutory scheme and Commission regulations designed to enhance the public's right to full and fair information, they would presumably be exempt from the system initiated by the lower court.

The plain meaning of *Red Lion*, we suggest, is that private interests must necessarily be subordinated to the paramount public interest in prudent utilization of the limited technical resource. Integral to such use is the presentation of "*representative* community views" on public issues. *Id.* at 394. (emphasis added). The critical right protected by the First Amendment as it applies to broadcasting is the right of the viewing and listening public to be informed (*id.* at 390):

> "It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC."

The individual access result reached by the court of appeals is not only different from the collective public access right approved by this Court in *Red Lion*, it represents a disservice to the very First Amendment interests on which the opinion below relies. Furthermore—as we now demonstrate—irrespective of the lower court's erroneous conclusion that broadcast operations are "state action", a comprehensive and flexible regulatory scheme exists to ensure that broadcast stations do not discriminate against speech on public issues and that the First Amendment interests of the public are fully vindicated.

II.

An Individualized "Right" to Purchase Spot Advertising Time on Broadcast Stations to Discuss Controversial Issues Which Have Been Covered in Other Broadcast Programming is Fundamentally Inconsistent With the System of Regulation Selected by Congress

In holding that private individuals and groups have a First Amendment entitlement to purchase spot announcements on broadcast stations, the Court of Appeals opinion represents, as we have shown, not only a misconception of this Court's prior decisions dealing with the relationship of broadcasting and the First Amendment, but also a fundamental inconsistency with the Congressional design of the broadcaster-federal government relationship fashioned in the Communications Act of 1934.

A. A Comprehensive Legislative and Administrative Framework Insures that Broadcast Licensees Serve the Public Interest Through the Presentation of Full and Fair Information on Significant Public Issues.

Since broadcasting, unlike other modes of expression, is inherently unavailable to all, it has been necessary to erect a mechanism to govern the inevitable selection process.[50] It was in recognition of this characteristic that the Commission in its early formulation of the fairness doctrine noted as follows:

> "In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups of individuals who might be more appropriate spokesmen for the particular point of view than the person making the request." [51]

In essence, prior to the lower court decision, the abiding concept was that it is the "right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his particular views on any matter, which is the foundation stone of the American system of broadcasting." *Editorializing Report,* 13 F.C.C. at 1249; see also *Red Lion, supra,* 395 U.S. at 390 (1969). Indeed, the District of Columbia Circuit has recently reaffirmed an earlier statement made by a different panel of that court, in a case decided prior to the instant cases, that no individual or group has a right of access. Thus, in dealing with the Democratic National Committee contention that the DNC had an organizational right to broadcast time to respond to Presidential appearances, the court concluded as follows:

> "We believe DNC's position to be fallacious and point to our recent decision in *Green* v. *FCC* [447 F.2d 323, 328 (D.C. Cir. 1971)], where we state that no individual or group 'has the right of access to the air; the licensee

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[50] See *National Broadcasting Co., supra,* 319 U.S. at 226; *Red Lion, supra,* 395 U.S. at 388.

[51] *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 1251–52 (1949).

may exercise their judgment as to what material is presented and by whom'."[52]

The lower court, we submit, too conveniently ignores the conceptual underpinning of the broadcast media and the practical conditions which have grown up around broadcasting. Rather than attaching a common carrier status to broadcasting, Congress specifically chose to establish a system under which limited-term licenses are granted for use of broadcasting frequencies,[53] and licensees are committed to operate their facilities in the "public interest."[54] This system entails a procedure of periodic review to ensure that the overall operation of given broadcast facilities is consistent with the needs and interests of the respective communities involved.

Under the broad public interest standard, a number of operational criteria have developed. Thus, out of the statutory mandate of public service have evolved such basic principles as (1) the licensee obligation to periodically survey communities served in order to ascertain problems and interests[55] and (2) the obligation, under the fairness doctrine, to devote a reasonable amount of broadcast time to the presentation of conflicting (including those of a partisan character) views on controversial issues. A further distinguishing characteristic of the broadcast medium, therefore, is that different licensees meet their responsibilities in different ways. This is not only reflective of the statutory scheme and the Commission policies which promote flexibility in serving public needs and disseminating news and information, it is a logcal and necessary consequence of the variety of broadcast facilities.[56]

Any suggestion that significant viewpoints are excluded from the broadcast airwaves is simply unfounded on the record in these cases. Indeed, the complainant groups below (DNC and BEM) acknowledge either implicitly or explicitly that they seek a special kind of access to the broadcast media that ignores consideration of whether a particular viewpoint has previously been presented on broadcast stations[57] and, in this context, whether the public has been adequately informed as to that viewpoint. The fact is that neither the Commission nor the court below has made a finding that the fairness doctrine and other administrative policies flowing from the legislative framework established by Congress are insufficient to satisfy the First Amendment interest of an informed public. Indeed, the Commisison was of the very opposite persuasion, that the present regulatory system affirmatively serves the paramount right of the public to receive access to information on significant issues and experiences, and that engrafting an individual right to purchase advertising for these purposes would actually inhibit and frustrate the overall public objective.[58]

Accordingly, the record in these cases will not support a contention that the public faces any informational gap or, indeed, that most licensees do not now afford sufficient access for ideas and opinions expressed by partisan voices. Nevertheless, the court of appeals has determined that there should be a right of access to a limited kind of broadcast time without consideration of the degree of access that is available in different forms on the multitude of broadcast stations throughout the country. In contrast, of course, the administrative agency given the responsibility for measuring public needs in this regard has concluded that although (1) there is no present deficiency in the information the public receives[59] (2) a general reexamination of contemporary requirements and procedures is nevertheless warranted.[60] Additionally, it is important to emphasize that no Commission policy precludes any station from selling any type of broadcast time to persons and groups for the discussion of controversial issues.[61]

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[52] *Democratic National Committee* v. *FCC,* D.C. Cir., No. 71–1637, decided February 2, 1972, slip op., p. 37, *petition for certiorari pending* (Case No. 71–1405).

[53] Section 307(d) of the Communications Act. 47 U.S.C. § 307(d).

[54] The guiding standard of the Communications Act is that the allocation of facilities and their continued utilization serve the "public convenience, interest, or necessity." See *e.g.,* 47 U.S.C. §§ 307(a) and 309(a).

[55] *Suburban Broadcasters,* 30 F.C.C. 1021 (1961), *aff'd sub nom. Henry* v. *FCC,* 302 F.2d 191 (D.C. Cir. 1962); *Minshall Broadcasting Co.,* 11 F.C.C. 2d 796 (1968); *Primer on Ascertainment of Problems By Broadcast Licensees,* 27 F.C.C. 2d 650 (1971).

[56] In addition to the three major television networks (and some special networks), there and Spanish-language radio networks, *FCC News Release,* No. 10624, April 26, 1972). Also are at least seven national radio networks (plus the recent announcement of Black-oriented see *F.C.C. Public Notice No. 85462,* released June 7, 1972, indicating that as of May 31, 1972, there were 4,368 commercial AM radio stations; 2,341 commercial FM stations; and 701 commercial television stations. In addition, there were 518 educational FM stations and 214 educational television stations.

[57] For example, in the *BEM* case the record shows that WTOP had presented a wide variety of representative views on the Vietnam War, including the specific viewpoint BEM sought to broadcast. In the *DNC* case, the complainant had not even specified the issues or particular viewpoints it wished to express.

[58] See, *e.g.,* App. 269.

[59] App. 258.

By singling out a certain block of broadcast time and enveloping the right to purchase such time in a constitutional mode, the Court of Appeals introduces a new conceptual standard that will adversely affect all broadcast programming. Under the existing broadcast system, it is not necessary to set aside a definable time period for the expression of viewpoints; a typical broadcast station already accomplishes this, and more effectively, in a number of different ways. These include, *inter alia*, replies to editorials, the appearance of private and public officials in discussion and documentary programming, telephone call-in programs, guest appearances on entertainment/talk shows, the reading of viewer's written opinions and editorial "feed-back" programs, the open-mike procedure allowing listeners to telephone in comments which can be taped and then re-broadcast, the carriage of editorials suggested by members of the public and interviews within news programs.[62]

The record in these cases clearly offers no support for a conclusion that the present system of broadcast regulation does not adequately serve the paramount First Amendment right of the public to be informed. Furthermore, the regulatory regime set out by Congress not only does not require broadcast licensees to sell advertising time to individuals or groups to present their particular views on public issues,[63] it deliberately rejects a system of individual access.

1. *The Public Trustee Concept Underlying the Statutory Standard Deliberately and Inherently Rejects A Common Carrier Role For Broadcasting.*—In setting the legislative foundation culminating in the Communications Act of 1934, Congress affirmatively rejected the proposition that the broadcast media should be subjected to an individual right of access. One of the clearest manifestations of this fundamendal decision is found in Section 3(h) of the Act which expressly provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(h).[64] Any standard along the lines suggested by the Court of Appeals that broadcast licensees must make one segment of their broadcast time an open forum (however modified) for the sale of time to persons and groups for the presentation of their views on public issues, would, in effect, make broadcasters "common carriers" in contravention of the express language of Section 3(h) of the Communications Act—

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[60] Accordingly, the Commission has recently launched an administrative proceeding which, in the context of the fairness doctrine, represents a comprehensive exploration of the process by which public issue information is disseminated via the broadcast media. The specific objective of this proceeding is to ascertain what problems, if any, exist and, where appropriate, to devise suitable solutions therefor. See *In re Notice of Inquiry in Docket No. 19260,* 30 F.C.C. 2d 26 (1971).

[61] App. 265.

[62] See Alfred I. DuPont—Columbia University Survey of Broadcast Journalism 1970–1971, pp. 7–31.

[63] A fact conceded by the court below (App. 455).

[64] Not only the plain language of the statute, but the legislative history indicates that the decision by Congress to reject a common carrier status for broadcasting ,and consequently to make licensees responsible for program selection and content, was a deliberate decision. For instance, during the early debate on the Radio Act of 1927 (44 Stat. 1162), Congress considered and subsequently rejected the notion that broadcasters should be charged with a common carrier responsibility. In deliberations leading to enactment of the 1927 Act, the original bill as reported by the Senate Committee contained a common carrier provision to the effect that "if any licensee shall permit a broadcasting station to be used . . . for the discussion of any question affecting the public, he shall make no discrimination as to the use of such broadcasting station, and with respect to said matters, the licensee shall be deemed a common carrier in interstate commerce." 67 Cong. Rec. 12503 (1926); S. Rep. No. 772, 69th Cong., 1st Sess. 4 (1926). However, this language was deleted from the committee bill by the full Senate. See 67th Cong. Rec. 12501–02 (1926). A subsequent revision of this portion of the bill resulted in Section 315 affording reply opportunities only in the limited situation involving political candidates. In the Conference Report that followed, Congress reaffirmed the conclusions reached in the Senate debate that it would be unwise to cloak broadcasting with a common carrier status. See 68 Cong. Rec. 2[illegible] (1927). Several years later during deliberations on the successor Communications Act of 1934, efforts were renewed to legislate some form of broadcast media access. For instance, Congressman McFadden proposed that broadcasting stations be forbidden to discriminate against programs sponsored by any religious, charitable or educational association. H.R. 7986, 73rd Cong., 2d Sess. (1934). The Federal Radio Commission opposed the McFadden Bill and it was not reported out of committee. *Hearings on H.R. 8301 Before the House Committee on Interstate and Foreign Commerce,* 73rd Cong., 2d Sess. 349–52 (1934). Accordingly, as finally adopted, the Communications Act of 1934 specifically declared that broadcasters are not to be deemed common carriers.

and in basic disharmony with the public trusteeship formula otherwise characteristic of the broadcast section of the legislation.[65]

The plain meaning of the statutory language and the legislative history which rejects placing broadcasting on a common carrier basis, has been, up to now, consistently affirmed by judicial interpretation. In *McIntire* v. *William Penn Broadcasting Company*, 151 F.2d 597 (3rd Cir. 1945), *cert. denied*, 327 U.S. 779 (1946), the Court of Appeals for the Third Circuit held that it would be inconsistent with the Communications Act to hold that a religious organization had a right to purchase time on a station for the broadcast of its programs. The court stated that "it is clear from hisory and the interpretation of he Federal Communications Act that the choice of programs rests with the broadcasting stations licensed by the FCC", and that "Congress has confided the selection of program material to be broadcast to the taste and discrimination of the broadcasting stations." *Id.* 599–600. Consequently, "a radio broadcasting station is not a public utility in the sense that it must permit broadcasting by whoever comes to its microphones." *Id.* at 601. See also *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

We believe that the essence of the *McIntire* and similar decisions was recognized by this Court in *Red Lion.* The thrust of that decision is not that the broadcast licensee is a common carrier, required to sell time to all applicants on public issues, but rather that he is a public trustee—a proxy—who must present *representative* community views and voices on controversial issues. The decision thus stresses the right of the public to be informed—not the right of the broadcaster or any individual or group to speak over given broadcast facilities.

In summary, the regulatory system established by Congress proceeds from two interrelated principles. One, rather than sharing the common carrier monopoly role ascribed to telephone and telegraph, broadcasting was to be characterized by private ownership operating on frequencies assigned under a public interest standard by an expert regulatory agency. Secondly, the designated licensees of such frequencies, in marked contrast to the passive role of common carriers under the Communications Act, were to bear an affirmative responsibility for the content of material broadcast, acting in a trustee capacity for the public at large. This initial legislative distinction shapes and permeates our entire system of broadcast regulation.

2. *Developments In Administrative Interpretation and Statutory Amendment Demonstrate the Viability of the Public Trustee System.*—Commission administration of the legislative scheme, and amendments thereto by Congress over the years, cumulatively reflect the vitality and practical wisdom of the threshold decision that broadcasters are to be trustees for the public, not common carriers. Moreover, pertinent development aptly demonstrate that the system designated by Congress is capable of making adjusments which, in a contemporary setting, appear necessary to continue to serve as well as preserve the public's paramount right to be informed.

Issued fifteen years after passage of the basic statute, the Commissioner's *Report on Editorializing by Broadcast Licensees*[66] represents the agency's most comprehensive articulation of the fairness doctrine[67] which—while not in the 1934 Act—was adopted in recognition of the public's right to receive full and fair information on all significant issues. This Report was issued in connection with public hearings designed to clarify the obligations of broadcast licensees and to explore various problem areas.[68] The Report emphasized that the licensee was to perform as a public trustee, and, in this capacity, could determine what should be broadcast and by whom, making such decisions in a manner that would promote the public's First Amendment interests in free and open debate. In the Commission's words:[69]

> "Only where the licensee's discretion in the choice of the particular programs to be broadcast over his facilities is exercised so as to afford a reasonable

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[65] Compare 47 U.S.C. §§ 307(a), 308(a), 309(a) and 315(a). See also Section 326 of the Act, 47 U.S.C. § 326.

[66] 13 F.C.C. 1246 (1949).

[67] The doctrine, however, had been enunciated in one form as early as 1929 by the Federal Radio Commission. See *Great Lakes Broadcasting Co.*, 3 F.R.C. Annual Report 32 (1929).

[68] *Report on Editorializing, supra*, 13 F.C.C. at 1246. See also note 60, *supra*, describing more recent activities of the Commission in this regard. In the pending proceeding initiated in 1971, the Commission has framed the basic objective of its current review as being directed to an examination of whether Commission policies promote to the maximum extent possible the national goal of fostering "uninhibited, robust, wide-open" debate on public issues. *In re Fairness Doctrine Study, supra*, 30 F.C.C. 2d at 27.

[69] 13 F.C.C. at 1250.

> opportunity for the presentation of all responsible positions on matters of sufficient importance to be afforded radio time can radio be maintained as a medium of freedom of speech for the people as a whole. These concepts, of course, do restrict the licensee's freedom to utilize his station in whatever manner he chooses but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for the general public."

Therefore, the essential ingredient of the fairness doctrine as originally formulated was the principle that the public interest is best served by requiring the presentation of opposing viewpoints on controversial issues under the supervision and control of licensees. In 1969 when this Court addressed the fairness doctrine and its extension in the political editorializing and personal attack rules,[70] the main thrust in sustaining these Commission policies was the paramount First Amendment interest that resided with the public at large. *Red Lion supra,* 395 U.S. at 390.

At about the same time the Commission was developing and refining the fairness doctrine, repeated attempts were being made in Congress to expand the coverage of Section 315 of the Communications Act which had been originally fashioned only to extend "equal opportunities" to opposing political candidates in the use of broadcast facilities.[71] In brief, despite such attempts to expand the coverage of Section 315 to spokesmen for candidates and ohter election issues[72]—Congress has carefully circumscribed the purview of Section 315.

In the first significant modification of that provision—the 1959 amendments—Congress actually refined the scope of Section 315 by exempting from the equal opportunities requirement appearances by candidates on newscasts, news interviews, news documentaries, and on-the-spot coverage of news events. 73 Stat. 557 (1959). Thus, Congress intended to restrict the right of individual access for candidates to broadcast facilities and thereby preserve to the greatest extent possible journalistic discretion in broadcasting.[73]

Of perhaps even greater significance, the 1959 amendments also saw Congress ratify and adopt the Commission's fairness doctrine as part of the public interest standard[74] by the addition of this sentence to Section 315(a):[75]

> "Nothing in the foregoing sentence [containing the news exemptions] shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Since the concept of licensee discretion and responsibility, as distinguished from an individualized right of access, is central to the fairness doctrine, the absorption of this Commission policy in the 1959 statutory amendments makes the concept an integral part of the basic legislative fabric.

The dynamics of the legislative process as it bears on our communications system is also reflected in the 1972 amendments to the Communications Act. These amendments not only vastly alter the requirements pertaining to the use of the "communications media" for political purposes,[76] they are indicative of the role gress is able to exert in overseeing the basic statutory system. Just as Con- ss initially rejected a common carrier role for broadcasting—electing instead place programming responsibility with licensees—in a more contemporary en- onment it has responded to what it perceived as a special need in the politi- area.

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[70] These rules represent an instance in which the Commission deemed it necessary to formulate detailed and definitive guidelines to govern licensee conduct in certain limited circumstances. (See note 90, *infra*). Otherwise, the fairness doctrine has been refined over the years on a cases-by-case basis. See *Applicability of the Fairness Doctrine to Broadcast Licensees,* 29 *Fed. Reg.* 10415 (1964). The Commission has, moreover, modified the fairness doctrine as it applies to political broadcasts to the extent of adopting a "quasi equal opportunities" approach in defined instances. For example, it has recently ruled that when a station sells time to spokesmen for or supporters of a political candidate during an election campaign, it must likewise make time available on the same basis to spokesmen for or supporters of opposing candidates. *Letter to Nicholas Zapple,* 23 F.C.C. 2d 707 (1970).

[71] See note 64, *supra.*

[72] See, *e.g.,* H.R. 3595, 80th Cong., 1st Sess. (1947) (to extend "equal opportunities" to spokesmen for political candidates, political parties, the discussion of referendum questions and the discussion of differing viewpoints on public questions); H.R. 6949, 81st Cong., 2d Sess. (1950) (similar to H.R. 3595, but not inclusive of public issue discussion); H.R. 11851, 87th Cong., 2d Sess. (1962) (opportunities for response required when an individual is subject to ridicule by a candidate utilizing Sec. 315 time).

[73] See H.R. Rep. No. 802, 86th Cong., 1st Sess. 4–7 (1959); S. Rep. No. 562, 86th Cong., 1st Sess., 9, 13–14 (1959).

[74] See *Red Lion, supra,* 395 U.S. at 381–85.

[75] 47 U.S.C. § 315(a).

[76] Among the major changes effectuated by the 1972 amendments are the establishment of spending limits by some political candidates in the communications media, greatly modified campaign contributions reporting requirements, and the fixing of maximum rates various media may charge for the use of their facilities by political candidates. See Conf. Rep. No 92–580, 92d Cong., 1st Sess. (1971).

ccordingly, the newly enacted Campaign Communications Reform Act[77] ends the Federal Communications Act to require broadcast licensees to allow sonable access to their facilities by candidates for federal elective office. Sec- n 103(a)(2)(A) of this Reform Act amends Section 312(a) of the Communica- ns Act to read as follows:[78]

> "The Commission may revoke any station license or construction permit—
>
> (7) for willful or repeated failure to allow reasonable access to or permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."

ection 103(a)(2)(B) of the new statute amends Section 315(a) of the Com- nications Act[79] by adding the three italicized words to the following language:

> "No obligation is imposed *under this sub-section* upon any licensee to allow the use of its station by any [political] candidate." (Emphasis added.)

These amendments are, therefore, consistent with previous Commission and ngressional determinations that the public interest requirements for the presen- tion of issues of public importance within the inherent limitations of the broad- st spectrum are a practical task peculiarly suited to resolution by Congress or the Commission. They are also reflective of the awareness and ability of Con- ess to modify the basic legislation so as to grant or preclude such individualized edia access as is deemed necessary[80] and consistent with the overall regulatory heme—a pattern which vests with licensees the responsibility to choose, subject their obligations under the fairness doctrine, what issues should be covered, at manner of presentation is most appropriate and what spokesmen are best ited to present the various sides of such issues.

III.

e Decision of the Court of Appeals Will Substantially Impede the Perform- ance of a Licensee's Public Trustee Role, Diminish the Exercise of a Broad- aster's Journalistic Discretion, and Increase Governmental Control of Broad- cast Speech

Reversal of the lower court's decision is particularly warranted in light of the bstantial adverse impact its implementation will have on the broadcast indus- y generally, and on the future administration of the Communications Act. As ted, the American system of broadcasting has been founded on a recognition at by its inherent nature the medium cannot be available to all,[81] and a de- rmination that broadcasters, rather than government, should perform the func- on of determining who can be accommodated.

In performing that dimension of his "public trustee" role involving the selec- on of material to be broadcast, the licensee is guided by a standard which antici- tes a "diligent, positive and continuing effort . . . to discover and fulfill the stes, needs and desires of his community or service area."[82] Generally, this tails a discretionary allocation between entertainment and non-entertainment gramming, and determinations as to the scheduling and time devoted to such gram categories as education, religion, sports, minority interest, news and blic affairs.

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[77] Pub. L. No. 92–225, Title I (February 7, 1972).

[78] 47 U.S.C. § 312(a).

[79] 47 U.S.C. § 315(a).

[80] See, *e.g.*, S. J. Res. 209, 91st Cong., 2d Sess., introduced by Senator Fulbright on ne 10, 1970 and subsequently considered but not acted upon by the Senate Subcommittee Communications. This measure was designed to develop a Congressional right of access counter-balance the use of television by the Executive branch of the government. It ould have amended Section 315 of the Communications Act to provide that licensees set ide "a reasonable amount of public service time to authorized representatives [of Con- ess] to present the views of the Senate and the House of Representatives on issues of ublic importance."

[81] *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943); *Larus & other Co.* v. *FCC*, 447 F.2d 876, 882 (4th Cir. 1971).

[82] *En Banc Program Policy Statement*, 20 Pike and Fischer, Radio Regulation 1901, 1913, 5 Fed. Reg. 7291, 7295 (1960).

This fundamental regulatory principle has also been the essential predi for the Commission's fairness doctrine which, while requiring treatment of posing views on controversial issues, permits licensee discretion in the selec of spokesmen, schedules and program format. Under the terms of the low court's decision, however, that discretion is significantly diminished; broad casters would apparently no longer be able to decide to exclusively meet the "fairness" obligations by public affairs and news programing, even though th may seem to be the approach best designed to *inform* the public.[83]

The likely practical effects of the Court of Appeals opinion include weight the initiation of public issue discussion in favor of those most able to aff the purchase of "editorial advertising," the resultant heavier involvement the Commission in disputes over who is to have access, and the transforma of public affairs programing from an innovative self-initiating posture to so thing more and more restricted as it is increasingly employed as a respons device for spot announcements.

Although the lower court attempted to discount the serious consequences its ultimate holding with a corrollary declaration that there is no absolute ri in any person or group to air any particular "editorial advertisement"[84] an that licensees need only accept *some* such announcements under guidelines to devised by the Commission,[85] the practical detriments to the overall public int est are not so easily avoided. Clearly, if a right of broadcast access is to be dividualized on a constitutional mantle, the process of promulgating and forcing "reasonable" rules cannot avoid impairment of a licensee's capacity fulfill his overall obligations to the public.

Two principal characteristics typify network and station advertising time— it is limited (especially in "prime time" when heavy demand accentuates inherent time restrictions) and it is expensive. Under the system establish by the court of appeals, a premium is automatically placed on wealth in at leas initially using broadcast facilities to disseminate controversial issue advertis ments. Consequently, undue encouragement is given to the exposure in t format of either (1) the *side* of a controversial issue espoused by those greatest wealth or (2) the limited *issues* which only attract well financed peting groups. This not only produces an unwarranted discrimination agai particular viewpoints and particular issues, but represents a direct impedim to the paramount right of the public to be informed by receiving access broad range of social, political and other ideas and experiences. *Red Li* *supra*, 395 U.S. at 390.

A less tangible but equally pertinent impact of the system imposed by Court of Appeals decision is that broadcaster independence in the news and pu affairs area is necessarily diminished to the extent there may be a need to p such programming in a contrasting posture to the paid controversial issue nouncements of others broadcast throughout the day, week or month. In normal course, news and public affairs programming is designed to be res sive to the fluctuating needs and interests of the public as a whole. To a sig cant extent, therefore, public events and problems determine program relev However, the changes set in motion by the Court of Appeals are potentially ruptive of this traditional journalistic process. For in many cases broadca will be forced to consider factors other than news value as a motivatio public affairs programming—placing increasing emphasis in content sele on matters which, irrespective of primary news value, may be the subje extended treatment in spot announcements prepared by controversial advertisers.

Thus, unless one assumes that issues initiated by advertisers—issues wh because of a lack of newsworthiness, a broadcaster may not have intend cover—can be adequately covered exclusively by paid spot announcemen broadcaster would be expected to devote a certain amount of his regular gram" time (news, public affairs, etc.) to the presentation of contrasting order to discharge his public trustee role of keeping the public adequately formed on the issues. In brief, the broadcaster will not only be forced to re- nquish a degree of control in initially selecting his news and public affairs ogramming, he may have to substitute programming representing a view con- ary to that expressed in a concentrated series of spot announcements for pro- amming previously planned on a subject matter of greater relevance to his dience. This anomaly was recognized by dissenting Judge McGowan who cor- ctly characterized the distorted design nominated by the majority below as one herein:

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[83] The lower court actually acknowledges the essentially distorted and artificial sion of viewpoints possible from their presentation in a fleeting 20 or 30 second "We recognize, of course, that the onesidedness and private editing of particular editorial advertisements may in the end steer viewers and listeners away from the by distorting complex issues." (App. 472). Objective information value would be further diminished by the non-applicability of such policies as the fairness doct private "editorial advertisers" and the absence of professional journalism standards

[84] App. 482.

[85] App. 482, 485.

> ". . . money alone determines what issues are to be aired, and in what format, even assuming as is likely to be the case, that those issues, whatever they may prove to be, compare favorably with the intellectual content of the great bulk of commercial advertising. The responsibility for informing the public is now squarely on the licensee. That responsibility will only be diluted and obscured by requiring the licensee, against his own better judgment, to accept paid editorial advertising."[86]

Thus, mandating the sale of spot announcements for the individual expression f views on public issues, without the exercise of journalistic judgments by censees as to the newsworthiness of the matters to be discussed, or consideration s to the adequacy of previous coverage and the appropriateness of particular pokesmen, will inevitably result in unfair and artificial exposure of some issues nd some viewpoints.

An even greater threat to broadcasters' journalistic independence is the re- ultant intrusion of the FCC into day-to-day station and network operations. here can be no doubt that, from the initial setting of "reasonable regulatory uidelines" to implement the lower court's directive,[87] the Commission would in- reasingly be called upon to rule on such matters as (1) what issues are to be overed; (2) what viewpoints on given issues require more or less attention; (3) hat persons or groups are to be allowed to express their views; (4) what view- oints particular groups or spokesmen actually represent; and (5) what, if any, ime limit should apply. Disputes over the exercise of the newly articulated right ill be inevitable and prolific, thrusting the Commission—and likely the courts s well—further and more profoundly into the area of program judgments of ews and editorial material.[88]

Significantly, any refusal by a licensee to broadcast a given editorial announcement will generate the contention that such refusal constitutes an infringement f the applicant's right of free speech. Thus, irrespective of the manner and form f any resulting Commission "guidelines", the First Amendment ground on which he Court of Appeals decision is based presumably dictates that a reason be given or any licensee refusal. Thereupon, the Commission will be placed in the position f arbitrating the basis for any such refusal by measuring the licensee's reason or declining to broadcast certain announcements against the applicable guide- ine. As a consequence, the lower court decision will result in increased and undesirable government supervision of licensee day-to-day programming judgments.[89]

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[86] App. 490–91. At present, because the licensee is cognizant that he may have to present opposing viewpoints free of charge, *Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963), he is able to take this into account in planning coverage. However, under the right articulated by the court of appeals, the *Cullman* principle is invoked at the initiative of the spot advertiser. In this scheme, it is possible for the advertiser's financial resources to determine "what issues are to be aired", with the broadcaster required to make free time available to permit a fair presentation of the issues. See concurring statement of Commissioner Cox in *BEM*, App. 368. Finally, any suggestion that the *Cullman* principle or the fairness doctrine be suspended in these circumstances (see Commissioner Johnson dissent, App. 281) could result in the public being left uninformed.

[87] App. 488.

[88] This would be directly counter to the Commission's long maintained policy of specifically avoiding any intrusion "in the news or editorial decision processes of licensees, because such intrusion by the government licensing agency might have a chilling effect on journalistic enterprise." *In re Fairness Complaint of Sidney Willens and Russell Millin*, 33 F.C.C. 2d 304, 309 (1972). See also *In re Mrs. J. R. Paul*, 26 F.C.C. 2d 591 (1969); *Letter to ABC, CBS and NBC*, 16 F.C.C. 2d 650 (1969); *New York City Health and Hospitals Corp.*, 32 F.C.C. 2d 299 (1971); *In re "The Selling of the Pentagon"*, 30 F.C.C. 2d 150, 152–53 (1971).

[89] Were the Commission to assume the responsibility to designate the issues or the spokesmen to be presented during broadcast advertising time, it would run a grave danger of violating the strictures of Section 326 of the Communications Act, 47 U.S.C. § 326. Like the refusal of Congress to require broadcasters to afford an individual right of access (see pp. 36–43, *supra.*), Section 326 reflects a firm Congressional intention to place the choice of programming in the hands of broadcast licensees. That section not only forbids any censor-

In sum, such an intrusion on the broadcaster's ultimate responsibility select and transmit program material[90] operates in a dual inhibitory fashion it directly affects program judgments as to the material proffered by an "editorial advertiser" in a spot announcement context and indirectly influences programming decisions in other areas. A significant modification in one area of programming could well induce changes in other areas. For instance, assuming that the constitutional basis for the lower court decision would not permit any rejection of proffered announcements on grounds of previous or intended coverage of the issues[91] a heavy concentration of announcements on an issue such as the nation's economic health could cause a broadcaster seeking to maintain a semblance of balanced treatment to forego certain program selections in order to prepare and present material directly responsive to the repeated position expressed in the saturated announcement schedule.

A basic error of the Court of Appeals opinion—an error which bears directly upon the reasonableness of licensee discretion in determining whether to accept or to reject controversial issue announcements—is the assumption that time devoted to commercial announcements is merely a segment of the broadcast "relinquished by broadcasters to others" and that it is not "closely controlled and edited by broadcasters", so that "all that is at issue is their decision as to which other parties will be given an opportunity to speak."[92] Elsewhere the court asserts that this is "an area in which editorial control over content has never been of major importance."[93]

This assumption is clearly erroneous. In screening commercial announcements for which broadcast time is sought, licensees exercise control over not only the "time, place and manner of speech" and other housekeeping functions referred to in the court's opinion,[94] but also substantive content. Thus, broadcast licensees, as part of their "public interest" performance, review proferred material to screen out false, misleading and deceptive advertisements, libelous statements, promotions of lotteries and other illegal activities, obscene, profane and indecent expressions, and other forms of speech found objectionable or questionable under federal statute, state law, FCC and Federal Trade Commission policy, and industry and licensee standards of good practice and taste.[95] Licensees must also concern themselves with the "reliability and reputation of every prospective advertiser and . . . his ability to fulfill promises made to the public over the licensed facilities."[96]

The constitutional underpinning of the lower court decision, however, casts grave doubt on the question of whether the Commission or its licensees

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ship of broadcast programming, but provides that the Commission should not set any regulations which would interfere with free speech in radio communication. Neither censorship in the classical sense—suppression of individual publications on the ground that their content is objectionable—nor establishment by the Commission of a scale of values which would govern the selection of individual programs was thought to be within the power conferred by this section. See 67 Cong. Rec. 12356 (1926); Sen. Rep. No. 772, 69th Cong. Sess. 4 (1926).

[90] As we have shown, proceeding from the assumption that subjects to be covered and speakers to be heard must be determined by someone, a cardinal principle of broadcast operations under the Communications Act has been that a licensee bears ultimate responsibility for all material broadcast over his facilities. See, *e.g.*, 47 U.S.C. § 310(b); *P Pub. Co.* v. *FCC*, 94 F.2d 249, 251 (D.C. Cir. 1937); *Regents of New Mexico* v. *Albuquerque Broadcasting Co.*, 158 F.2d 900, 905–06 (10th Cir. 1947). The only exception to this general policy are broadcasts by candidates for public office where the licensee is forbidden to censor programming in which the candidate appears. 47 U.S.C. § 315(a). In a different sense, one legislative provision (47 U.S.C. § 315(a)) and two administrative regulations (the "personal attack" and "political editorializing" rules approved in *Red Lion*) circumscribe, in limited situations a licensee's responsive programming determinations. Thus individuals subject to personal attacks have been designated the appropriate spokesmen delivering replies and opposing political candidates have been predesignated as appropriate reply spokesmen to answer political editorials. In each instance, however, the licensee initially responsible for the broadcast generating the reply obligations. Finally, while section 315(a) requires that "equal opportunities" be extended opponents of a qualified candidate, the provision expressly states that "no obligations is imposed under this subsection upon any licensee to allow the use of its station by any such candidate."

[91] The reasoning of the Court of Appeals clearly appears to suggest that it would be permissible to refuse to sell advertising time on the ground that a similar viewpoint already been adequately presented (App. 471–73) or on the ground that the matter unimportant and that other issues are more deserving of coverage (App. 469).

[92] App. 464–65.

[93] App. 483.

[94] *Ibid.*

[95] See *Center for Law and Social Policy*, 23 Pike and Fischer, Radio Regulation 192–97 (1971); *Adoption of Standards Designed to Eliminate Deceptive Advertising Television*, 23 Pike and Fischer, Radio Regulation 1550, 1560–65 (1971).

[96] *Center for Law and Social Policy, supra*, 23 Pike and Fischer, Radio Regulation at

develop substantive standards of these kinds to control the entry of editorial announcements, so as to prevent misleading, scandalous, indecent and "crackpot" statements on social or political issues.[97] The lower court recognized that a "discrimination against all controversial speech—such as we face in these cases—is somewhat less 'odious' than a discrimination among different controversial viewpoints on particular issues."[98] But the court ignored the fact that broadcasters will either have to make discriminatory judgments on the suitability of particular announcements for audiences of all ages and sensibilities, or permit what, in the eyes of the public generally, would be a clear debasement of the broadcast media by speech more appropriately expressed in other places.[99]

It is an unacceptable choice which should convincingly demonstrate that neither the First Amendment nor common sense compels a right of personal access for editorial announcements on all broadcast stations.[100] Indeed, the First Amendment interests of the public as a whole would be disserved by such a development. Rather than enhancing, it would be contrary to First Amendment interests, and a severe if not impossible administrative burden, if broadcasters were compelled to engage in the delicate balancing of constitutional and other interests concerning the acceptability of inflammatory, hateful, "frivolous" and other questionable expressions of opinion by all persons offering to pay for broadcast time.

As a "public trustee" the broadcast licensee has the obligation to select "appropriate spokesmen" to voice "significant" viewpoints on issues of "public importance". But, in implementing the kind of right of access proclaimed by the Court of Appeals, it is not likely that licensees would be permitted to limit access to "significant" views on important subjects. Ironically, the concept of licensee responsibility so fundamental to the system chosen by Congress and the Commission, and upheld by this Court in *Red Lion*, not only prompts the court below to find constitutional infirmities in the existing regulatory scheme,[101] but is the very component at least partially removed from the new constitutional scheme set in motion.[102]

As we have elsewhere shown, Congress, the Commission and the courts have determined that the central goal of the First Amendment as it applies to broadcasting is to enhance the right of the public to be informed. In these particular cases, the Commission, based on decades of experience in interpreting the statutory public interest standard and administering the fairness doctrine based thereon, carefully articulated the practical and legal basis for such policies and concluded that the public's interest in broadcasting would be best served by declining to compel stations to sell time for the presentation of individual views.[103] Moreover, as the administrative agency entrusted with the task of developing workable policies to govern the allocation and utilization of broadcast frequencies, the Commission is continuing to examine what further adjustments and changes are desirable or possible in fulfilling the spirit of the fairness doctrine.[104] Thus, if deficiencies in the public's First Amendment right to be informed are perceived, they can and should more appropriately be handled through administrative procedures before the Commission which look toward modifications in the existing system and take into account the full complement of related broadcast policies.

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[97] The Court of Appeals itself relied upon the difference between "commercial" and "political" speech so far as the permissibility of content regulation is concerned (See, *e.g.*, App. 473 and n.38); but, as we have shown, it ignores the fact that broadcasters actually do regulate the subject matter of commercial announcements and may be called upon to act differently with respect to editorial announcements. For instance, in one of many ironies engendered by the Court of Appeals decision, the First Amendment ground of the opinion would presumably not permit a licensee to reject a brief 10-second announcement that is mere "sloganeering" on the basis that only a longer presentation on the complex issue would contribute to the public's right to be informed.

[98] App. 478.

[99] A public place need be opened for First Amendment-protected expression only to the extent that the speech is presented "in a manner and for a purpose generally consonant with the use to which the property is actually put." *Amalgamated Food Employees Local Union 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 319–29 (1968).

[100] As we have shown, "differences in the characteristics of news media justify differences in the First Amendment standards applied to them." *Red Lion*, *supra*, 395 U.S. at 386, 388. The court of appeals opinion recognizes no distinguishing characteristics of the broadcast media in this sense, and applies the strictest First Amendment tests, including the "clear and present danger" doctrine. App. 475. It is somewhat disconcerting that the lower court decision should end with a reference to *Terminiello* v. *Chicago*, 337 U.S. 1 (1949), if that is meant as an example of the kind of speech which must be broadcast in spot announcement form to citywide or nationwide captive audiences. The speech there in question, as detailed in Mr. Justice Jackson's dissenting opinion (337 U.S. at 13), involved an inflammatory anti-Semitic harrangue. Distinguishing features of that case are that the speech occurred at an auditorium at which sympathizers gathered inside and a disorderly protesting mob gathered outside; the majority of the Court held, in a 5–4 decision, that the situation could not justify conviction of the scheduled speaker for breach of the peace.

[101] According to the court of appeals, the present system is constitutionally inadequate because it allows broadcasters to "decide what issues are 'important,' how 'fully' to cover them, and the format, time and style of the coverage." (App. 469).

[102] For instance, the court found that the First Amendment interest in self-expression it had formulated could only be vindicated by putting the "crucial controls" for the use of some advertising time in the hands of outside individuals or groups. App. 468–69. Thus, even if broadcasters demonstrate a full exposition of viewpoints and partisan spokesme during non-advertising time, "their retention of total initiative and editorial control i inimical to the First Amendment." App. 469. See also App. 485.

In contrast, the lower court's objective of removing from broadcast licensees and allocating to affluent individuals and groups discretion in some program content selection represents a glaring aberration of the total scheme of broadcast regulation. As we have seen, in a limited-time medium, the paramount right of the public to be informed cannot be meaningfully served by a common-carrier approach in which views and spokesmen are presented on a first-come, first-served basis. Accordingly, Congress and the Commission have determined to treat broadcast licensees as trustees for the public at large with the concomitant responsibility to select the issues and spokesmen to be broadcast. The lower court charts a dramatic departure in attempting to reformulate this system in a manner which diffuses responsibility for program content to individuals and groups who bear neither a journalistic responsibility nor a statutory obligation to serve the public. Consequently, the new regime which is proposed would seriously compromise the vital First Amendment interests at stake by frustrating the ability of radio and television stations to program for the public at large and by leading to increased governmental supervision of broadcast speech.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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June, 1972.

(Brief for Petitioners and Intervenors The Tobacco Institute, Inc., *et al.*)

IN THE UNITED STATES COURT OF APPEALS

For the Fourth Circuit

(No. 15,382)

LARUS & BROTHER COMPANY, INC., T/A THE HOUSE OF EDGEWORTH; PHILIP MORRIS INCORPORATED; AND R. J. REYNOLDS TOBACCO COMPANY, PETITIONERS, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

Petition To Review an Order of the Federal Communications Commission

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[103] App. 256–69; 366–68.

[104] See *In re Notice of Inquiry and Notice of Proposal Rule Making in Docket No. 18859*, 23 F.C.C. 2d 27 (1970); *In re Notice of Inquiry in Docket No. 19260*, 30 F.C.C. 2d 26 (1971). The latter proceeding, which incorporates the former, is a comprehensive review of all aspects of the fairness doctrine and is intended to thoroughly explore, *inter alia*, the question of access generally to the broadcast media for the discussion of public issues.

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ISSUES PRESENTED FOR REVIEW

This is a petition to review a "Report and Order" of the Federal Communications Commission adopted on December 15, 1970.[1] The petition requests this Court to review and to reverse a ruling by the FCC that licensed television and radio stations who broadcast anti-smoking messages are not required by the "fairness doctrine" to grant time for the presentation of the opposing viewpoint. Petitioners and the Intervenors named in the margin[2] are manufacturers igarettes; together these companies account for nearly all of the cigarettes nufactured in the United States. Intervenor The Tobacco Institute, Inc. is a intary association of domestic manufacturers of tobacco products. One of the adcasting networks, the American Broadcasting Companies, Inc., has inter- ed in support of the Commission's action.

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[1] The jurisdiction of this Court is based on Section 402(a) of the Communications Act of 1934, 48 Stat. 1093, as amended, 47 U.S.C. § 402(a); Section 2 of the Judicial Review Act of 1950, as amended, 80 Stat. 622 (1966), 28 U.S.C. § 2342 (Supp. V, 1965–69); Section 10 of the Administrative Procedure Act, as amended, 80 Stat. 392 (1966), 5 U.S.C. §§ 701–06 (Supp. V, 1965–69); and 28 U.S.C. § 2112. Venue is properly laid in this Court pursuant to the provisions of 28 U.S.C. § 2343 (Supp. V, 1965–69).

[2] Petitioners are Larus & Brother Company, Inc., trading as The House of Edgeworth; Philip Morris Incorporated; and R. J. Reynolds Tobacco Company. The intervening cigarette manufacturers are American Brands, Inc.; Brown & Williamson Tobacco Corp.; Liggett & Myers Incorporated; Lorillard, a Division of Loew's Theatres, Inc.; Stephano Brothers;
turers and that of The Tobacco Institute, Inc., we shall refer to these parties collectively
and United States Tobacco Co. In light of the identity of the interests of these manufac-
in this brief as "Petitioners."

he issues presented for review are as follows:

. Whether, consistently with Sections 315 and 326 of the Communications t and the First Amendment, the FCC may authorize television and radio tions to broadcast anti-smoking messages without requiring them to pre- t the opposing point of view on the theory that the smoking and health issue ceased to be controversial.

. Whether the Commission's decision that broadcast licensees can take the ition that cigarette smoking is not a controversial issue, thereby relieving h licensees of their obligations under the fairness doctrine, is arbitrary l capricious in light of the Commission's prior rulings, representations to ngress, and public statements on the smoking and health issue.

STATUTES INVOLVED

he statutes involved are set forth in Appendix A to this Brief, pp. 1a–2a, *ra.*

STATEMENT OF THE CASE

) *Background Facts*

For many years, the Federal Communications Commission has imposed a duty television and radio broadcasters to present both sides of controversial public ues. This obligation—known as the "fairness doctrine"[3]—is based on the atutory requirement that licensees must "operate in the public interest and . . . ord reasonable opportunity for the discussion of conflicting views on issues public importance."[4] In September, 1967, the Commission applied the fairness ctrine to the broadcast of cigarette commercials; it ruled that cigarette broad- st advertising presented one side of a controversial issue of public impor- nce—the relationship of smoking to health—and that broadcasters who carried arette advertising were required by the fairness doctrine "to provide a sig- icant amount of time to the other side of this controversial issue of public portance."[5] In compliance with this ruling, a large volume of anti-smoking essages has been broadcast since 1967 by TV and radio licensees on a virtually ily basis. (Joint Appendix 13, cited hereinafter as "J.A.")

In November, 1967, shortly after the foregoing ruling, the Commission in- ructed a licensee that broadcasters who did not carry cigarette advertising it who presented anti-smoking messages were required by the fairness doc- ine to afford time for the presentation of the opposing viewpoint.[6]

All cigarette advertising on the broadcast media terminated on January 2, 71, pursuant to the provisions of Section 6 of the Public Health Cigarette oking Act of 1969, Public Law 91–222, 84 Stat. 89 (1970); Appendix A, p. 2a, *fra.*

) *The Proceedings Before the FCC in This Case*

The present case had its genesis in a "Notice of Inquiry" issued by the Com- ission on October 15, 1970, inviting comments from interested parties with re- ect to regulatory policies which the Commission should adopt "Concerning igarette Advertising and Anti-Smoking Presentations." (J.A. 1.) Comments were quested on two specific issues, namely: "(1) the possible fairness doctrine ligations, if any, in the situation where a broadcast licensee, which does not esent cigarette commercials, broadcasts announcements to the general effect at cigarette smoking is hazardous to health and persons should therefore not mmence or continuine smoking . . . and (2) the public interest obligations of the roadcast licensee after January 1, 1971, when all cigarette advertising on roadcast media will cease. . . ." (J.A. 1.)

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[3] The history of the fairness doctrine and its administration by the FCC is described in *ed Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 375–86 (1969).

[4] Communications Act of 1934, § 315(a), as amended, 73 Stat. 557 (1959), 47 U.S.C. 315(a).

[5] *In the Matter of Television Station WCBS–TV, New York, N.Y. Applicability of the airness Doctrine to Cigarette Advertising,* 9 F.C.C. 2d 921, 922 (1967), *aff'd sub nom. anzhaf* v. *FCC,* 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969).

[6] Letter to Larry Jonas, November 2, 1967, 8330–S, C9–1304. For the convenience of the ourt, this letter is reprinted in Appendix B to this brief, pp. 3a–5a, *infra.*

On December 15, 1970, after receiving comments from various interested parties,[7] the Commission adopted its "Report and Order." (J.A. 3.) The Commission ruled that stations who now broadcast anti-smoking messages are not required by the fairness doctrine to present a different view on the ground that "the general issue of smoking being a health hazard" can reasonably be regarded by licensees as "no longer controversial." (J.A. 8.)

The Commission proceeded from the premise that "it is up to the licensee to make a reasonable good faith judgment on the basis of the particular facts before him as to the possible application of the fairness doctrine, and specifically whether he has presented one side of a controversial issue of public importance." (J.A. 7.) The Commission noted that some broadcasters who had filed comments in response to the "Notice of Inquiry" had "stated their belief", in reliance on "prior Commission precedents", that "fairness would require the presentation of pro-smoking viewpoints" if anti-smoking messages were broadcast. Other broadcasters contended in their comments that, upon the termination of broadcast cigarette advertising, "the general issue of cigarettes being a health hazard can reasonably now be regarded as no longer a controversial one." (J.A. 7-8.) The Commission concluded that it would "decline to upset that [latter] judgment as unreasonable." (J.A. 8.)

The Commission emphasized that its "holding is directed to only one *general* aspect, albeit a most important one—that cigarette smoking is a hazard to public health. . . . While that fact may now be adjudged by the broadcaster no longer to be a controversial issue, there can clearly be most substantial controversies as to other aspects (e.g., particular studies or statistics; what remedial actions should be taken). As to such aspects, the fairness doctrine would be applicable. . . ." (J.A. 9; emphasis in original.)[8]

It had been pointed out in various comments that the Commission itself had consistently maintained since 1967 that the smoking question presented a controversial issue of public importance. With respect to this point, the Commission stated that "we believe that little is gained here by citation of previous Commission rulings or by reference to past testimony before the Congress. The critical issue is the licensee's judgment *today*—directed to the circumstances before him." (J.A. 7; emphasis in original.)

The Commission rejected the argument that its refusal to require broadcasters to present replies to anti-smoking messages was inconsistent with its prior ruling, upheld on review,[9] that broadcasters were required to balance cigarette commercials with anti-smoking messages. (J.A. 10–11.) It also rejected the contentions that its decision would involve "the official government view dominating public broadcasting" and "a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves," in violation of the First Amendment and the Communications Act, as interpreted in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). (J.A. 10.)

As to the second question raised in its "Notice of Inquiry"—the public interest obligations of broadcasters with respect to the smoking and health issue following the cessation of cigarette broadcast advertising—the Commission ruled that licensees would not be obliged after January 1, 1971, to continue to devote a significant amount of time each week to anti-cigarette messages. The Commission added, however, (i) that licensees are obligated to present some programming on "matters of great public concern" and (ii) that cigarette smoking is such a matter. (J.A. 15.) The Commission held that although licensees have discretion in determining the manner and extent of their presentation of the anti-smoking viewpoint, "the question whether the licensee who fails to treat this subject has served the public is one which can be definitvely assessed only at [license] renewal time when the licensee's *overall* public service performance effort is evaluated." (J.A. 17; emphasis in original.)

Commissioner Robert T. Bartley concurred in the Commission's judgment that licensees had discretion to determine whether to cover the smoking and health issue after cigarette advertising ceased and to determine if the issue was controversial; he did not express any opinion on the controversial nature of the smoking and health issue. (J.A. 20.) Commissioner H. Rex Lee "concurred in the result" reached by the Commission without filing a written opinion. (J.A. 44.) Commissioner Nicholas Johnson filed a separate opinion, concurring in part and dissenting in part. (J.A. 21.)

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[7] All the comments received by the Commission are included in the record in this case which has been filed with the Clerk of this Court.

[8] Emphasis is supplied throughout, except where otherwise indicated.

[9] *Banzhaf* v. *FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

ARGUMENT

Summary Statement of Petitioners' Position

The basic issue in this case is whether a deviation should be permitted from the principle that broadcasters who present one side of a controversial issue are obligated to present the other side. So far as we can determine, the present case is the first instance in which the Commission has relieved broadcasters from their fairness doctrine obligations on the theory that a widely discussed issue is noncontroversial.

Petitioners submit as follows:

First, under the Communications Act, broadcast licensees who present one side of a controversial issue of public importance must furnish an opportunty for presentation of a differing view.

Second, prior to the present case, the Commission had repeatedly and consistently stated in decisions, public announcements, and in statements to Congress that smoking and health is a controversial issue subject to the requirements of the fairness doctrine. This conclusion was the cornerstone of the Commission's landmark decision requiring broadcasters to balance cigarette commercials with anti-smoking messages. It was also the basis for the Commission's 1967 ruling that broadcasters who did not carry cigarette commercials but who aired anti-smoking messages were required by the fairness doctrine to present the opposing view. The Commission's present decision does not state any reasoned basis for suddenly repudiating all of its previous announcements.

Third, the Commission's decision violates the First Amendment. It involves a discriminatory refusal by the FCC to require broadcast licensees to present views differing from the official government view. As a result, the listening public will be deprived of a balanced presentation on an important issue, and the public's ability to make informed judgments on the smoking issue will be prejudiced.

Finally, the Commission's action is arbitrary and capricious. The Commission disregarded all of its prior precedents and pronouncements on the application of the fairness doctrine to the smoking and health issue, and it failed to articulate any objective standard for determining when a subject ceases to be controversial for purposes of the fairness doctrine.

In sum, it is our position that if TV and radio stations grant free time for the broadcast of anti-smoking messages, they must also grant free time in conformity with the fairness doctrine for discussion of a differing viewpoint. In the presentation of this contrary view, cigarette brands may not be advertised or promoted, but evidence and arguments counter to those of cigarette critics are entitled to be expressed.

I. Broadcasters Presenting Programming on Controversial Issues of Public Importance Are Required To Present Both Sides Fairly

Broadcast licensees have been required for many years to comply faithfully with the fairness doctrine. The Commission first expressed the fundamental principle of the fairness doctrine in 1949 in its *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246:

> "[In the] presentation of news and comment the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise. . . .
>
> "[B]roadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues on their facilities. . . ."

This principle was subsequently embodied in Section 315(a) of the Communications Act, which provides that broadcasters have a duty "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U.S.C. § 315(a), as amended 73 Stat. 557 (1959).[10]

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[10] The legislative history of Section 315, described by the Supreme Court in *Red Lion Broadcasting Co., supra*, 395 U.S. at 383–84, demonstrates that Congress intended that broadcasters would be required to give adequate coverage to public issues and that such coverage should fairly reflect contrasting views. The Senate Report on Section 315 noted that "Every licensee who is fortunate in obtaining a license is mandated to operate in the public interest and has assumed the obligation of presenting important public questions fairly and without bias." S. Rep. No. 562, 86th Cong., 1st Sess., pp. 8–9 (1959), quoted in *Red Lion Broadcasting Co. v. FCC, supra,* 395 U.S. at 383.

The basis of the fairness doctrine, as the Supreme Court stated in *Red Lion Broadcasting Co., supra,* 395 U.S. at 394, is that licensees have been "given the privilege of using scarce radio frequencies as proxies for the entire community. . . ." A licensee is required, the Court stated, "to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." *Id.* at 389. The fairness doctrine guarantees "the promotion of informed decisionmaking by the public by insuring that the facts and arguments relevant to decision are made available to the listening audience." *Retail Store Employees Union v. FCC,* D.C. Cir., No. 22,608, Oct. 27, 1970, slip opinion p. 17.

It was these considerations which prompted the Commission to state recently:

> "[W]*e regard strict adherence to the fairness doctrine as the single most important requirement of operation in the public interest*—the '*sine qua non*' for grant of a renewal of license . . . . We have stressed that we have allocated so much spectrum space to broadcasting because of the contribution which it can make to an informed public . . . . That basic allocation purpose would be largely undermined if the broadcaster could discuss such issues unfairly—by presenting only one side or only the viewpoints with which he agreed." *In re Complaints of Committee for the Fair Broadcasting of Controversial Issues,* 25 F.C.C. 2d 283, 292 (1970).

Licensees have heretofore been accorded considerable discretion in determining in the first instance what matters of public interest should be dealt with from among the multitude of such issues competing for broadcast time.[11] However, once a licensee has presented a point of view on a public issue, the fairness doctrine is applicable, and contrasting views must be presented.[12]

Prior to the present case, the Commission had consistently required the presentation of divergent viewpoints. The fairness doctrine has been applied to a wide variety of "controversial" issues, including "the fluoridation of drinking water, the value of krebiozen in the treatment of cancer, the nutritive qualities of white bread, . . . the use of high potency vitamins,"[13] the sale of alcohol,[14] the regulation of private aviation,[15] and, as we discuss below, the smoking and health issue.

II. The Broadcasters' Obligation To Present Contrasting Views on Important Public Issues Applies to the Smoking and Health Controversy

(a) Prior to the present decision, the Commission had consistently held that the fairness doctrine applies to the smoking and health issue. In 1967, the Commission ruled that stations who carried cigarette advertising were presenting one side of a controversial issue and they accordingly had an obligation under the fairness doctrine to present the contrasting point of view, as an aspect of their duty to operate in the public interest. *In the Matter of Television Station WCBS-TV, New York, N.Y. Applicability of the Fairness Doctrine to Cigarette Advertising,* 9 F.C.C. 2d 921 (1967), *aff'd sub nom. Banzhaf* v. *FCC,* 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969).

Several months after its decision in *Banzhaf, supra,* the Commission notified a licensee that a broadcaster who did not carry cigarette advertising but did carry anti-smoking messages was obliged, under the fairness doctrine, to present the opposing viewpoint. Letter to Larry Jonas, November 2, 1967, 8330-S, C9-1304, reprinted in Appendix B, pp. 3a-5a, *infra*. The Commission said:

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[11] The Commission stated in promulgating its *Policy on Programming:*

> "The ascertainment of the needed elements of the broadcast matter to be provided by a particular licensee for the audience he is obligated to serve remains primarily the function of the licensee. His honest and prudent judgments will be accorded great weight by the Commission. Indeed, any other course would tend to substitute the judgment of the Commission for that of the licensee." 20 P & F Radio Reg. 1901, 1913–14 (1960). See also *Editorializing by Broadcast Licensees, supra,* 13 F.C.C. at 1250–51.

[12] The Commission has stated that "Only where the licensee's discretion in the choice of the particular programs to be broadcast over his facilities is exercised so as to afford a *reasonable opportunity for the presentation of all responsible positions on matters of sufficient importance to be afforded radio time* can radio be maintained as a medium of freedom of speech for the people as a whole." *Report on Editorializing by Broadcast Licensees, supra,* 13 F.C.C. at 1250.

[13] *In the Matter of an Inquiry into Compliance with Section 317 of the Communications Act of 1934, as Amended, and with the Commission's Policy on the Presentation of Opposing Viewpoints on Controversial Issues of Public Importance by Licensees Broadcasting the Program "Living Should Be Fun,"* 33 F.C.C. 101, 107 (1962).

[14] *In re Petition of Sam Morris,* 3 P & F Radio Reg. 154 (1946).

[15] *In re Complaints Concerning National Broadcasting Co., Fairness Doctrine Relating to General and Commercial Aviation,* 19 P & F Radio Reg. 2d 137 (1970).

> "*The Commission has recognized that there is a controversial issue of public importance involved here—the possible effect of cigarette smoking on health. Thus the fairness doctrine is applicable.* The initial judgment, as you have noted, as to whether the presentation of material regarding cigarettes is in the public interest is one for the licensee to make. . . . However, *having presented a view on the issue, the licensee may not prevent the presentation of opposing views on the ground he personally does not believe them to be in the public interest.* Rather, the Commission is of the view that when a reasonable opportunity is afforded for the presentation of opposing views on an issue of public importance, so that all facts relating to the controversy are exposed, the public will have the benefit of full information concerning it." *Id.*, p. 1; Appendix, pp. 3a-4a, *infra*.

The Commission reiterated its position in a public notice, issued on December 15, 1967, in which it stated that the licensee's duty to present opposing views in the "situation of a station which presents health hazard claims but no cigarette commercials . . . would be governed by the same principles as are applicable generally under the 'Fairness Doctrine.'" *Tobacco Institute, Inc.*, 11 P & F Radio Reg. 2d 987, 988 (1967).

Prior to the present case, the Commission repeatedly and consistently stated in unequivocal terms that the smoking and health issue is controversial, and that any presentation of the issue is subject to the fairness doctrine. Thus, in its 1967 rulings applying the fairness doctrine to cigarette advertising the Commission said:

> "We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this *controversial issue of public importance*—that however enjoyable, such smoking may be a hazard to the smoker's health." Letter to Television Station WCBS-TV, New York, New York, 9 P & F Radio Reg. 2d 1423, 1424 (1967).

* * * * * * *

> "[H]ere *the controversial issue* posed is one of health hazard. . . ." *Applicability of the Fairness Doctrine to Cigarette Advertising, supra* 9 F.C.C. 2d at 941.

In its brief filed in 1968 with the Court of Appeals in support of its cigarette advertising decision, the Commission said:

> "We believe that all parties would agree, however, that a *public controversy of major dimensions presently surrounds the subject of cigarette smoking.*" Brief of Appellee, p. 15, *Banzhaf* v. *FCC*, 405 F. 2d 1082 (D.C. Cir. 1968).[16]

These views were reiterated by the Commission's Chairman in the recent Congressional hearings which resulted in enactment of the Public Health Cigarette Smoking Act of 1969, Public Law 91-222, 84 Stat. 87 (1970). Chairman Hyde, testifying on behalf of the Commission before the Consumer Subcommittee of the Senate Commerce Committee, clearly stated that, after cigarette advertising went off the air, the fairness doctrine would require a balanced presentation of the issue:

> "Senator Moss. Something was said this morning about there might be a turnaround of the fairness doctrine the other way; that in the event there were a number of these educational, antismoking showings, that perhaps there ought to be a right of the tobacco industry to come in the fairness doctrine and state its pro side over again.
>
> "What is your response to that?
>
> "Mr. Hyde. *There may well be an advantage in that, Senator.* Let me explain. The fairness doctrine in principle holds that the public is entitled to hear both sides of the proposition or both sides of the issue which is controversial, and affects the public interest.

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[16] It is noteworthy that John Banzhaf and ASH—the principal proponents of the 1967 fairness doctrine ruling on cigarette advertising—acknowledged the controversial nature of the smoking and health issue in papers filed by them with the Commission in this proceeding. In their "Petition for Rule Making," filed on October 13, 1970, they stated:

> "Could one possibly find—particularly in the absence of any testimony or evidence—that this issue is no longer controversial or of public importance." (Record, p. 15.)

Similarly, in comments filed in response to the "Notice of Inquiry," Banzhaf and ASH noted that a finding that the smoking issue is no longer controversial "would be clearly contrary to fact and logic." (Record, p. 148.)

> "Now, it is quite possible that, if a station carries an anticigarette smoking presentation, that more attention could be attracted to that presentation if you had the other side of the argument available at the same time.
>
> *"What I am suggesting is that a good, sharp argument might attract more attention than a presentation of simply one side of the issue.*
>
> "Senator Moss. For that reason you wouldn't necessarily oppose the statement of the pro side if the anti side was permitted to continue?
>
> "Mr. Hyde. That is right. But let me indicate how this operates.
>
> "The fairness doctrine says that if a station presents one side of . . . a controversial issue of public importance, they must provide some reasonable opportunity for the presentation of other viewpoints.
>
> "Now, assuming there is no cigarette advertising as such, but simply a presentation of what we might classify as an educational presentation to discourage the use of a product which the Surgeon General has found harmful to health. *In that situation fairness would require that there be some reasonable opportunity for the presentation of the other viewpoint as long as this remains in controversy.*" *Hearings on H.R. 6543 Before the Consumer Subcommittee of the Senate Commerce Committee*, 91st Cong., 1st Sess., p. 160 (1969).

Chairman Hyde repeated this view during a colloquy with Senator Cotton:

> "I presume that if the matter comes up in the context of an educational program warning the public about the hazards of cigarette smoking, that *then any demands for opportunities to present the opposing viewpoint would be handled in somewhat the same way, that a spokesman for the other point of view would be given some reasonable opportunity*, but not necessarily equal time." *Id.* at 162.

Chairman Hyde was equally explicit on this point in his testimony before the House Commerce Committee, as is shown by the following colloquy:

> "Mr. Friedel. If we were to ban advertising of cigarettes, should we then also ban anticigarette warnings under the application of the fairness doctrine?
>
> "Mr. Hyde. No, I believe not. If we were to ban the advertising of cigarettes on radio and TV, it would still be appropriate for a station to, as a public service, carry information about the health hazard involved in the use of cigarettes, and *if they did that, they would be subject, under the fairness doctrine, to the duty of making some reasonable provision for the presentation of the other side of the argument.* This would not be in the form of advertising. It could be in the discussion of the issue by persons who would have a different viewpoint." *Hearings on H.R. 643 Before the House Committee on Interstate and Foreign Commerce*, 91st Cong., 1st Sess., p. 209 (1969).

The Commission Chairman further stated:

> "Mr. Watson. Now as I understood earlier, you stated that even if your proposed ban should become effective, that you would still want the stations to carry the public service advertisements against smoking.
>
> "Did I understand you correctly?
>
> "Mr. Hyde. I think I said that they might very well carry such materials as the public service, and that *if they did, they would be required under the fairness doctrine to provide some appropriate opportunity for the discussion of the other side of the issue.*" *Id.* at 226.

In sum, it is beyond dispute that prior to the instant decision, it was the Commission's position, repeatedly reiterated, that (i) smoking and health is a controversial issue of public importance, and (ii) that a broadcast licensee who presents one side of this issue is required by the fairness doctrine to present a contrasting view.

(b) In its "Report and Order", the Commission's stated basis for repudiating its own precedents and pronouncements is that "the general issue of smoking being a health hazard is no longer controversial" and that a judgment of a broadcaster to this effect will not be set aside by the Commission as "unreasonable." (J.A. 8.) As we have just shown, the foregoing conclusion is inconsistent with numerous Commission statements. The arguments advanced by the Commission for the sudden turn-about in its views will not survive scrutiny.

First, in support of its conclusion that smoking and health has ceased to be a controversial issue, the Commission stated that "there have been most significant developments since the Surgeon General's 1964 Report which touched off a substantial controversy." (J.A. 8.) The first of these "developments" cited by the

Commission was various studies on cigarette smoking which had been reported to Congress in 1967, 1968, and 1969 by the Department of Health, Education, and Welfare in compliance with the provisions of the 1965 Federal Cigarette Labeling and Advertising Act.[17] (J.A. 8.) The short answer is that the 1967 and 1968 HEW reports were public knowledge prior to the Commission's representations to Congress in 1969 that smoking and health is a controversial issue to which the fairness doctrine applies. There is no suggestion in the Commission's decision that the 1969 HEW report made any dramatic change in the state of knowledge on the smoking and health controversy. Moreover, the three HEW reports cannot be cited to support silencing debate since they were themselves the subject of heated controversy.

A report by the House Committee on Interstate and Foreign Commerce—the governmental body to whom HEW was required by law to submit these three reports—demonstrates that Congress did not believe there had been any "significant developments" since 1964 establishing the proposition that smoking is hazardous to health beyond reasonable dissent and dispute. In 1969, that Committee held extensive hearings on bills which, as modified, were enacted as the Public Health Cigarette Smoking Act of 1969. The Committee stated in its report:

> "On the basis of these hearings the committee concludes that *nothing new has been determined with respect to the relationship between cigarette smoking and human health since its hearings in 1964 and 1965. The arguments pro and con with respect to cigarettes are the same now as then,* though supported by a larger statistical base. The 1964 report of the Surgeon General's Advisory Committee on Smoking and Health remains the principal basis for efforts to regulate the labeling and advertising of cigarettes." H.R. Rep. No. 91–289, 91st Cong., 1st Sess., p. 5 (1969).

Second, as a further basis for its decision, the Commission noted that the caution notice which had appeared on cigarette packages in compliance with the 1965 Federal Cigarette Labeling and Advertising Act—"Caution: Cigarette Smoking May Be Hazardous To Your Health"—had been changed by Congress in the 1969 Act to read as follows: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health." (J.A. 8.) The Commission's conclusion that the smoking and health issue has ceased to be controversial certainly does not follow from this amendment in the phrasing of the caution notice. There is not a shred of evidence in the legislative history relating to this change which shows that Congress intended thereby to displace the fairness doctrine as it applied to the smoking and health controversy. To the contrary, Congress had been assured by the Commission Chairman that the fairness doctrine would remain operative after cigarette advertising ended.

The fact that the Surgeon General believes smoking is dangerous to health is certainly not a new "development". The Surgeon General has maintained that position since the issuance of the Report of his Advisory Committee in 1964. His statements and reports, however, are not conclusive either in fact or law on the issue of smoking and health. An active controversy continues on the relationship of smoking to health. Responsible scientists maintain that the smoking question is an "open" one and that smoking has not been proved to cause the diseases and conditions which are claimed to be statistically associated with smoking; that there has been no agent identified in cigarette smoke which, as found in smoke, has been established as causing any of the diseases claimed to be statistically associated with smoking; and that there are defects in the statistical studies which report associations between smoking and mortality or morbidity. A number of eminent physicians and scientists testified to this effect during hearings in 1969 before the House Interstate and Foreign Commerce Committee. See, *e.g.*, *Hearings on H.R. 643 Before the House Committee on Interstate and Foreign Commerce*, 91st Cong., 1st Sess., pp. 740–808, 849–92, 930–60, 1018–41, 1080–1127, 1255–71 (1969). The Surgeon General himself has recognized that not all the facts about smoking and health are known and that there is "disagreement" with his position. *Id.* at 180. Whether the Surgeon General or the scientists who disagree with him are correct is not the question. What is important is that there are responsible spokesmen with conflicting points of view, and the public has an interest in hearing differing viewpoints.

Moreover, the Commission itself has acknowledged that the Surgeon General's views do not foreclose dissent. In 1969, when the Commission proposed to issue a rule to ban cigarette broadcast advertising, it stated in its Notice of Proposed Rule Making:

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[17] Federal Cigarette Labeling and Advertising Act, § 5(d)(1), 79 Stat. 283, 15 U.S.C. § 1334(d)(1) (Supp. V, 1965–69).

> "While many health authorities now regard the matter as settled . . . [*their*] *reports obviously cannot be regarded as barring dissent thereto, or the presentation of contrary views.*" *In the Matter of Amendment of Part 73 of The Federal Communications Commission Rules With Regard to the Advertisement of Cigarettes*, 16 F.C.C. 2d 284, 291 n. 30 (1969).

Indeed, even in its present decision, the Commission acknowledged that "there can clearly be most substantial controversies" as to various "aspects" of the smoking and health issue such as "particular studies or statistics" and "'what remedial action should be taken." (J.A. 9.) The Commission ruled that "as to such aspects, the fairness doctrine would be applicable. . . ." (*Id.*) This arbitrary attempt to divide the smoking and health issue into controversial and noncontroversial "aspects" is untenable. The possible relationship of smoking to health can only be determined by reference to specific studies. The various reports of the Surgeon General which the Commission relies upon are essentially collations of a number of specific studies and statistical reports. There is sharp controversy surrounding the evidence, the methodology, and the conclusions of these studies. It is absurd to state that the conclusion that smoking is hazardous to health is *not* controversial, while the premises leading to this conclusion—the evidence, methodology, and results of the underlying studies—*are* controversial. It is apparent, we submit, that the *entire* question of the relationship of smoking and health is still embroiled in controversy.

Third, the Commission professes to find it "difficult to reconcile the cigarette industry's acquiescence in the 1969 [Congressional] ban [on cigarette broadcast advertising], with its contention here" that a broadcaster who presents anti-smoking messages should present a contrasting viewpoint. (J.A. 8-9.) There is no evidence, however, that the "cigarette industry" has ever acquiesced in a decision sanctioning the broadcast of anti-smoking messages without a corresponding duty on the part of licensees to present the other side. Indeed, the "cigarette industry," together with Congress and the general public, was led to believe, by the unambiguous representations made to Congress on behalf of the Commission by Chairman Hyde, pp. 15-18, *supra*, that after cigarette broadcast advertising ceased, the fairness doctrine would apply to any presentation of the smoking and health issue.

Finally, the Commission relied in its decision upon the following excerpt from the opinion of the Court of Appeals in *Banzhaf* v. *FCC*, *supra*, 405 F. 2d at 1103:

> "[T]he Commission did not abuse its discretion in refusing to require rebuttal time for the cigarette manufacturers. The public health rationale which supports the principal ruling would hardly justify compelling broadcasters to inform the public that smoking might *not* be dangerous. . . ." (J.A. 12; emphasis in original.)

It is true that the Commission and the Court held in *Banzhaf* that stations *that carried cigarette advertising* were not also required to present *rebuttals* to the counter-balancing anti-smoking messages they were required to broadcast. But this was based on the premise that "a licensee who has carried cigarette commercials has extensively covered one side of the issue." Letter to Metromedia, Inc., from Ben Waple, Secretary, FCC, FCC 67-1074, September 21, 1967. There was no issue before the Court of Appeals in *Banzhaf* concerning the fairness doctrine obligations of licensees who presented anti-smoking messages in a situation where there was no cigarette advertising. See *Tobacco Institute, Inc.*, 11 P & F Radio Reg. 2d 987 (1967). The Court's statement as to the *right of rebuttal* given such advertising does not in any way support the conclusion that the *right of reply* to anti-smoking messages is to be denied in the absence of such advertising.

The Court of Appeals' decision in *Banzhaf* does not support the Commission's ruling in the instant matter. To the contrary, the logic of the opinion in *Banzhaf* is that both sides must be granted an opportunity to present their point of view to the public. If the cigarette advertising considered in *Banzhaf* obligated licensees to broadcast the anti-smoking side of the issue, the converse must also be true: the broadcast of anti-smoking messages, absent advertising, creates a correlative duty to present the other side.

The Commission did not enunciate any valid basis for rejecting all its prior rulings and statements that smoking and health is a controversial issue subject to the fairness doctrine. We submit that it remains a controversial issue. There is no basis for finding that this issue is so settled as to render the fairness doctrine inapplicable.

III. The Commission's Ruling Violates the First Amendment and Section 326 of the Communications Act.

The fairness doctrine is rooted in the First Amendment. As the Commission recently stated:

> "[W]e remain firmly convinced that the fairness doctrine *is* workable and does promote robust, wideopen debate. Again, no extended discussion is needed on this score, in light of the *Red Lion* opinion, where the [Supreme] Court indicated that *the fairness doctrine is not only constitutional but may well be constitutionally required . . . ." In re Complaints of Committee for the Fair Broadcasting of Controversial Issues, supra,* 25 F.C.C. 2d at 292. (The word "is" italicized in original.)

In *Red Lion Broadcasting Co., supra,* the Court, in discussing the relationship of the fairness doctrine to the First Amendment, stated:

> "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . . It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." 395 U.S. at 390.[18]

We submit that in the present case the Commission has overstepped the limits imposed by the First Amendment in two respects:

First, as the Supreme Court pointed out in *Red Lion,* Commission action in the fairness doctrine area could conflict with the constitutional guarantee of free speech if it involved "a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves. . . ." 395 U.S. at 396. Before January 2, 1971, a station which carried cigarette commercials was required to present anti-smoking messages in order to inform "its audience of the other side of this controversial issue of public importance. . . ." Letter to Television Station WCBS-TV, *supra,* 9 P & F Radio Reg. 2d at 1424. Commencing January 2, 1971, a station which carries anti-smoking messages has not been required to inform "its audience of the other side." The Commission insisted on balanced treatment of the smoking and health issue before January 2, 1971; it responded to the demands of anti-smoking critics that their views should be presented. However, since January 2, 1971, the Commission has not required balanced presentation, and it has rejected the contention that the opposing views, including those expressed by eminent scientists and physicians, are also entitled to be presented. This one-sided administration of the fairness doctrine blockades the public's right to hear a balanced presentation on this controversy.

Second, in its decision in the present case, the Commission cautioned broadcasters that "the question whether the licensee who fails to treat this subject [*i.e.,* a licensee who does not carry anti-smoking messages] has served the public is one which can be definitively assessed only at renewal time when the licensee's *overall* public service performance effort is evaluated." (J.A. 17; emphasis in original.) This is a thinly veiled warning to licensees that they must broadcast "the official government view" on the smoking issue and that failure to do so will prejudice applications for renewal of their licenses to broadcast.[19] See *Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 396.

Let it be assumed, for purposes of discussion, that there are some transcendent issues confronting a community to which the Commission may require a broadcaster to devote time. It does not follow that the Commission may properly insist that one side of such issues be presented without requiring that the opposing view be afforded opportunity for expression. Governmental compulsion to present one point of view infringes free speech no less than censorship. This is especially true where compulsion is exerted to require dissemination of the "official government view"—in the present case, the view of the Surgeon General. It is the purpose of the First Amendment to protect the public against the propagation by mass media of an official government stand on any issue.

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[18] The Supreme Court has consistently stressed that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ." *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945). See, *e.g., Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967); *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964).

[19] The Communications Act of 1934 prohibits broadcasting by any person unless he has been licensed by the FCC. Section 301, 48 Stat. 1081, 47 U.S.C. § 301. Licenses can be issued or renewed for a period of not more than three years. Section 307(d), 48 Stat. 1083, as amended, 47 U.S.C. § 307(d). The statutory standard to be applied in determining whether initially to grant or renew a license is "the public interest, convenience, and necessity." Section 309(a), 48 Stat. 1085, 47 U.S.C. § 309(a). In considering whether to ren a license, the FCC reviews a licensee's past performance. This life or death power over enterprise effectively compels a broadcast licensee to adhere closely in his operations the view of the public interest expressed by the Commission.

The Commission is expressly prohibited by Section 326 of the Communications Act from exercising the "power of censorship" and from interfering with "the right of free speech" on the airwaves. Communications Act of 1934, as amended, 62 Stat. 862 (1948), 47 U.S.C. § 326. The Commission cannot permit its own views as to the "social value" of programs or issues to govern its interpretation of the public interest. *FCC* v. *American Broadcasting Co.*, 347 U.S. 284, 297 (1954). Nor can the Commission prevent the utterance on the air of statements it considers erroneous or offensive. *Anti-Defamation League of B'nai B'rith* v. *FCC*, 403 F.2d 169 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969).[20] To the contrary, the Commission is under an affirmative duty to ensure that broadcasters "afford reasonable opportunity for the discussion of conflicting views on issues of public importance." Communications Act of 1934, § 315(a), as amended, 73 Stat. 557 (1959), 47 U.S.C. § 315(a). The ruling in the present case violates this obligation.

IV. The Commission's Ruling Is Arbitrary and Capricious.

As we have discussed, the Commission's decision in the present case cannot be reconciled either with its prior fairness doctrine decisions generally or with its precedents and pronouncements concerning the obligations of broadcast licensees in connection with the smoking and health controversy. The Commission attempted to brush aside all of its previous rulings and statements by asserting: "[W]e believe that little is gained here by citation of previous Commission rulings or by references to past testimony before the Congress." (J.A. 7.) We submit, however, that precedents and prior representations cannot be so readily dismissed.

It is, of course, basic that an administrative agency cannot adopt special, *ad hoc* rules good for only one case. As Judge Brown of the Fifth Circuit has put it:

> "[L]aw does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case." *Mary Carter Paint Co.* v. *FTC*, 333 F. 2d 654, 660 (5th Cir. 1964) (concurring opinion), *rev'd on other grounds*, 382 U.S. 46 (1965).

See also *City of Chicago* v. *FPC*, 385 F.2d 629 (D.C. Cir. 1967), *cert. denied sub nom. Public Serv. Comm'n of Wisconsin* v. *FPC*, 390 U.S. 945 (1968).

In *NLRB* v. *Pittsburgh Plate Glass Co.*, 270 F. 2d 167 (4th Cir. 1959), *cert. denied*, 361 U.S. 943 (1960), this Court applied this principle to inconsistent rules applied by the NLRB to craft representation and held that objective standards had to be applied to parties similarly situated, unless the agency could clearly set forth a basis for the deviation from those standards. The Court said:

> "Conceivably such a decision could be justified by the circumstances of a given case, but in this instance it must be condemned as discriminatory, in view of the conflicting policy and action of the Board . . . under precisely similar circumstances in certain selected fields." 270 F.2d at 174.

The FCC is, of course, subject to the requirement that standards must be consistently and evenly applied. *Melody Music, Inc.* v. *FCC*, 345 F.2d 730 (D.C. Cir. 1965); *Hall* v. *FCC*, 237 F.2d 567 (D.C. Cir. 1956).

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[20] In its opinion in the cited case, the Commission clearly recognized the restrictions imposed upon it:

> "Individual Commissioners joining in this opinion have the strongest personal feelings against the views represented by the assailed broadcasts . . . but believe that *the action of the Commission must be governed by legal principles rather than the personal feelings* of the Commissioners. . . .
>
> "The Commission has long held that its function is not to judge the merit, wisdom, or accuracy of any broadcast discussion or commentary but to insure that all viewpoints are given fair and equal opportunity for expression and that controverted allegations are balanced by the presentation of opposing viewpoints. . . .
>
> "In broadcasting it is required that controverted or controversial matters be subject to fair and adequate opportunities for reply by those of differing viewpoints." *In the Matter of Complaint of Anti-Defamation League of B'nai B'rith Against Station KTYM, Inglewood, Calif.*, 4 F.C.C. 2d 190-92 (1966).

It is also axiomatic that an administrative agency must "articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination." *Greater Boston Television Corp.* v. *FCC*, D.C. Cir., No. 17,785, Nov. 13, 1970, slip opinion, pp. 17–18.

The foregoing principles were violated here.

First, the Commission did not express any objective standard for determining when an issue may be deemed noncontroversial within the meaning of the fairness doctrine.

Second, the Commission did not adequately explain why an issue it had consistently held to be controversial was suddenly to be consigned to the "noncontroversial" category.

Third, the Commission did not explain why the public is not entitled to hear contrasting views on the smoking and health issue although the public must hear both sides of such issues as the nutritive value of white bread and the use of high potency vitamins.

The Commission in this case has abandoned the neutral position which it is required to take with respect to the merits of controversial public issues, although it has previously recognized that it is not the "proper arbiter of scientific and medical issue[s]." See *Banzhaf* v. *FCC*, *supra*, 405 F.2d at 1097–98 n. 64. The Commission, of course, has no scientific expertise which qualifies it to pass upon the medical, statistical, and other scientific aspects of the smoking and health controversy. Nevertheless, the Commission has decided, in effect, that the anti-smoking argument is "right," and that the public therefore need not be exposed to a conflicting view.

The Commission cannot allow its own whim to govern the resolution of this important question essential to the application of the fairness doctrine but must apply "general standards . . . without unreasonable discrimination." *Greater Boston Television Corp.* v *FCC*, *supra* at 17–18. If the Commission deviates from its own standards it must show why this is relevant "to the purposes of the Federal Communications Act." *Melody Music, Inc.* v. *FCC*, *supra*, 345 F.2d at 733. The Commission has failed in its responsibility to articulate and apply neutral standards in application of the fairness doctrine, and its decision is invalid on this ground.

CONCLUSION

For the foregoing reasons, the ruling of the Commission under review should be declared unlawful and invalid.

Respectfully submitted.

ABE KRASH,
DANIEL A. REZNECK,
JEROME I. CHAPMAN,
STEPHEN M. SACKS,
Arnold & Porter
1229 Nineteenth St., N.W.
Washington, D.C. 20036

Attorneys for Petitioners Larus & Brother Company, Inc., t/a The House of Edgeworth; Philip Morris Incorporated; and R. J. Reynolds Tobacco Company; and for Intervenors The Tobacco Institute, Inc.; American Brands, Inc.; Brown & Williamson Tobacco Corp.; Liggett & Myers Incorporated; Lorillard, a Division of Loew's Theatres, Inc.; Stephano Brothers; and United States Tobacco Company.

[Appendix A]

Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 73 Stat. 557 (1959), 47 U.S.C. § 315(a), provides:

> "(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have n power of censorship over the material broadcast under the provisions of th

section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

> "(1) bona fide newscast,
>
> "(2) bona fide news interview,
>
> "(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> "(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

shall not be deemed to be use of a broadcasting station within the meanings of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Section 326 of the Communications Act of 1934, 48 Stat. 1091, as amended, 62 Stat. 862 (1948), 47 U.S.C. § 326, provides:

> "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

Section 6 of the Public Health Cigarette Smoking Act of 1969, Public Law 91-222, 84 Stat. 89 (1970) provides:

> "After January 1, 1971, it shall be unlawful to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."

[Appendix B]

November 2, 1967

8330-S
C9-1304

AIR MAIL

Mr. Larry Jonas,
KBCM-FM
2895 Hilyard
Eugene, Oreg. 97405

Dear Mr. Jonas:

This refers to your letter of September 25, 1967, wherein you advise us that you do not broadcast tobacco advertisements but do broadcast warnings as to the effect of smoking on health. As you have a request for broadcast time to present the other side of the controversy—material proposed by proponents of smoking—you inquire concerning your obligations under the fairness doctrine.

The Commission has recognized that there is a controversial issue of public importance involved here—the possible effect of cigarette smoking on health. Thus the fairness doctrine is applicable. The initial judgment, as you have noted, as to whether the presentation of material regarding cigarettes is in the public interest is one for the licensee to make. (See also the Commission's Public Notice of September 8, 1967, paragraph 64.) However, having presented a view on the issue, the licensee may not prevent the presentation of opposing views on the ground he personally does not believe them to be in the public interest. Rather, the Commission is of the view that when a reasonable opportunity is afforded for the presentation of opposing views on an issue of public importance, so that all facts relating to the controversy are exposed, the public will have the benefit of full information concerning it. This position was set forth in paragraph 6 of the 1949 Editorializing Report:

> "And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning those vital and often controversial issues which are held by the various groups which make up the community. It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast

licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting."

We wish to make clear, however, that it is up to the licensee to make a good faith reasonable judgment as to what is required based on all of the facts. Thus, in the circumstance here, he must determine whether, taking into account all of the programming on his station over a considerable period of time (e.g., advertising, news, public affairs, etc.) and his future plans, there has been, or will be, a reasonable balance between pro-smoking and anti-smoking points of view. As you know, equal time is not required in the fairness area. If the licensee makes a bona fide judgment that one side has not received a reasonable amount of time, he has discretion to decide whether he wishes to present information concerning the other side of the controversy himself, or if not, to choose an appropriate spokesman and the format (e.g., forum discussions, short talk programs, news coverage, etc.). Your attention is further called to Questions and Answers 12–16 in the enclosed fairness doctrine "Primer."

We hope this will help to explain your obligations with respect to this matter.

Very truly yours,

BEN F. WAPLE.
Secretary.

(Enclosure.)

MISCELLANEOUS

U.S. SENATE,
COMMITTEE OF THE JUDICIARY,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,
Washington, D.C.

DEAR ———: The Subcommittee on Constitutional Rights is undertaking a broad study of the state of freedom of the press in America. Recent developments, including the subpoenaing of journalists by grand juries and Congressional Committees, efforts to secure injunctions against certain newspapers, the use of assumed press credentials for investigative "covers", and new fears about the use of broadcast licensing for intimidation and censorship, have brought into sharp relief existing concern about the relationship between government and the press. In my judgment, these events underline the importance of a comprehensive and thoughtful Congressional examination of the meaning and vitality of the free press in contemporary America.

In this connection, I am writing to you and other persons who have an appreciation for these matters for suggestions as to the issues and problems to which the Subcommittee should direct its attention. Your suggestions will enable the Subcommittee's study to reflect a broad range of views and interests. They will be especially important as the Subcommittee looks to hearings on this subject later this year.

The Subcommittee is concerned with the application of the First Amendment to both the printed press and the broadcast press. We are interested in the relationship between all three branches of the government and the press. In discovering the problems and defining the issues, we intend to examine legislative and other proposals for resolving the conflicts which have emerged in recent years. Preserving the principle and renewing the spirit of the First Amendment is the Subcommittee's paramount concern. A greater public appreciation for the role of a free press in a democratic society is the Subcommittee's ultimate goal.

I am certain that your suggestions will be helpful to the Subcommittee as it undertakes this study of what I believe to be one of the critical constitutional dilemmas of our day.

With kindest wishes,

Sincerely yours,

SAM J. ERVIN, Jr.,
Chairman.

AUGUST 2, 1971.

Hon. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: Dean Wayne Danielson, president of the Association for Education in Journalism, asked me to write directly to you about your study of freedom of the press. You wrote to him on July 20 soliciting comment on your plan for hearings.

I was in residence at the Brookings Institution, Washington, in 1965–66 when you and your staff studied Free Press and Fair Trial and had several contacts with Mr. Baskir and members of the committee staff. On the basis of this earlier observation, I feel that any study of freedom of the press you make is likely to be of considerable importance. For that reason, I set forth here some ideas that I hope will be useful. I must make clear that these ideas are personal and do not at this time represent the views of Dean Danielson or of the AEJ executive committee members.

RATIONALE

Your statement of purpose is thoughtfully considerate of the institutions of self government, as they deserve, and I hope in this letter to follow your excellent example.

The subject of press freedom is rendered unnecessarily tender, however, by the convention that the government really is out of bounds when it discusses the topic in a meaningful way. The convention seems to mean that although the government has a deep obligation to see that conditions favor freedom of the press, and therefore self-government, it may take little or no corrective action without the consent of the press. For its part, the press is such an amorphous institution that we can't really tell who speaks for it.

It is not as if nothing in the public interest needs to be done; instead, it is as if no matter what should be done, the government should not do it.

For this reason, it seems to me that your committee might properly consider, quite early, the kind of instrument it deems appropriate, in the circumstances, for carrying on work that clearly needs to be done. Should the instrument chosen be supported by public funds but placed legally beyond the control of any agency of government? If so, how can it also be protected from undue influence by private agencies and individuals? Should it be quasi-public? Or private? Should it cross the jurisdictional and interest lines of several committees or joint committees of the Congress?

And, in any case, as you observe, what should be its terms of reference? At the very least, given existing conditions, I think those terms should be broad and deep enough to enable the staff to get to the bottom of the major problems.

PROBLEM AREAS

What are the major problem areas? The following is my preliminary effort at describing them:

I

What are the physical dimensions of the tasks assigned by our society to the private and quasi-public agencies of mass communication? Are these agencies able, as presently organized and managed, to assemble and use the physical resources necessary to perform the minimum of services necessary for self-government? What problems of industrial and machine design, manpower supply, and distribution facilities block or impede realization of these minimum goals? What changes or improvements in physical resources and arrangements are necessary for realization of these minimum goals?

II

To what extent do the newsgathering agencies, the press associations and syndicates, the radio and television network news and special events departments, at home and abroad, meet the minimum goals of providing information for our self-governing community?

III

What are the goals and performance standards of the news and editorial personnel in the mass media? Are the conditions of collegiate instruction in journalism for print and broadcast media adequate for these standards? Do these conditions enable the media to recruit the needed minimum number of specialist and generalist employees?

IV

How does modern journalism arrive at its internal goals and standards? How are these goals articulated and propagated? Is there a sense of professional cohesion within journalism? If such professional cohesion exists, is it formal or informal? If informal, that is, unorganized, who are the "movers and shakers" in journalism and what is the internal process by which they communicate with the professional and quasi-professional news workers in the media? Would a press or communications council help meet the minimum needs of communication for self-government? If so, could such a council serve, in addition to its other duties, as an unofficial and impartial referee in disputes between government agencies and the press over matters of access to news of importance to self-government?

V

What are the barriers, inside and outside government, to the flow of information necessary to self-government? How can these barriers be modified or removed?

VI

Is the advertising industry an adequate physical support basis, or partial support basis, for the mass media at the present time and in the development of the news media, such as cable television and computers? If not, to what extent will supplementary support be necessary for the full development of present and news media and how can this support be made available?

Trusting that these suggestions will be found useful, I am,

Cordially yours,

J. EDWARD GERALD,
Professor, University of Minnesota, School of Journalism.

OUTDOOR ADVERTISING ASSOCIATION OF AMERICA INC.,
Washington, D.C., February 15, 1972.

Hon. SAM J. ERVIN, Jr.,
Old Senate Office Building, U.S. Capitol,
Washington, D.C.

DEAR SENATOR ERVIN: It has come to my attention that your Subcommittee on Constitutional Rights of the Senate Judiciary Committee is investigating freedom of the press and government interference. Although I understand it is not the prime purpose of the investigation, it has been reported that some attention has been given to the application of the First Amendment to advertising.

If this should be a matter for consideration by the Subcommittee, I want to call your attention to the fact that outdoor advertising is one of the major media. The standardized industry which we represent, consisting of 500 individuals and companies operating in 10,000 markets, carries not only product, service and place advertising, but also carries political advertising of candidates and issues and editorial comment in the nature of public service messages relating to various subjects, such as drug abuse, charities, public health, religion, traffic safety and many others.

Outdoor advertising is also one of the most highly regulated media. It is subject not only to the general advertising content regulations of the F.T.C., but is regulated as to area of placement, size, spacing and lighting by the Highway Beautification Act of 1965 and state implementing laws. It is also regulated at the local level by zoning authorities and in some instances attempts have been made to totally ban the medium contrary to the First, Fifth and Fourteenth Amendments to the Constitution.

Although we recognize that freedom of the press does not prohibit all regulation and although we fully support reasonable regulation, we feel that in many instances our constitutional rights as one of the major media have been infringed upon.

If the Committee is to concern itself with these matters with respect to television, radio, newspapers and magazines, we do not want the government interference in our industry and the application of the First Amendment to be overlooked with respect to our medium.

Your consideration is greatly appreciated.

With highest esteem, I am

Respectfully,

HARRISON LEWIS

NEWSPAPER GUILD OF MADISON,
Madison, Wis., October 25, 1971.

Hon. SAM J. ERVIN,
Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SEN. ERVIN: I am responding to your letter of Sept. 22 regarding the constitutional and practical problems surrounding freedom of the press. I am taking the liberty of discussing the issue broadly, providing more than the specifics of the press card question which you mentioned.

At the outset I warn you of my prejudice. I believe that collective bargaining or collective action by concerned newsmen may solve many of the problems.

What then, you ask, are the press problems facing a middle-sized city in middle America? Those problems include press issuing credentials, authorities selectively recognizing those who carry equal credentials, authorities harassing reporters with threats if they do not turn over information, and publishers who accede to the whims of political figures.

Perhaps a greater issue is that of press freedom "for whom?" Newspaper economics tend to make press freedom a privilege for the very rich. How then does the average reporter or the poor man (which may be redundant) gain access to "freedom of the press?"

Let me explain how the Madison Newspaper Guild, a union of 50 members, is attempting to attack these problems.

The Columbia Journalism Review briefly mentioned our deliberate destruction of the police press cards. Allow me to background that incident. In the past the Madison police department had issued newsmen's "permits" signed by the chief. Our members complained to management, and they were able to convince the police to withdraw the word "permit" from the press cards.

However, the management of The Capital Times continued to provide its reporters with press cards signed by the chief of police. The student-police riots which engulfed this city periodically in the last four years produced civic uneasiness and changed press relations.

Many police did not allow reporters and photographers with authorized credentials signed by the chief to cross their lines. Young people on the other side were suspect of newsmen carrying credentials *signed* by the chief of police.

Life became particularly difficult for photographers because city and campus police turned to picture taking to attempt to improve their conviction rate. Riot reaction to persons carrying cameras became so difficult that in one instance Guild photographers as a body refused to go out and cover a riot. Management apparently agreed with the danger of the situation as no photographer was penalized.

This set the stage for Guild action on the press cards. The Guild, without dissent, voted to turn in their police press cards to me. As president I chopped them up in full view of management and dropped the remains on the city editor's desk.

Management responded with press cards signed only by company officials. They also carried the union "bug." The Guild was pleased but the union was prepared to authorize its own credentials signed by union officers if management had not acted.

Several of our reporters have faced threats of imprisonment from federal officials who were seeking information related to news stories. Let me relate their stories as they have relayed them to me.

The federal attorney for Western Wisconsin pointedly advised James Hougan of our union, on at least two occasions, that he would be jailed for obstructing a federal investigation if it were determined that he was withholding information about the 1970 bombing of a University of Wisconsin building. Hougan told U.S. Atty. John Olson that any information he had was contained in the printed news stories, adding that he would not "repeat gossip or data which could not be substantiated."

Hougan and David Wagner who also covered the story believed that the threat was a "thinly-veiled threat designed to force us into gathering information for authorities while acting in our roles as reporters."

They also report that following Olson's warning FBI agents came to the editorial offices to question them. They said the agents were polite but firm in their insistance that interviews be granted despite the reporters' pleas that they did not want to discuss the case with federal investigators since they believe "our news sources are our own." They told the FBI that their job was to inform the public, adding that that role would be compromised if they were forced to be "informers."

They spoke to the FBI agents and repeatedly declined to discuss such things as the personal habits of a local underground editor, that editor's news judgment or his friends. Hougan and Wagner felt that the FBI action was harassment and could tend to raise doubts in their superiors' minds about them.

That underground editor served 4½ months in jail for refusing to tell a grand jury investigating the bombing about the sources of a news story related to the bombing. He spent that time in jail for refusing to tell how he received a message from the so-called "New Year's Day Gang" which took credit for the bombing. That imprisonment came despite the fact that a federal grand jury had returned indictments against four young men for the bombing.

However, law enforcement officials are not the only ones working against the public's right to know and freedom of the press. Political figures and publishers work their own kind of "magic" in this area.

One of our reporters stumbled across a meeting between Gov. Patrick Lucey and members of the state's boards of regents. The reporter was asked by the governor's executive secretary to stay away from the meeting. Supported by his city editor, the reporter declined the request. Then the political aide asked the publisher to intervene and the reporter was ordered to stay away from the meeting.

As Guild president I registered a strong objection to the governor's aide. I told him that similar actions helped America sink into the Vietnam morass. He replied that he would do it again if he ever had the chance.

Later I was removed from coverage of the same issue—merger of the state's two collegiate systems—allegedly because of news stories which hurt the governor's position. The Guild is studying action in this case.

My greatest concern is not my situation but rather than of society. The Madison situation has shown that a publisher has unlimited power to determine what appears as news. He has the ultimate authority to determine even which "letters to the editors" get into the newspaper.

"Freedom of the press" is his alone. Congress can make no laws abridging this absolute freedom. Nor should it. The working men and women of the press, I believe, can do something about it. The journalism reviews which have sprouted are small ways to brake an uncontrolled engine riding the press freedom rails.

The Madison Guild is seeking another switch on this important road. In current negotiations we are seeking the right for any staff member to have an 800-word column printed *UNCHANGED* on the editorial page. We are willing to have it reviewed for libel and postal regulations. And we are willing to provide 72 hours notice for production problems.

What we are not ready to give up is the concept that the whim of a publisher can kill an idea because it is unpleasant to him.

Collective bargaining is perhaps the only way to achieve a brake on this whim. As you can imagine the publisher is having fits over the suggestion that he share freedom of the press with anyone.

Freedom of the press, after all, is the freedom to express varying ideas. Publishers privately and publicly brag that they are not frightened by Presidents or Senators. We think that they should not be afraid of ideas either.

MATTHEW A. POMMER,
President.
(For the Guild).

THE WHITE HOUSE,
Washington, D.C., September 21, 1971.

Hon. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: In response to your letter of September 16, 1971 requesting me to appear before your Subcommittee on September 29, 1971, I wish to advise you that, as a member of the immediate staff of the President, I must respectfully decline the invitation to testify.

Sincerely,

HERBERT G. KLEIN,
Director of Communications for the Executive Branch

WRAL–TV VIEWPOINT

AN EDITORIAL EXPRESSION OF THE VOICE OF FREE ENTERPRISE IN RALEIGH-DURHAM

(Jesse Helms, Executive Vice President and Vice Chairman of the Board)

A Senate subcommittee headed by North Carolina's senior U.S. Senator, Sam J. Ervin, Jr., is beginning a study of whether freedom of speech is being eroded in America. A letter of inquiry, bearing the Senator's signature, has been dispatched to several hundred representatives of the news media, and to other citizens as well. We suspect the Senator will receive plenty of mournful complaints that the First Amendment is indeed being abridged.

The Senator would be well advised to take most of such declarations with a grain of salt, or maybe a whole shaker full of it. It is not difficult to imagine, for example, that CBS will step forward, with a pious air of injured innocence, protesting that its rights were invaded by a Congressional inquiry disclosing the network's practice of distorting the news. And, of course, the whole leftwing crowd has been baying like hounds at Vice President Agnew because Mr. Agnew has refused to roll over and play dead for the major news media.

But if the Senator's committee wants to get its teeth into an obvious abridgement of the First Amendment, it ought to assign an investigator to look into a recent action taken by a federal judge down in Alabama.

Let's first circle the wagons, and get the background in perspective. For several years now, there has been a concerted campaign to ban all public renditions of the song, "Dixie." In school after school, in state after state, school authorities have yielded to demands that "Dixie" is never—never—to be played by school bands or sung by school choruses. Up to now, the melody had not been outlawed. But the federal judge in Alabama has made it *against the law!* Anybody who hums that old refrain about the land of cotton now risks being in a heap of trouble.

Funny thing about "Dixie." It was written by a Negro—and a resident of Ohio, at that—named Daniel Decatur Emmett. He wrote it for a minstrel show, and its original title was "Hurrah Song." It was one of President Lincoln's favorite tunes, and on April 10, 1865, Mr. Lincoln directed that it be played at a function at the White House.

In recent years, it has been claimed that "Dixie" is "racist," and that it is a symbol of the Confederacy and therefore a sort of advocacy of slavery. Those who make such assertions demonstrate their ignorance of history. The federal judge in Alabama fell into line with the ignorance. Of all people, he should be aware that the War Between the States was fought over tariffs and the right of secession—not slavery.

But, even so, where—under the First Amendment—did the judge find the power, and *lawful* power, to limit the free speech of those desiring to sing or play "Dixie" in public—at football games, in parades, etc.? He didn't *find* it; he *manufactured* it! Not only that, he also outlawed the display of the Confederate flag, and the use of "any other symbols, regalia or indicia of the Southern Confederacy" at any school function in Huntsville, Alabama!

We raise the question of free speech in this matter because Senator Ervin's subcommittee has raised it in general. It appears, frankly, that free speech yet survives only among a carefully selected and favored group. The federal courts have declared that mobs of hippies can desecrate the American flag as a part of their "freedom of speech." Demonstrators have been declared within the law—by federal judges—when they shout obscenities in public.

But in Huntsville, Alabama, the school band cannot play "Dixie," and nobody can wave a Confederate flag. It is a depressing delineation of freedom of speech. The cheer leaders in Huntsville don't have it, but the anti-American mobs in the streets do. Senator Ervin's subcommittee might well begin its investigation in the office of a federal judge who obviously misunderstands the intent of the First Amendment as badly as he does the history of the South—and the origin of "Dixie."

OCTOBER 6, 1971.

[From the Washington Post, Aug. 19, 1971]

The News Business—WHERE AND WHAT IS "THE POWER OF THE PRESS"?

(By Richard Harwood)

Bernard Nossiter of our staff noted in a book review the other day that "the subject of power in American life . . . is essentially a mystery." He was talking about Rockefellers, duPonts, General Motors, etc.—the "power elite." He could have been more parochial about it, however, because the subject of power is one of the great mysteries in relation to our own business. Who runs the newspapers? For whom do we sing our songs at suppertime?

A popular theory (you even hear it in newsrooms) has it that newspapers are peculiarly vulnerable economic enterprises that are easily manipulated by the advertisers that keep them alive. On the face of it, this is not a bad theory.

Consider The Washington Post. This newspaper last year had revenues of about $77 million and profits of about $9 million. Only $13 million of the income came from our readers and that wasn't enough to pay the cost (more than $20 million) of the blank paper we consumed. It was the advertisers who kept us alive and prosperous; they spent $64 million for space in The Washington Post last year. Without their dollars we could not survive in our present form and that is true of every daily newspaper in America. Thus, if your mind works in a certain way, it is easy to arrive at the following ipso facto: advertisers have the ultimate power of the purse; either we dance to their tune or they cut off our bread and wine. They have made us, one scholar has said, "the cultural arm of American industry."

Statements of that sort evoke a specific vision of Big Oil, Big Steel, Big Autos and Big Banks using their advertising millions to shape news and editorial policies, to "turn the status quo into social law," (as another press critic has put it). Venality of this kind has occurred often enough in the history of American journalism to lend credibility to the view. It may still occur in the case of financially shaky newspapers. But as a general theory of newspaper control, it won't do.

The reason is that newspapers in the last quarter century or so have become very muscular economic units. Collectively, they are now rated the 10th largest industry in the country (in the value of shipments). Increasingly they have evolved into conglomerate corporations, buying up radio and television properties, magazines, paper companies, book publishing houses, and related businesses. And increasingly they have achieved, after fierce competitive struggles, monopolistic or near-monopolistic publishing positions in their home communities. Effective newspaper competition exists today in only 4 per cent of our large cities. Only New York, Boston and Washington have more than two newspaper ownerships.

The elimination of diverse newspaper voices may have been an unhealthy social and political development. It may have been an unhealthy economic development simply because monopolies have always been anathema in America. But it has also enabled newspapers to broaden their circulation and advertising bases to the point that they are now virtually immune to advertiser pressures or controls. No single company and no single industry now dominates newspaper advertising. The biggest corporation in the country—General Motors—spent $29.4 million on newspaper advertising last year and that represented less than half of one-percent of newspaper advertising revenues.

The major source of newspaper revenues today is thousands of local advertisers—merchants, in the main—none of whose exenditures are crucial to survival. Of the 2,500 retailers who advertise in The Washington Post, only about 20 spend as much as $100,000 a year; the largest spends $3 million.

Business Week magazine last year examined the economic structure of the newspaper industry and concluded that it would continue to draw advertisers like flies, despite television, "because newspapers . . . are the next best thing to an indispensable medium . . . Besides important local and national happenings, newspapers dish up everything from hometown job, apartment, housing, movie, theater, stock market and television listings to details on yesterday's garden club luncheon, last night's PTA meeting, and tonight's YMCA squash match, along with A&P's latest prices on sirloin and the department store's close-out bargains on minis." They win their audiences (and hence their advertisers), Business Week suggested, by selling a daily smorgasbord of information and entertainment.

Consider, again, The Washington Post. As a fully autonomous corporation it presumably could change its character overnight. For good or ill, it could eliminate its sports section, the comic strips, the amusement and feature pages, for instance, and then easily double the space devoted to "serious" affairs of state. But whether, under those circumstances, it could retain its present audience (and advertisers) is doubtful enough that no one has even been tempted to try it. (When Prince Valiant was dropped from the comics section for space reasons last Sunday the uproar from readers was such that the Prince has been declared untouchable on future Sundays).

This means that the audience exerts a very direct and palpable measure of "control" over a newspaper, in the sense that it limits our options and shapes the character and content of our product. It does not mean that every time Reader X or 100 Reader Xs disapprove of something in the paper the product is changed to meet those objections. But if 50,000 or 100,000 readers were to opt out as subscribers someone—to put it very mildly—would ask: "What are we doing wrong? How de we get them back?"

This business of audience "control" goes beyond the matter of sports pages and comic strips. It affects, also, our treatment of the news. In those forgotten times when there was a multiplicity of dailies in the large cities, it was common for newspapers to pander to particular audiences. They functioned, very often, as organs of political parties, factions or ideologies in much the way that journals like Human Events (rightwing) or the Quicksilver Times (Maoist left) do today. The rise of monopolistic newspapers in search of very large and very diverse audiences changed all that. For both practical and public service-minded reasons, newspapers began regarding themselves as having at least some aspects of a public utility and thus assumed a new responsibility to be "professional" and "fair" in their presentation of the news. A major factor in that evolution was the recognition that propaganda is very difficult to sell to a mass audience marked by political and ideological diversity.

So newspapers have become less partisan and more professional and, overall, highly profitable economic enterprises. And this success, itself, has affected the traditional power and control mechanisms by which they were run. In leaner times they resembled cottage industries in their internal structure. They tended to be projections of the personalities of forceful owners or editors. But today a large newspaper is a large corporation with all the bureaucracy and diffused authority that are characteristic of such institutions. Last year, someone asked an editor of The Post to tell him who ran the place and the editor replied: "if you find out, please let me know." His answer was not entirely facetious, one suspects, because The Washington Post is a house of many mansions, each of which is "run" by different people operating under different constraints. There are, of course, super-powers within the corporation, notably the owner Katharine Graham and her chief deputies. But if "running" a newspaper means deciding what goes in and what stays out, then The Washington Post is "run" by a host of people—reporters as well as editors—who bring to their work different standards, different interests and different points of view. Tthey are all cogs in the "control" and "power" mechanisms. They all shape its character and content within the broad constraints imposed by the diversity of the audience.

[From the News and Observer, Apr. 15, 1971]

EDITORS FACE THREAT TO PRESS FREEDOM

(By James Reston of The New York Times)

WASHINGTON.—The American Society of Newspaper Editors is in Washington again for its annual skull practice, and this year, it has some serious questions to discuss, for all news reporters and editors—radio and television even more than newspaper—are under mounting pressure from all branches of the government and from the public as well.

In the last year, the Defense Department has gone beyond the normal regulations on battlefield reporting to censor the news on the war in Laos and limit access to the primary areas of combat. Also, as the editors' freedom of information committee charged in its annual report: "Never has the subpoena been used as viciously, as irresponsibly and as often against freedom of the press as it has this (past) year."

Reporters and editors in radio and television have had even more difficult problems, for while the newspapers usually have the protection of the freedom of the press amendment to the Constitution in the courts, the networks and their affiliated stations are licensed by a government which has the power to impose its notion of "fair reporting" by threatening to withdraw a station's license.

The threats, of course, are always oblique. Thus in recent weeks, Vice President Agnew has not only been running a campaign against the Columbia Broadcasting System's program on the Defense Department's propaganda apparatus ("The Selling of the Pentagon") and demanding the right to edit his own copy on the subject over the CBS network, but the investigations subcommittee of the House Interstate and Foreign Commerce Committee has subpoenaed CBS to produce all its notes and unused film and disbursements of money on the Pentagon program.

These are issues—the radio and television as well as the newspaper subpoenas—that deserve more attention from the newspaper editors than they have been getting. Newspaper editors howl like a scalded dog whenever any government official asks to see their reporters' notes or questions their news judgment—and quite right too—but they are comparatively quiet when the vice president or committees of the Congress demand the same thing of the radio and television reporters.

This double standard could use a little more examination from the newspaper editors here this week. The basic assumption of the First Amendment was that the people in a democratic society had a better chance to get a fair presentation of the news from a multitude of free reporters than from reporters regulated by the government.

The founding fathers had no illusions about the infallibility of the press. Their comments about our stupidity, inaccuracy, and bias make Spiro Agnew's sound almost genial. But they were persuaded that the risks of freedom were less than the risks of legal strictures or government control, and it is hard to argue that this protection for the newspaper reporters should not now be guaranteed to the radio and television stations, which now supply a majority of the American people with their first reports of the news.

There is, of course, nothing wrong with the vice president complaining publicly about bias in the press and the radio and television. As he is constantly pointing out, he has his freedom of speech too, and since major newspapers select about 100,000 words a day out of almost two million, it would be remarkable if there was not an argument about whether the selection and front-page presentation were "fair."

The difference is that newspaper editors can tell the complaining vice president or the members of the House Investigations Committee to go climb the Washington Monument and the radio and TV editors are not quite so free. They are under government license. They use "the people's airwaves" (as if the newspapers didn't use the people's streets and interstate highways), and they operate under different rules.

They must submit to an official "fairness doctrine," which is a government and not a professional journalist's standard. It is enforced, or at least under threat of being enforced, by a government licensing agency. The radio and TV people must answer when the Federal Communications Commission inquiries are made, and truth is not necessarily a defense.

It is ironic that the FCC's "fairness doctrine" was intended to assure precisely that, but everything depends on who is deciding what is "fair," and the guess here is that the founding fathers would still bet on Walter Cronkite rather than on Agnew.

Nevertheless, the public reaction to all this is clearly divided. The people have heard all the arguments between government and press, and it is fairly obvious that their confidence is not unbounded in either institution.

Part of this is due to the fact that the newspaper, radio and television editors have not been very good at self-criticism, or in establishing an effective "fairness doctrine" of their own, which is why there is so much public criticism of reporting, and why there is now so much talk of establishing some kind of local and national news council machinery to review the record of the papers and stations.

No doubt there will be much discussion of these issues in Washington this week, particularly the newspaper side of the question, but the immediate threat of government pressure and influence is on radio and television, and if their freedom is impaired, even the freedom of the printed press is not likely to be unaffected.

[From the Washington Post, Feb. 22, 1972]

Seventh Class Postal Service

(by Marquis Childs)

The theory was that a postal service divorced from the patronage control of Congress would be able to move a letter between two principal cities in, say, a day and a half instead of two to three days. Efficiency, economy—that was the pitch of former Postmaster General Winton M. Blount, a supersalesman who argued that it was time to junk the old mess for a business operation.

Today, nearly two years after the divorce, the turgid mass of the mail moves at the same glacial pace. Nothing so directly touches millions of Americans as the delay and uncertainty in the delivery of the mails. It is everybody's business and yet almost nobody seems able to do anything about it, if only because the process has the same impenetrable bureaucratic look as it had when Congress was calling the shots.

Elmer Cerin, a Washington lawyer who has made himself a postal expert, did a careful study last year on first-class mail delivery. He concluded that a program heralded as making better use of manpower and equipment had resulted in increasing mail handling time by 29 per cent for outgoing letter mail originating and destined for the nation's 10 principal post offices. The Cerin study was put in the congressional record by Sen. Gale McGee (D-Wyo) chairman of the Post Office and Civil Service Committee, with the threat that the post office reorganization act would be greatly modified or even repealed if things did not look up.

A fair-minded man, Cerin says there has been a slight improvement since he did his duty. But it is almost imperceptible as the P.S. faces the same frozen structure of union rigidity, rapid turnover of personnel and outmoded techniques as under the old system.

The choice is between stepping up efficiency and raising rates in the hope that more money will turn the trick. A business operation, the service was to pay its own way and Congress surrendered control over the mail rates.

In May the first-class letter rate went from six cents to eight cents. The airmail rate is soon to jump from 11 to 13 cents. Business and banks, the principal users of first-class mail, will simply pass it on to the consumer, which means another upward notch in the inflationary spiral.

The power of the P.S. over rates cuts a wide swath. It threatens to put in further jeopardy the printed word that is now hard pressed under the impact of television. Nothing could illustrate this better than the way the Nixon China expedition is tailored for the cameras with the new technology of the satellite.

Under the old system Congress provided a subsidy for second-class mail covering magazines and newspapers. This was in the belief, advanced in the early days of the republic, in the educational value of the printed word. With that subsidy wiped out the Postal Service is proposing a 142 per cent increase in second-class rates.

In testimony the other day before Sen. Sam Ervin's Subcommittee on Freedom of Information, Andrew Heiskell, chairman of the board of Time, Inc., said the increase would raise the mailing costs of Time's four magazines by $27 million over a five-year period.

And he set this against profits before taxes of the four publications. According to Heiskell, it is even worse, with pretax earnings of $50 million under the gun of a rate increase of $130 million by 1976.

The concept of the subsidy as underwriting education has been stretched a long way, with publications pandering to sensationalism and others that offer thinly disguised political propaganda.

Yet the demise of the printed word is a fact of the television era. Collier's, The Saturday Evening Post, and Look have gone. And Life suffers heavy losses. Metropolitan dailies benefited little, if at all, from the subsidy, since distribution was largely by truck. But weeklies, the specialized periodicals of nationwide organizations and a host of other printed media will feel the heavy hand of the rate increase.

Setting up published service standards late last year, the P.S. promised one-day delivery within a 600-mile radius for first-class mail and a 95 per cent improvement in delivery of air mail. The way is open for infinite improvement.

[From the New York Times, "Arts and Leisure" section, Oct. 11, 1970]

DEAR VICE PRESIDENT AGNEW . . .

Do we live in a "drug culture" largely promoted and spread by rock music via the communications media? Vice President Agnew, in a speech in Las Vegas recently, cited part of a Beatles' song ("I get high with a little help from my friends") as but one example of how American youths are being "brainwashed" into drug use. Nicholas Johnson, a member of the Federal Communications Commission, replied to Mr. Agnew's charge several days later at a symposium of the United States Information Agency in Washington, D.C. His address follows.

(By NICHOLAS JOHNSON, FCC Commissioner)

Earlier this week Vice President Agnew revealed that even he has been listening to rock music. I don't think this should be cause for panic—even though *he* does. I think it holds out some promise. The Administration may just find out what's happening in the country.

Mr. Agnew now seems to think that music is the cause of (rather than the relief from) the pressures that lead people to use hard drugs. Perhaps we can understand and excuse this rather fundamental error as he came down from his first trip, but I think we can fairly hold him to a higher standard in the future.

The Vice President has asked us to "Consider . . . the influence of the drug culture in the field of music. . . . [In] too many of the lyrics the message of the drug culture is purveyed." That's where he makes his mistake. No song writer I know of is urging as a utopia a society in which the junkie's life is a rational option. Most would agree with his suggestion that dependence on hard drugs is "a depressing lifestyle of conformity that has neither life nor style."

Listen to the music:

Your mind might think it's flying
On those little pills
But you ought to know it's dying
Because . . . Speed kills!

That's Canned Heat in "Amphetamine Annie." Here's Steppenwolf, singing about "The Pusher":

You know I've seen a lot of people walkin' around
With tombstones in their eyes
But the pusher don't care
If you live or if you die
If I were the President of this land
I'd declare total war on the Pusher Man
God Damn the Pusher.

Or listen to the Rolling Stones' "Mother's Little Helper," because they're really trying to help you understand what your generation's problem is, as well as giving the kids some good advice:

Mother needs something today to calm her down
And though she's not really ill
There's a little yellow pill
She goes running for the shelter
Of her "Mother's Little Helper"
And it helps her on her way
Gets her through her busy day

And if you take more of those
You will get an overdose
No more running for the shelter
Of a "Mother's Little Helper"
They just help you on your way
Through your busy dying day.

There is comparable advice in Love's "Signed, D. C.," "Crystal Blues" by Country Joe and the Fish, and The Who's "Tommy."

No, the real issue, Mr. Vice President, is not the desirability of hard drugs. The issue is whether you, and the rest of the Administration, are—to borrow Eldridge Cleaver's (and VISTA's) phrase—part of the solution, or part of the problem. The question is whether you have done anything to alter the repressive, absurd and unjust forces in our society that drive people to drugs. Since you've suggested that "we should listen more carefully to popular music," and quoted from "With a Little Help From My Friends," I'd like to lay a few more lyrics on you.

Listen to Steppenwolf's "Monster," written by Jerry Edmonton, John Day and Nick St. Nicholas (no relation):

Once the religious, the haunted and weary
Chasing the promise of freedom and hope
Came to this country to build a new vision
Far from the reaches of kingdom and pope
The spirit it was freedom and justice
Its keepers seemed generous and kind
Its leaders were supposed to serve the country
But now they don't pay it no mind
'Cause the people grew fat and got lazy
And now their vote is a meaningless joke
They babble about law and order
But it's all just an echo they've been told
The cities have turned into jungles
And corruption is strangling the land
The police force is watching the people
And the people just can't understand.

Or Hal David and Burt Bacharach's "Paper Mache" for Dionne Warwick:

Twenty houses in a row
Eighty people watch a TV show
Paper people, cardboard dreams
How unreal the whole thing seems.

Can we be living in a world made of paper mache?
Ev'rything is clean and so neat
Anything that's wrong can be just swept away
Spray it with cologne and the whole world smells sweet

There's a sale on happiness
You buy two and it costs less.

Here's some musical commentary about what the major campaign contributors (Democrats and Republicans alike) have done to America—Joni Mitchell's "Big Yellow Taxi":

They took all the trees
And put them in a tree museum
And they charged all the people
A dollar and a half just to see 'em
Don't it always seem to go
That you don't know what you've got
Until it's gone
They paved paradise
And put up a parking lot.

I can understand why some wouldn't like lyrics like those.

You see, Mr. Vice President, somebody's trying to tell you something—"And you don't know what it is . . . do you, Mr. Jones?" (To quote Bob Dylan.) These music people aren't really urging death through drugs; they are urging life through democracy. They believe that governments are instituted among men to promote "life, liberty and the pursuit of happiness." And many don't think yours is doing it.

As the Chairman of the Bank of America, Louis Lundborg, said recently, "What [young people] . . . say they want doesn't sound so different, you know, from what our Founding Fathers said they wanted—the men who wrote our Declaration of Independence, our Mayflower Compact, the Bill of Rights, the other early documents that laid the foundation for the American Dream. They said they wanted the freedom to be their own man, the freedom for self-realization. We have lost sight of that a bit in this century—but the young people are prodding us and saying, "Look, Dad—this is what it's all about."

But this is not all. It's not just that corporate, governmental and other institutions have turned away from our original goals, and that they have created conditions that stimulate the desire to escape. They are actually encouraging the drug life and profiting from it. Senator Frank Moss has observed that: "The drug culture finds its fullest flowering in the portrait of American society which can be pieced together out of the hundreds of thousands of advertisements and commercials. It is advertising which amounts so graphically the message that pills turn rain to sunshine, gloom to joy, depression to euphoria, solve problems and dispel doubt."

And the former Chairman of the Administration's Federal Trade Commission, Caspar W. Weinberger, has noted that, "Advertisements for over-the-counter medicines may be a contributing factor in drug abuse problems in the United States." (TV ran about $20 million worth of ads for sleeping aids alone in 1969.)

Our entire consumer-manipulating economy is based on a dishonest, destructive exploitation of human emotions and motivations. Television teaches—with continuous, air-hammer effectiveness—the dangerous and debilitative lie that the solution to all life's problems and nagging anxieties can be found in a product, preferably one that is applied to the skin or taken into the body. It has so distorted and demeaned the role of women as to make it almost impossible for either men or women to relate to each other in other than a sex-object, manipulative way. It has educated our children to go for the quick solution, to grow impatient and disinterested in developing skills and solutions requiring discipline and training. And it has urged us all to seek "better living through chemistry."

The Vice President is going after the song writers. One cannot help but wonder how he overlooked Ford's urging, "blow your mind," TWA's taking us "up, up and away," the honey company that suggests we "get high on honey," the motor bike company that advertises "a trip on this one is legal," or the Washington, D.C., television station that promotes its programing as great "turn-on's." Perhaps the critical point is that young song writers and performers don't make political campaign contributions, but that Ford, TWA, and other drug-image merchandisers do.

The Vice President might better turn his attention to the corporate campaign contributors (of both parties) who finance their fat campaign donations with the profits they make from worthless or harmful drugs, and from cigarettes and alcohol that first "addict" and then kill hundreds of thousands of Americans a year.

The Vice President has urged each of us to do our own part to "set an example" within our own families. How about the "political families" of the major political parties? To what extent is the Vice President's own party prepared to refuse to accept contributions from (or do special favors for) those politically influential corporate interests that feed, and feed upon, the artificially-induced thirst for drugs, pep pills, tranquilizers, alcohol, cigarettes, and other contemporary commercial "panaceas"?

The Vice President has pointed with pride to what the Administration has done to crack down on "drugs." But what has it done to deal with our number one drug problem, alcoholism? It is, perhaps, symbolic of the basic hypocrisy in government today that he chose Las Vegas as the battlefield to attack drugs. For the only thing that flows faster than the gamblers' money in Las Vegas is alcohol. There are estimated to be at least five million alcoholics in this country. There are more alcoholics in San Francisco alone than there are narcotics addicts in the entire country. If you're interested in "law and order," one-third to one-half of all arrests by police in the United States are for chronic drunkenness. More Americans are killed by drunk drivers every year than are killed by murderers and the war in Southeast Asia combined. And, of course, the economic loss through absenteeism, the physical damage to the body (cirrhosis is the sixth leading cause of death; psychosis due to alcoholic brain damage is irreversible), and the impact upon family and friends, are far more severe from alcoholism than from all other hard drugs combined.

Or how about nicotine addiction? There are 300,000 deaths a year related to cigarette smoking. What is the Vice President doing to cut down on *these* pushers? One recent survey found that of *seventh graders*, only 30 per cent of the boys and 40 per cent of the girls had never tried tobacco. There are a lot more kids who are being exposed to drugs because of the deliberate efforts of greedy, immoral television and tobacco company executives to hook 'em on nicotine—executives who are revered as the pillars of our society, and whose activities are sanctioned by the Federal Government—than there are those who get pot "with a little help from their friends."

So who's kidding whom? If we're really serious about doing something to alter the drug culture in America's let's get on with the work and stop worrying about the music. Let's not indulge the hypocrisy of going after the drug users who are poor, black and young with a vengeance, as if they were criminals, without even providing them adequate treatment centers, and ignore the far more serious problem of the hard-drug pushers (of alcohol and cigarettes) who are respectable, rich and middle-aged. Let's stop accepting the campaign contributions of the "respectable" liquor manufacturers with one hand while we're imprisoning some of our finest young people with the other.

Above all, let us stop going for help to advertising executives who sit around, after their three-martini lunches, coming up with ad campaigns that preach the get-away-from-it-all qualities of caffeine, nicotine, aspirin and other pain killers, alcohol, stomach settlers, pep pills, tranquilizers and sleeping pills (plus the whole range of mouthwash, deodorant, cosmetics, etc.). How, in the midst of the chemical life they're glamorized, can they absolve their consciences by telling our kids that a 16th or 17th chemical will bring the downfall of their lives and the Republic? They can run it up your flagpole, Mr. Vice President, but nobody's going to salute it.

The forces of censorship are subtle. This Administration repeats and repeats that it is not censoring—just as the Russians did when they rolled their tanks into Czechoslovakia in August, 1968. But when the Vice President starts criticizing television, pretty soon the "analysis" of the President's speeches is watered down or disappears, and President Nixon builds up a record of (free) prime time television usage that exceeds every other prior President. The President shows up on a Bob Hope special; the Vice President opens the Red Skelton show. Now they are moving in on radio. FCC Chairman Burch says he's interested in "obscenity" in lyrics; the Vice President is concerned about mentions of drugs. That's the way you do it. You don't come right out and say, "Cut the controversial stuff, guys. We don't like the people getting that social criticism set to music." Of course not. You talk about obscenity and drugs. But the radio station owners get the message: the Administration's listening to them, just like it's watching their big, wealthy brothers, the TV stations.

If we really want to do something about drugs, let's do something about life. Because if we make an effort to strike at the real causes of addiction to alcohol and other less prevalent and dangerous drugs, we will find that we have also made a big dent in mental illness, divorce and suicide rates, and the other statistical indicia of social disintegration. Let's get on with the job of giving people the physical, mental and spiritual environment they need in order to grow closer to their full potential. That means more money (not vetoes of appropriations) for rebuilding our cities, education, food programs, urban transportation, welfare, job training, and health care. It means more meaningful job opportunity for all Americans—white and black; a meaningful attack on the problems of underemployment and meaningless employment as well as unemployment. It means appropriations for the Corporation for Public Broadcasting, for parks, libraries, and beautification programs.

The song writers are trying to help us understand our plight and deal with it. It's about the only leadership we're getting. They're not really urging you adopt a heroin distribution program, Mr. Vice President. In fact they don't think that you can "spray it with cologne and the whole world smells sweet" either. It stinks. They want us to help them clean it up.

The song you quoted, "With a Little Help From My Friends," is not a joyful pitch for drugs. It contains the lines,

Do you need anybody
I need somebody to love,
Could it be anybody
I want somebody to love.

How many Americans seek in drugs the solace from a vicious cruel world they did not create, but cannot escape? What are you doing to change that world?

Some song writers are hopeful. Mama Cass sings,

Yes a new world's coming
The one we've had visions of
And it's growing stronger with each day that passes by
Coming in peace, coming in joy, coming in love.

She's holding out optimism. She's giving you a little more time, Mr. Vice President. But we can't wait much longer if history is not to record our presiding over the decline and fall of the American empire—complete with words, music, and a drug culture sold to the American people by large contributors to Presidential campaigns.

[From the Washington Post, Dec. 9, 1971]

THE SLOAN REPORT: VIEWING CABLE TV

(By Alan M. Kriesgman)

Cable television could bring as many as 40 separate channels into more than half of American homes by the end of the decade, a long-awaited report predicted yesterday.

The Sloan Commission on Cable Communications, which issued the report, holds that rapid development of cable systems is in the public interest. The report envisions a "television of abundance"with in the next 10 years, offering the public a broad range of programs and services.

The fulfillment of these predictions, the study states, will depend upon the ability of cable to gain access to programming upon payment of copyright fees. Given this access, the commission deems that no restrictions upon the importation of "distant signals" would be necessary.

The copyright and distant signal issues have long been a course of dispute between cable interests and established television broadcasters, who have tended to regard cable TV as an economic threat.

The Sloan report, however, maintains that the public interest would best be served by permitting cable and broadcast television to compete on equal footing. The broadcast industry has "no greater right than other industries" to protection from the encroachments of technological innovation, the report asserts.

If its recommendations are followed, the commission foresees a nationwide cable hookup that would carry mass entertainment—some picked up "off-the-air" from existing television, some provided by cable operators and persons leasing cable channels; most of this programming would be supported by advertising.

The cable systems also would carry specialized entertainment programs, supported by subscription or advertising or both. They also would transmit news and opinion, supported by subscription and advertising and would have channels set aside for governmental, community, education and commercial services. Public access channels and two-way capability would be built into the framework.

The report differs in several ways from the recent "compromise" formula issued by the President's Office of Telecommunications Policy and approved by the Federal Communication Commission, the cable industry, broadcasters and the film companies that hold most television copyrights.

The Sloan Commission and the OTP plan agree on the desirability of cable industry growth. But they take different views on how this should be achieved.

The Sloan report is more liberal towards cable operators in the matter of distant signals. The effect of the OTP plan, which Congress is expected to consider early next year, would be to allow the cable industry to expand the cable within the bottom half of the 100 largest markets across the country. But cable growth would be restricted within the top 50 markets, where two-thirds of the national television audience resides. The Sloan report would permit immediate expansion in all 100 markets, with relatively minor restrictions.

These differences reflect divergent attitudes toward the possible threat cable may pose to the broadcasting industry.

According to the Sloan report, the FCC, and by implication the OTP as well, has tended to favor the broadcasters. The Sloan Commission, asserting that the interest of the viewing public in diversity of programming is paramount, recommends no special protective measures for existing broadcasting systems.

"We have sought to maximize the service to the public that can be provided by television as a whole," the report states. "If, in that process of maximization, the existing structure of over-the-air television is undermined, we believe that the public interest must still remain paramount.

"We do not believe that in the short term the structure of over-the-air television is seriously undermined; we believe further that in the long term over-the-air television can adjust to the developing new situation.

"But in any case, if over-the-air television is to fall victim, in some degree or another, to technological change, it is in no different position from any other enterprise in which investments have been made, and possesses no greater right than other industries to protection from technological change."

The 256-page Sloan report is the work of a 16-member panel of economists, educators, scientists, lawyers and other public figures, appointed by the Alfred J. Sloan Foundation in June of 1970 to undertake a study of the promise and proplems of cable television.

The commission was headed by Edward S. Mason, chairman dean emeritus of the Harvard University Graduate School of Public Administration.

Among the members were Kermit Gordon, president of the Brookings Institution; Carl Kaysen, director of the Institute for Advanced Study, Princeton. N.J.; Jerome B. Weisner, president of the Massachusetts Institute of Technology; James Q. Wilson, Harvard University professor of government; Franklin A. Thomas, president of the Bedford-Stuyvesant Restoration Corp. Patricia M. Wald, attorney with the Center for Law and Social Policy in Washington, and Ivan Allen Jr., former mayor of Atlanta.

Among the major specific recommendations of the report are the following:

Resolution of the copyright issue by Congress, which is advised to make bidding on copyrighted material equally available to cable companies and broadcasters.

Setting of minimum standards for allocation of channels, technical requirements, public access, and franchise and ownership conditions by Congress or the FCC.

Establishment by Congress of a federal program to encourage the exploitation of cable's potentialities.

Prohibition of ownership of cable franchises by networks.

Limiting the number of cable subscribers served nationally by any single individual or corporation owning a cable franchise.

Preference, in granting franchise ownership, to "community non-profit and profit-making institutions within neighborhoods which have special social or ethnic problems and needs."

Waiver of the Fairness Doctrine in the case of public access channels.

Limitation of cable franchises to 10 years, during the present decade.

The Commission also recommends "legislation that would reserve specified playoff and championship sports events for conventional television, and would free other sporting events for competitive bidding between pay television and sponsor-supported television."

The report concludes, "We have tried to establish the prerequisites for a television of abundance and to suggest some of the services that such a television system might provide, including those beyond an enriched provision of entertainment and news. An impressive new instrument of communication has been made available to society by the advance of technology. It remains for society to employ that instrument wisely and well."

The report, entitled "On the Cable: The Television of Abundance," has been published in paperback format by McGraw-Hill and will be available at $2.95 per copy.

Members of the Sloan Commission and other experts in the cable field will be participants in a television show, "The Cable TV Revolution—the Promise of Abundance," to be seen locally on WETA-TV (Channel 26) at 11 p.m. Sunday evening (part I) and 11 p.m. next Tuesday (part II).

[From the Washington Post, Aug. 5, 1970]

THE "UNDERGROUND" PRESS: AN OLD TRADITION

Time was in America when newspapers abounded everywhere. They were not. for the most part, mass circulation newspapers; they did not need mass circulations to survive. They were perhaps, more ideological than commercial, reflecting an almost endless variety of political and social points of view. Conceived by men who had something they wanted to say, they were born easily and died easily. It didn't take much capital in the early days of the Republic to become a publisher; a simple flat-bed printing press and an ability to set type were about all that was required. Indeed, the economic context in which the free press clause of the First Amendment was framed presumed a diversity of editorial opinions, challenging and counteracting each other.

Newspaper publishing in any major city is now a big business enterprise, and competition has become the exception rather than the rule. The established press tends, therefore, to reflect, in greater or lesser degree, an establishment view of contemporary life. And that view is doubtless easily and less effectively challenged than it ought to be. Challenges of a sort have been coming of late, however, from the so-called "underground" press. The term is applied to newspapers produced somewhat irregularly, usually on a rather inadequate financial foundation, odd in format, irreverent in outlook, self-consciously shocking in style and opposed to almost everything established.

Faithful readers of The Washington Post (praised be their name) may not find the Washington Free Press or the Quicksilver Times or any of the many underground papers currently circulated among GIs—about which Washington Post Staff Writer Sanford J. Ungar reported the other day—entirely to their liking. These publications tend to tell more than the average reader wants to know about how to make a Molotov cocktail or how to blow up a bank or how to find a partner for one's pad. And they occasionally deviate, in some slight measure, it must be said, from established standards of good taste.

Nevertheless, the underground papers fulfill an important function—and a function which the First Amendment was contrived to protect. They assail orthodoxy, puncture pomposity, rail at those in power. The risks inherent in having this function discharged captiously, unfairly, extravagantly and tastelessly—from an orthodox point of view—are far less than the risks inherent in letting such criticism be silenced by official censorship. This, at least, is the theory of the First Amendment, and it is a theory that has so far worked very well for the American people.

[From the Press, Freedoms Under Pressure, 20th Century Fund, N.Y., 1972]

"*Where men cannot freely convey their thoughts to one another, no other liberty is secure; the way is barred for making common cause against encroachments . . . Free expression is thus unique among liberties as protector and promoter of the others . . . The meaning of a free press is inseparable from the general meaning of freedom in the modern state.*"

—William Ernest Hocking

"*The First Amendment presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and will always be, folly; but we have staked upon it our all.*"

—Learned Hand

INTRODUCTION

Farsighted though they were, James Madison, John Adams and Thomas Jefferson, who led the battle for adoption of the Bill of Rights, could not possibly have envisioned what the years ahead were to hold for the nation they were founding. Theirs was a country of just over three million people and an inhospitable wilderness. There were just 32 newspapers in all of the country; total circulation, at most, was 40,000 a week. To the nation's founders, journalism was as much Tom Paine's *Common Sense* and the "Crisis" papers as newspapers struggling to exist. The passage of the Stamp Act that placed a tax on papers and the drama of John Peter Zenger's trial that centered on freedom of the press were still fresh.

It was not possible, those 200 years ago, to foresee a nation of more than 200 million people, of 1,750 daily newspapers with 65 million copies each day rolling from their presses, of magazines of infinite variety numbering more than 200 million copies each month, and of ubiquitous radio and television. Even Jefferson, that Renaissance man of his time, would not have speculated about electronic communication, much less one that reaches almost every home with the power to bring sight and sound from American explorers on the moon.

Yet it is reasonable to believe that were they with us today, Jefferson and his colleagues would acknowledge and accept radio and television as integral arms of the press. For the founders of the Republic felt themselves to be inheritors of a great tradition. They were acutely aware that the intellectual revolution launched in the middle of the fifteenth century by Johann Gutenberg had been persistently opposed by governments; that the curbing of public communications had been so extensive that for 200 years printing in Europe could be likened to Rousseau's mankind, "born free, but everywhere in chains." In making their own revolution, they felt themselves moving in the spirit of John Milton's *Areopagitica*:

> Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties. . . . Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; whoever knew Truth put to the worse in a free and open encounter.

Areopagitica had been the core of the Zenger defense in 1735. Benjamin Franklin was one of many colonists to support the immigrant printer, whose New York *Weekly Journal* had fulminated against William Cosby, the profligate royal governor. Franklin had helped persuade Andrew Hamilton to plead Zenger's cause. Hamilton's defense was Miltonian, declaring that "the words themselves must be libelous—that is, false, scandalous and seditious, or we are not guilty." Hamilton claimed "a right—the liberty—both of exposing and opposing arbitrary power by speaking and writing truth." The verdict upholding Zenger became part of the tradition which was to make the Constitution as originally drafted unacceptable without the Bill of Rights.

The First Amendment was all encompassing:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or abridging the freedom of speech, or of the press . . .

The founders recognized journalism as a restless, cantankerous force. At the time, the nation's fledgling press was tendentious, wildly partisan and, all too often, wilfully and grossly inaccurate. Although Jefferson once wrote "Nothing can now be believed which is seen in a newspaper," he never recanted another statement upholding the right of a free press. As he put it:

> The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without government, I should not hesitate a moment to prefer the latter. But I mean that every man should receive these papers, and be capable of reading them.

Many in the young Republic did not agree with Jefferson. Some refused to tolerate the waywardness of editors. When George Washington was vilified in the press, notably by Franklin's grandson in the Philadelphia *Aurora*, it was wrecked by an angry mob. The ill-advised and hastily passed Alien and Sedition Acts of 1798 were turned against editors and many were charged with "writing and printing false, scandalous and malicious" statements against the government and the congress. Jefferson, after taking office as President, stopped further prosecutions.

Yet through much of the nation's history, the press has continued to be a troublesome presence. Frequently, the press has been irresponsible; always it has been a constant and visible target. Newspapers were wrecked by mobs on both sides of the slavery-abolitionist battle preceding the Civil War; one such mob martyred the Illinois abolitionist editor, Elijah P. Lovejoy. During the Civil War, generals like Burnside and Dix used their powers to suppress newspapers in Chicago and New York. In World War I and after, superpatriots sought to punish editors of whom they disapproved through the Espionage Act of 1917. Later, there were other and different attacks. In the 1930s, Huey Long of Louisiana, for instance, induced a compliant legislature to place a tax on advertising: it was struck down by the courts as "a deliberate and calculated device to limit the circulation of information." During the 1940s, some judges in Southern and Western states sought to impose contempt citations on editors who insisted on appraising the operations of their courts. And throughout our history, the chief executive and other government officials have found reason to deplore, scold or denounce one or another segment of the press, including the minority press.

This continuity of conflict makes clear that friction is inevitable between a free press and government, and that it is most strained when the public is deeply divided over issues. So it was inevitable that controversy over governmental power and freedom of the press should erupt in the current climate of opinion, a climate formed in part by the unprecedented crises that the nation has been experiencing since the holocaust of World War II and its Cold War aftermath. Now the nation is contending with deep divisions—between a younger generation which accuses its elders of enshrining materialism, practicing materialism, and contaminating the atmosphere; between minorities who charge their fellow citizens with racist tendencies that bar the way to equal opportunity; between rich and poor, the citydweller and the suburbanite, the hawks and the doves.

The nation's press reflects these divisions. Its coverage is frequently apocalyptic; dwelling on crime, drugs, violence, corruption, welfare scandals, pollution, financial crisis—and the prolonged war in Indochina. It should come as no surprise that there has been increasing hostility and a widening credibility gap between the government and the press and between the press and the public. Unquestionable the media are not blameless. On the contrary, over the years their irresponsible scrambling for reader and viewer attention has only led many to look with skepticism at what they see on their television screens and to doubt what they read in their papers. Unfortunately, Vice President Spiro T. Agnew's criticisms, which created so much perturbation in the media and received so much approbation among sections of the public, have not helped matters. On the contrary, his attacks increased the acrimony and suspicion. In the last few years, news organizations have protested the issuance of subpoenas by federal grand juries ordering newsmen to testify and to produce notes, tapes, films, financial records, and other data sought by federal prosecutors in their investigations of left-wing militants and Black Panthers. Complaints were made that government agents were posing as newsmen to gather information on radical groups. It was in this troubled atmosphere that the Twentieth Century Fund assembled an independent Task Force on Governmental Power and Press Freedom, made up of jurists, lawyers and journalists.

Originally, we had intended to confine our study to the questions of subpoenas, law-enforcement agents posing as newsmen, official harassment of the so-called underground press and the government's criticisms—and investigations—of news judgments. But in the midst of our deliberations, we were confronted with the latest and most celebrated clash between government and press: the publishing of The Pentagon Papers and the attempts by the Nixon Administration to halt further publication. This collision, in which the right of the press to publish the classified material was upheld by the Supreme Court, is treated in a separate section of this report.

In our discussions, which were frequently far-ranging and always spirited, the task force did not feel it necessary to dwell overlong on the critical linkages between democracy, which depends on an informed citizenry, and the press, which is the purveyor of information to the public. But we all were well aware that the public has the biggest stake of all in seeing to it that the nation's press is protected against governmental intrusion or pressure. It is a truism that the public gets the newspapers it deserves, but we feel that the public has a right to fuller and fairer information than it has been getting. If government officials have sometimes been irresponsible toward the press, it is our view that the press has not always been responsible toward the public it serves.

We are in agreement that the nation's press must exhibit greater balance in its news judgments and higher ethical standards from its practitioners. All too often, the performance of journalists, particularly in dealing with governmental affairs, has been marked by a lack of basic understanding, by easy acceptance of "handout" information and by a misdirected passion for the headline or scoop. It is the task force's belief that journalism must clear itself of James Reston's charge that "most American newspaper people are really more interested in dramatic spot news, the splashy story, than in anything else. They want to be in on the big blowout, no matter how silly, and would rather write about what happened than whether it made any sense."

There is another problem of "access," involving press-public relations rather than press-government relations. That is the problem of affording the public, i.e., the individual citizen or groups of citizens, access to the news media.

Ben M. Bagdikian has noted, "In a large, urbanized society, individual free speech doesn't guarantee access to the marketplace of ideas," and he cites the suggestion of Professor Jerome A. Barron of George Washington University Law School that the interpretation of the First Amendment be expanded "to include the right of the individual to have a fair chance at access to the press, with the courts or legislatures deciding what is fair." That would seem a rather ponderous, time-consuming and costly way for an individual to seek a forum: but it must be acknowledged that although the path to the press is open through letters-to-the-editor columns, it is a very narrow path. For the broadcast media it is practically a closed path for a multitude of reasons including libel considerations, physical accessibility and cost. Still, it is inherent in the First Amendment that free speech is not completely free if it cannot find a free forum. Ultimately, a situation could arise in which government saw reason to intervene to assure access to the press, at which point the question of freedom would pose new uncertainties.

The difficult task of governing—and communicating in—a pluralistic society calls for greater responsibility on the part of both public officials and newsmen. That responsibility must begin at local and state levels, where mutual trust should be the keystone for effective conduct of public affairs. Unfortunately, this is not always the case. School, housing, health, and zoning boards have often tended to conduct public business in private meetings; when subsequent reports in the press, not unnaturally, are presented as exposés, the consequence is angry exchanges between government and press that confuse and distort public understanding. The problem becomes even more sensitive when newsmen venture into investigations of crime. It is an open secret that most stories of civic corruption stem from public officials with private knowledge willing to direct newsmen to incriminating evidence. If there has been any single ethic in American journalism it is that newsmen are prepared to protect such confidential news sources, likening their responsibility to the relationship existing between the clergy and their parishioners, doctors and patients, lawyers and clients.

The task force has sought to resolve the difficult problems confronting newsmen who are subpoenaed in order to get them to divulge confidential information. Until very recently, newsmen have not thought in terms or requiring legal protection, largely because they have felt themselves covered by the First Amendment. But the Supreme Court has before it three cases rooted in government subpoena issues, and unless the Court's determinations are broader than now anticipated, a majority of the task force favors recommendations to prevent the compelled disclosure of confidences by newsmen that might reduce or impair the flow of information to the public.

The task force also dealt with the attempts by governmental bodies to delve into the editorial judgments of the media. We welcomed the action of the House of Representatives in refusing to cite for contempt the Columbia Broadcasting System and its chief executive for declining to produce unpublished film and other background material demanded by a House Commerce subcommittee in an effort to investiagte charges that the network had used some material out of context in the documentary "The Selling of the Pentagon." As we see it, the government lacks the legal authority to question the editorial judgments of the media, including television, radio and the underground press, which, according to some observers, can trace its origins to Tom Paine's *Common Sense*.

In studying the issues raised by publication of the Pentagon Papers, the task force found that the press did not challenge the government's right to protect confidential information affecting the security of the nation, its military forces and its diplomatic negotiations. The record of the press throughout two great wars and the protracted Cold War has been remarkable in its voluntary observance of security regulations. To be sure, the extent of federal classification procedures has been a vexing one. The press, under the rallying cry of "The People's Right to Know," has often been restive under what it regards as a paper curtain of excessive suppression. The system, if it can be called that, has spawned the practice of declassification by "leak," which became the focal battle over the Pentagon Papers. In supporting the right of newspapers to publish the material, the courts held that the administration had failed to demonstrate damage to essential national security. As Associate Justice Potter Stewart noted in his decision, "when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical and careless and to be manipulated by those intent on self-protection or self-promotion."

Each of the subjects covered by our report is important for a free press and an informed public. Our recommendations are designed to strengthen the press in its essential task of providing the public with information and to preserve a healthy adversary relationship between the press and the government. In our view, the health of that relationship is bound to suffer if publishers and editors bow to economic or political pressures and restrain reporters from adequate investigation or if public officials restrict or interfere with journalists in the performance of their professional duties.

SUMMARY OF FINDINGS AND RECOMMENDATIONS

The members of the task force represent different disciplines and views. We did not reach unanimous agreement on all of the many complicated issues before us. (Dissents are listed in the text.) But we shared in common a concern about governmental infringements, actual or potential, on the nation's press, and held in common a faith in the value of free press as a disseminator of information to the public. Because we believe that a free and responsible press is, as William Ernest Hocking put it, "inseparable from the general meaning of freedom in a modern state," and because we are convinced with Learned Hand that "right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative solution," the independent Task Force on Governmental Power and Press Freedom makes the following recommendations:

PRESS SUBPOENAS

An adequate newsman's privilege should be incorporated into the law to protect the flow of information through the press to the public.

Confidences and Press Photographs

The privilege should apply to personal testimony and records of journalists and to records of news organizations that might lead to the disclosure of confidential sources or of other confidential information.

The privilege should be available to all journalists, including personnel of the "underground," collegiate and minority press.

The privilege should extend to testimony before grand juries, preliminary hearings, trials, administrative hearings, legislative investigations and other bodies having the power of contempt.

The privilege should authorize journalists to withhold the identities of confidential sources, as well as information given in confidence, and notes, tapes and other records of confidential communications.

If the privilege is to be qualified, the qualifications should be as narrow and specific as possible. This could be done by specifying that if newsmen possess information about particular violent crimes, such as murder or kidnapping, they may be compelled to testify.

In civil trials the privilege should be limited so that journalists cannot invoke it in order to avoid being held accountable for defamatory publications.

The privilege should shield news organizations from being compelled to furnish unpublished photographs or unused television films of events, including rallies, demonstrations and disturbances.

Secret Testimony

The privilege should shield journalists from having to appear for questioning before grand juries or other secret investigative agencies to the following extent: that when a subpoenaed newsman can make a showing that his newsgathering capacity would be seriously damaged merely by his entry into the secrecy of the interrogation room, then the official who subpoenaed him should be required to demonstrate a compelling need for his testimony before the journalist could be required to appear.

INVESTIGATIONS OF THE BROADCAST MEDIA

The public's need—and the value of democracy—of the fullest possible information can be threatened by Congressional investigations of editorial judgments, as well as by the Federal Communications Commission's questioning of editorial content.

Because of the threat to press freedom posed by such governmental investigative efforts as the attempt by the House Committee on Interstate and Foreign Commerce to subpoena unpublished material from the CBS documentary film, "The Selling of the Pentagon," no arm of the government should attempt to use the subpoena power to obtain the unpublished material of newsmen—whether in the regulated broadcast media or not.

Because similar threats to the rights of a fully informed public can be posed by the Federal Communications Commission's questioning of editorial content in determining whether to grant or revoke licenses, a group of experts in the law and in broadcast journalism should undertake a careful study of how best to reconcile the competing values of journalistic freedom and governmental regulation.

POLICE POSING AS JOURNALISTS

The chief officers of all law enforcement and other public agencies that seek intelligence about domestic groups—and particularly those agencies that have permitted their agents to pose as journalists—should publicly disapprove of these masquerades and should take steps to ensure that they do not happen in the future.

Law enforcement agencies should abandon the practice of employing journalists as informants. As citizens, journalists may choose to volunteer information to the police, but the payment of any money by the police to a journalist—either for "expenses" or for services rendered—in connection with the disclosure of information is tantamount to infiltration of journalism by the police and should be stopped.

THE UNDERGROUND PRESS

The underground press should be considered entitled to all legal and constitutional rights applicable to other elements of the press, and all actions by public officials that discriminate against the underground press by subjecting it to arrests, searches, seizures or other official acts of harassment or intimidation should be vigorously opposed by the "established" press.

The professional associations of journalism should form legal defense funds to aid underground publications when they are subjected to unlawful pressures from government officials.

FINDINGS

PRESS SUBPOENAS

The present tension between the press and government was brought into focus by a series of subpoenas that have been issued by federal and state prosecutors over the past two years in efforts to compel newsmen to disclose information obtained from confidential sources. These subpoenas have raised in the clearest form the central issue: that the government's law enforcement efforts—particularly those directed at political radicals—are taking forms that pose a serious threat to the confidence between journalists and their sources, thus reducing the free flow of information to the public. In some instances, journalists have been forced to be ready sources of evidence for the government, serving as an investigative arm of law enforcement.

In the matter of the press subpoenas, the issue has been brought swiftly before the United States Supreme Court. Three newsmen, Earl Caldwell of the *New York Times*, Paul M. Branzburg of the *Louisville Courier-Journal*, and Paul Pappas of WTEV-TV in New Bedford, Massachusetts, were subpoenaed and refused to testify. In each instance secret grand jury testimony was demanded. Mr. Caldwell and Mr. Pappas were called to testify about black radicals; Mr. Branzburg was to be questioned about alleged marijuana and hashish offenses. Each man asserted that to testify would destroy his confidential relationships with his sources and would impede the flow of information to the public. They contended that the First Amendment's free press guarantee thus shields them from having to comply with the subpoenas. The Supreme Court will hear arguments on the three cases during the 1972 Court term.

The Supreme Court's decisions in these cases will be its first regarding the protection, if any, extended by the First Amendment to journalists in the news-gathering process. Previous decisions by the Supreme Court have dealt solely with newsmen's rights to publish the news. Thus these forthcoming decisions are likely to go far toward determining the extent to which newsmen may be shielded by the Constitution from being compelled to testify about information received in confidence. Since the common law does not recognize a "newsman's privilege," if the Court should hold that the First Amendment grants little or no protection from subpoenas, then important public decisions will have to be made as to whether Congress and the state legislatures should pass "shield" laws to protect newsmen from being forced to disclose confidences.

The members of the task force state no opinion, of course, as to the First Amendment issues posed by the pending Supreme Court cases. But we agree that press subpoenas pose a threat to the free flow of information to the public. Some of us feel that the First Amendment covers the news-gathering process completely, constituting a "newsman's privilege" that shields journalists from being required to disclose confidences under any circumstances; those members who take this point of view argue against the enactment of "shield" statutes for fear they would narrow constitutional privilege. Others feel that legislation is generally better suited than constitutional rulings to creating a complete and detailed newsman's privilege. But since the Supreme Court's forthcoming decisions may well determine whether newsmen's privilege is to be based on the First Amendment or on statutes, the task force has decided to confine its views to those details that will have to be considered, whether by judges or by legislators. It is hoped that these views of the task force will provide helpful insights to those who will eventually deal with this important problem of governmental power and press freedom.

Competing values of press freedom and law enforcement effectiveness will undoubtedly have to be resolved. Critics of a newsman's privilege argue that there is scant empirical proof that the lack of a privilege has a significant impact upon the flow of news. They say that many reporters can convince their sources that the journalists would go to jail before betraying a confidence. Moreover, critics suggest that many news sources want to get their views before the public and are willing to take the risk that their confidences might be disclosed.

In contrast, those who support the privilege claim that there is even less proof that law enforcement would be handicapped, other than in rare, extraordinary situations, if it could not subpoena newsmen. They point out that press subpoenas have usually been issued in two situations: when radical groups are being investigated and reporters are known to have some knowledge of the radicals' affairs; and when reporters have published articles publicizing the existence of consensual or "victimless" crimes, prosecutors may be tempted to use press subpoenas because evidence is difficult to obtain by other means.

The task force believes that the mere existence of legal controls over press subpoenas would discourage their use. In the year that has passed since Attorney General John N. Mitchell issued guidelines governing the subpoenaing of newsmen by Justice Department lawyers, only three such subpoenas have been issued—a marked decline over the previous year.

The subpoenas issued over the past two years reveal that the question of newsmen's privilege has become vastly more complicated than it appeared to be only a few years ago. Eighteen states now have "shield" laws establishing a newsman's privilege.[1] Although many of these laws were passed within the last decade, most are already obsolete because they protect journalists only from having to reveal the names of their sources. The current subpoena controversy has underscored the inadequancy of the law in most jurisdictions to protect the lines of communication from news sources to the public. The task force has concluded that legal reforms are needed in a number of areas to assure that the free flow of information is not curtailed.

1. Defining the press.—The task force recommends that the newsman's privilege be designed to shield the press as an institution in its efforts to gather and disseminate the news. It should reach beyond daily newspapers to protect the periodical, minority, underground and collegiate press, the broadcast media, newsletter and news services. It also should extend beyond actual newsgatherers to cover editors and other supervisory personnel.

Surprisingly, some of the state newsman's privilege statutes fail to cover classes of journalists who often need protection most. Several of these laws do not cover the broadcast media. Some do not protect magazine writers. Even the broad New York "shield" law fails to cover the underground and the collegiate press.

Because any privilege can be expected to exact a price by limiting the truth-finding functions of the courts, the task force believes that privilege should not be extended beyond the limits necessary to protect the regular flow of information to the public through the efforts of journalists. Accordingly we are of the opinion that the newsman's privilege should cover only those persons engaged in gathering, writing, editing, producing and supervising the collection of information for dissemination in such media as newspapers, news services, newsletters, periodicals, radio and television.

2. Privilege against being required to disclose confidential sources or information.—The task force recommends, subject to qualifications discussed later, that when a reporter is subpoenaed to give testimony, he should have the right to withhold the identity of his sources, plus any information received in confidence and any information that will damage his confidential relationship. It follows from this recommendation that his notes, tapes or other records of confidential communications should also be privileged.

We recognize that reporters may feel that they should testify and that they can do so without undermining press freedom and therefore recommend that the law should not preclude the posing of such questions to journalists, so that they can respond if they deem it appropriate to do so.

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[1] **A complete list of state "shield" laws is reproduced in the appendix.**

3. Privilege against being required to appear to testify.—Some lawyers and journalists have argued that the reporter's privilege should not merely protect reporters from having to disclose confidential sources or confidential information, but that in some instances it should also shield them from having to testify about any matters in secret. This was the argument made by Earl Caldwell of the *New York Times*. He asserted that by merely entering the grand jury room, with its secret interrogation, he would appear to be cooperating with the government in its investigation of the Black Panthers. Such a step would seriously undermine his capacity to obtain information in the future, he contended, and would violate his First Amendment rights as a newsman. The United States Court of Appeals for the Ninth Circuit agreed. It held that "where it has been shown that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret grand jury interrogation, the government must respond by demonstrating a compelling need for the witnesses' presence before judicial process properly can issue to require attendance."

The Ninth Circuit noted that the district court had already held that Mr. Caldwell could not be forced to disclose confidential information unless the government could demonstrate "a compelling and overriding national interest in requiring Mr. Caldwell's testimony which cannot be served by any alternative means." As the Ninth Circuit saw it, this meant that Mr. Caldwell could not be required to tell the grand jury more than he had written in his article—an exercise that would probably be a waste of time for all concerned. It concluded that nothing would be lost to the government if it were required to make a showing of "compelling" need before even subpoenaing Mr. Caldwell to enter the grand jury room.

The task force recommends a broad newsman's privilege against journalists having to disclose confidential sources, or information received in confidence. Armed with this protection, newsmen should be subject to the normal subpoena power of grand juries, except in extraordinary circumstances. We state no opinion as to the First Amendment issue confronting the Supreme Court in the *Caldwell* case. But to legislatures considering creation of a reporter's privilege, the task force recommends that where a subpoenaed reporter can make a showing that his or her news-gathering capacity would be seriously damaged merely by entry into the secrecy of the grand jury room, then the prosecutor should be required to demonstrate a compelling need for the testimony before the journalist could be required to appear.[3]

4. Photographs and films.—A particularly troublesome problem arises when the government seeks to subpoena unpublished still photographs or unused television film taken by news cameramen at public meetings, demonstrations or disturbances. In such situations there is not an orthodox confidential relationship, since participants at the event know that their pictures may be published. But it is also understood that the photographer is a neutral recorder. Photographers are not expected to serve as an investigative arm of the prosecution by supplying photographs of persons who were not included in the published or broadcast pictures. To force them to act as such through subpoenas would do more than breach this implied confidence—it would probably subject photographers to attacks from participants in such events, and would reduce the news photographers' ability to cover the news.

The courts have not yet had an opportunity to work out the proper limits of this aspect of the reporter's privilege. Some newspapers have refused to give the government more than glossy prints of photographs that were published; one has compromised by turning over other photographs of individuals who were identifiable in published pictures.

Whenever the issue has been raised, it has exposed deeply conflicting values. Prosecutors, believing that newspaper or television files may contain filmed proof of guilt in arson or riot cases, have sought to get that material. Defendants, hoping that newspaper, magazine and television films will prove their absence at riots, have also attempted to subpoena film from the media. Journalists, having no desire to protect any person who was photographed committing a crime but realizing that the media's role as observer will suffer if it becomes recognized as a ready source of evidence, have balked. Some publications and television stations have begun routinely to destroy film that might be subpoenaed—a strong indication of the need for a reasoned legal solution.

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[3] Bert Early dissents: see footnote.

The task force's studies reveal that this problem usually arises in such circumstances as riots or demonstrations, in which photographers who are present at a public place to photograph actions by a group record activities that are subsequently alleged to have been unlawful. For example, prosecutors have sought to subpoena the photograph files of the *St. Louis Post-Dispatch* after the burning of an ROTC building following a demonstration on the campus of Washington University and to subpoena photographs taken by the University of Maryland's campus newspaper of a violent demonstration on the campus; California officers have made use of a search warrant in an attempt to seize incriminating photos of a student disturbance from the *Stanford Daily;* and officials in Washington, D.C., have tried to obtain photographs taken by Washington newspapers of destructive demonstrations at Howard University.

The task force believes that in situation such as these, news organizations should be privileged not to furnish any photographs or films beyond those that were published. Normally, the most descriptive pictures will be published by the media, and to make others available solely for the purpose of aiding one side or the other in a legal action would compromise the neutral position of the press.

It must be emphasized that the ultimate interest at stake is the public's access to information, not a possessive attitude by the news media toward its pictures. Obviously, the line of least resistance for the press would be to surrender the photographs. But journalists know that if they become a ready source of court evidence news photographers will lose the free access to events that they now usually enjoy—and that if such access is lost, it is the public's view of news events that will suffer.[3]

5. Records of news organizations.—Sometimes records of a newspaper or television network's telephone calls, disbursements, expense accounts or other records can disclose the identity of a source as unerringly as the compelled testimony of a reporter. There have been instances in recent months in which prosecutors have attempted to subpoena such records. The task force recommends that when a news organization can show that a subpoena calls for documents or other evidence that would disclose confidential sources or information, then the subpoenaed organization should be privileged not to produce them.

6. Qualifications.—Some of the state shield laws create an unqualified journalist's privilege. Others qualify the privilege in one of two ways: (a) by declaring that a judge may divest a journalist of the privilege and order him to testify under certain general circumstances, such as "to prevent a miscarriage of justice," or "to protect the public interest"; or (b) by stating that in investigations of certain crimes, such as murder, kidnapping, or those that pose "a threat to human life," the privilege is revoked.

The theory behind these qualifications is that society will benefit more from obtaining information in exigent circumstances than from protecting journalistic confidences. Appealing claims can be made for qualifying the reporter's privilege to allow for such exigencies. It is difficult to argue that a reporter should be permitted to stand mute in, say, a kidnap case when a child's life is at stake. Yet any reporter's privilege will be weakened to the extent that it can be waived and it is possible that such exceptions can swallow the rule—that is, the privilege can be so easily divested that news sources will have no assurance that their confidences will actually be protected by the law.

A majority of the task force believes that, as a practical matter, no "safety valve" qualifications are needed.[4] A journalist is rarely given information about a grave criminal offense; but when he is, the information is usually published. In the even rarer event that a journalist receives such information and believes so strongly in the need for confidentiality that he neither publishes it nor volunteers it to the police, it is doubtful that he would divulge it under any circumstances. This reasoning about the practicalities of the reporter's privilege seems to have been borne out in practice. In states with statutes that do not qualify the privilege it has encountered no major objections. The New York State Legislature, which recently had a careful study of the problem done before enacting a detailed shield statute, did not qualify the privilege.

Although most task force members saw no need for safety valves, they acknowledged that there are some strong arguments in favor of qualification. All of us believe that if the privilege is to be qualified, the qualifications should be as narrow as possible. But a majority of the task force does not favor the general "public interest" qualifications. The application of such a qualification usually comes at a time of great public concern over a newsman's refusal to testify about such emotionally charged and politically sensitive subjects as the narcotics trade or corruption of public officials. Under these circumstances the pressures will always be strong for the trial judge to conclude that it would be in the public interest for the journalist to testify.

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[3] Roger Rook and Ralph de Toledano dissent; see footnotes.

[4] Judge Robert Williamson and Mr. Early dissent.

Accordingly, a majority of the task force recommends that if there are qualifications, they must be stated as precisely as possible in the statute, so that the reporter and his or her source can know, at the time when confidential information is passed, whether the journalist will be protected by the shield law from having to identify sources. This qualification might be achieved by specifying in the law that if reporters have information concerning particular heinous crimes, such as murder or kidnapping, they may be compelled to testify.

7. *Where the privilege should apply.*—The task force believes that the privilege for newsmen should apply before grand juries, preliminary hearings, criminal trials, administrative hearings, legislative investigations and other official bodies that have contempt levying power to compel testimony. Civil suits raise special considerations of press freedom and responsibility, but they do not involve similar problems of conflicting public interests. Yet American society seems to be entering a phase of increased interest in corporate responsibility and consumer rights. Journalistic muckraking into corporate and business affairs is on the rise. We recommend that some form of journalist's privilege be observed in civil litigation, in order to keep open the avenues of information about corporate affairs. If exceptions are required, they must be drawn so that reporters cannot use the privilege improperly when they or their publication are defendants in a civil suit for libel or violation of privacy. This limitation is especially required when the plaintiff is faced with a First Amendment burden that prevents him from winning his suit unless he can show that the newspaper printed a false and defamatory story without making an adequate effort to check the facts. Assuming that a broad journalist's privilege will be recognized by the courts or legislatures, rules will have to be worked out to lift the privilege when a journalist-defendant invokes it to shield his own failure to check the facts adequately.

INVESTIGATIONS OF THE BROADCAST MEDIA

An essential corollary of the principle of press freedom is broad protection. To insist on the First Amendment rights of newspapers and magazines but not of the electronic media invites governmental encroachment on all forms of news gathering and dissemination. For if government acts as arbiter over the editorial affairs of the electronic media, controlling them in the guise of "legislative oversight" or regulations of the Federal Communications Commission, then a principle has been established which may eventually be applied to other forms of free expression.

There is, of course, some justification for government's involvement in the editorial affairs of television and radio. Anyone with sufficient determination and capital can publish a newspaper, but only so many channels are available to television, and these by right belong to the public. The allocation of these channels must therefore pass through the Congress and the FCC.

The task force recognizes that this regulatory obligation creates serious conflicts between the "public interest" and the First Amendment. The nature of the "public interest," after all, is difficult to define, which means that government must tread very lightly, if it treads at all. There is no disputing its right to intervene against fraudulent or misleading advertising.

Regulation of television content is a problem because it is the nation's major—or most popular—source of news and news commentary. The television documentary, moreover, has become an important addition to the news process. It is assumed the networks, as well as individual stations, operating under public sufferance, are impartial in dealing with controversial issues. But a growing number of persons believe television has sometimes permitted its reporters, writers and producers to slant the truth while presenting the news.

Does this belief warrant governmental interference in the editorial process? Does the obvious fact that the television viewer cannot take his trade elsewhere give the Congress and the FCC the right to impose punitive measures on television when, in their judgment, television exceeds the bounds of editorial probity?

These are difficult questions; they become manageable only if the concept of freedom of expression remains paramount.

These strictures can be but cold comfort for the television industry. Television stations are faced with winning renewal of their licenses every three years. If, for one reason or another, they invite the displeasure of groups which can gain the ear of the FCC, they are faced with a possibility of a loss of license. Worse still, a network can be brought before a Congressional committee to explain its editorial judgments on pain of a contempt citation if it refuses to lend itself to editorial second-guessing, which was the experience of CBS News with its documentary, "The Selling of the Pentagon."

There is very little dispute over the facts in the case. On February 23, 1971, CBS News broadcast a documentary on the activities of the Defense Department. Its thesis was that the Pentagon spent millions of the taxpayers' dollars in an effort to sell its military programs. "The Selling of the Pentagon" was praised by some as a contribution to the public's knowledge of military chicanery, but drew criticism for being misleading and heavily slanted from others.

The task force believes the merits or demerits of the broadcast are irrelevant as is the evidence that CBS edited interviews of at least two Pentagon officials in a manner which led to charges of deception. In one instance, a statement of Assistant Secretary of Defense Daniel Z. Henkin in answer to a question from a CBS interviewer was attached to the response of a subsequent question. In another, a quotation from a speech by Colonel John A. MacNeil was made to appear as if he were expressing his own views. According to the complete text of his statement, he was quoting another person, though he seemed to agree with the views he was quoting.

The result was an outcry from certain members of Congress demanding an investigation of CBS. Chairman Harley O. Staggers of the House Committee on Interstate and Foreign Commerce, which has legislative jurisdiction over the FCC and the radio-television industry, scheduled an investigation, and on May 26, 1971, a subpoena was served on Dr. Frank Stanton, president of CBS. The subpoena directed him to submit "all film, workprints, out-takes, and sound-tape recordings, written scripts and/or transcripts utilized in whole or in part by CBS in connection with" the documentary.

Dr. Stanton appeared before the Staggers Committee but refused to produce the materials demanded of him. "If newsmen are told that their notes, films, and tapes will be subject to compulsory process so that the government can determine whether the news has been satisfactorily edited, the scope, nature, and vigor of their news gathering and reporting will inevitably be curtailed," Dr. Stanton said. He insisted that no committee of the Congress has the power to "engage in official surveillance of journalistic judgments" by investigating particular news reports for distortion.

Representative Staggers replied that the subpoena was a proper exercise of his committee's supervision of the television industry. The broadcast media have the capacity to change and manipulate the recorded statements of individuals, he added, so that legislation might be required to prevent deceptive news editing. He went on to argue that both the public and those filmed by CBS have First Amendment rights equal to those of the television medium. When Dr. Stanton still refused, the committee voted to recommend that CBS and Dr. Stanton be cited for contempt of Congress. In a rare refusal of the House to support such action by one of its committees, the contempt citation was voted down.

It is the position of the task force that this retreat from the committee recommendation, while commendable, left the question of governmental intrusion into television's editorial process up in the air. Representative Staggers and a majority of his committee still apparently believe that their mandate to regulate the radio and television industries gives them the right to employ the subpoena power to second-guess journalistic judgments of the broadcast news media. As the task force sees it, this view ignores a critical distinction between the government's power to prevent deception on quiz shows and commercial advertisements and its responsibility, if any, to supervise the quality and accuracy of news. The difference is the First Amendment.

The task force believes that Congress has no more power to subpoena the files of a broadcast news organization in an effort to investigate its journalistic judgments than it has to subpoena the editorial files of a newspaper for the same purpose. Precisely because the broadcast media *do* exist under governmental regulation, there are strong reasons why this principle should be firmly established.

It is important to recognize the distinction between the constitutional validity of a press subpoena issued for the purpose of investigating a journalistic decision, and a subpoena issued in the course of an investigation of events outside the realm of journalism. An example of the latter is the Earl Caldwell case. His unpublished material was sought in connection with an investigation of alleged crimes by Black Panthers. The Supreme Court has yet to say to what extent, if any, the First Amendment protects a journalist's unpublished materials from such subpoenas. There is considerable doubt that a subpoena is valid when it is issued to obtain information for a governmental inquiry into the handling of unpublished material itself.

Because the government has the power to withdraw a radio or television station's license, journalists in the broadcast media may be particularly susceptible to the "chilling" effect of governmental second-guessing of their work. In the event that their materials were subject to subpoena, they would be under strong pressure to trim their sails when criticizing the government. For if a strong news item might provoke an investigation, and the government had the power to subpoena the "out-takes" from a television film or the words omitted from the final draft of a news comment, some fault might be found with their editorial judgments. Station licenses—and jobs—could be at stake, so that radio and television journalists would be working under an inhibiting burden. Whenever an editorial decision required subtle and delicate balancing of various considerations, the journalist would be aware that some official or Congressman, who might be offended by the article, might make a public issue of the editing—with the station's license perhaps at stake. Such a condition would lead to curtailment of robust reporting of controversial issues affecting the government—precisely what the First Amendment seeks to prevent. The task force believes, therefore, that no arm of the government has the legal authority to issue a subpoena for a reporter's unpublished material.

The task force realizes that the relationship of radio-television to government is a highly complex one, and that to insist that broadcast journalists' unused materials be given the same constitutional protection as the notes of newspapermen and women does not resolve all the tensions between government regulation and free expression. Under a regulatory system a radio or television station can lose its license because of the editorial content of its news and public service broadcasts, which poses a threat of subtle governmental control and self-censorship discouraging bold and forceful expression. Yet we recognize that it is not tenable to assert that a licensee of one of the limited number of broadcast channels should be permitted to use its monopoly of that channel to discredit, malign or ignore groups in the community.

To resolve the conflict between these competing values of journalistic freedom and governmental regulation is an issue of great importance and extreme difficulty, one that is beyond the scope of this study and the expertise of this task force. The task force urges that a group of experts experienced in the law and the broadcast media undertake a careful study of these problems.

POLICE POSING AS JOURNALISTS

In recent months a series of unrelated and apparently uncoordinated instances have come to light in which personnel of government intelligence and law enforcement agencies have posed as news reporters or photographers. In a variation of this practice, law enforcement agencies have paid reporters and press to obtain material for governmental use. These incidents appear to be regrettably widespread, both geographically and organizationally. They have occurred from Washington to Saigon and within the Army, the Federal Bureau of Investigation and local police forces.

Whether such incidents were common in the past and were undiscovered is not known. But it does seem significant that a rash of these occurrences has come to light within the past two years, almost in rhythm with the rising tempo of dissent, violence and official concern about political protest and violence. In fact, most of the instances that have been discovered involved police investigations of political dissenters—groups about which the public should be as fully informed as possible. However, the frequency with which police have been found to be posing as newsmen has tended to raise barriers of suspicion that have made it more difficult for the press to cover many events.

The limited time and investigative means at the disposal of the task force did not permit exhaustive verification of all incidents that were brought to its attention. But we have verified that at least fourteen such events have occurred:

In Saigon, in 1969, two U.S. agents were found to have infiltrated the press corps.

The Army Security Agency painted a van with the name of a non-existent television company and filmed demonstrators at the Democratic National Convention in 1968.

Army intelligence agents also posed as TV cameramen during the Presidential Inauguration activities in Washington in January 1969.

In July 1970, a female intelligence agent for the District of Columbia police department posed as a reporter to gain access to a welfare-rights group's meeting.

Army intelligence agents obtained press credentials from the New York City Police Department to cover actions of H. Rap Brown and Stokely Carmichael in New York during the summer riots of 1967.

In Wichita, Kansas, press credentials were given to local policemen during a visit by Vice President Agnew in October 1970.

A member of the Chicago Police Department's Intelligence Division was discovered in March 1971 posing as a newsman to gain information from black students at a protest rally.

Two plainclothes officers of the Nassau County, N.Y., police force posed as photographers for a weekly newspaper in order to photograph the audience at a veterans' antiwar rally.

An Army agent masqueraded as a reporter for the *Richmond Times Dispatch* to obtain information on the Southern Christian Leadership Conference.

A Detroit policeman posed as a news photographer to observe a General Motors stockholders' meeting in May 1970.

In Albuquerque a city policeman posed as an Associated Press photographer at the University of New Mexico campus during demonstrations protesting the invasion of Cambodia in the spring of 1970.

Complaints by newsmen covering July 4, 1971, ceremonies in San Juan, Puerto Rico, that police were posing as reporters led to an admission by the Commonwealth Secretary that his department had been issuing press credentials to police for about eight years.

At a draft-card burning demonstration outside the Supreme Court in June of 1968, reporters for the *Washington Post* and *Boston Globe* spotted, along with the familiar faces of the Washington press, men whom they recognized as F.B.I. agents using television cameras and tape recorders to interview the demonstrators.[5]

In the spring of 1971, a man recognized as an F.B.I. agent by Pulitzer Prize-winning reporter Jack Nelson of the *Los Angeles Times* was observed taking notes with reporters at a meeting called by Congressman William R. Anderson of Tennessee to discuss the Berrigan conspiracy prosecution. The man denied he was an F.B.I. agent, insisting that he was a writer; but he ran away when asked by a congressional aide to identify himself. The aide followed the man outside the building and saw him enter a car. *Life* magazine reported a check of the license plates later traced the car to the F.B.I.

All but one of these incidents involved police or intelligence agents masquerading as journalists to gather information about dissident groups or to investigate other "political" matters. The reason seems obvious: law enforcement agencies tend to be ill-informed about political dissenters who do not fit the traditional "criminal" mold, and reporters often have easy access to them. However, when policemen masquerade as reporters, the same kind of forces come into play that arise when journalists are subpoenaed, except that the effect is more direct. As in the subpoena situation, the target groups are usually highly suspicious of officialdom and "establishment" institutions and are likely to freeze the press out at any indication that the media are serving law enforcement. This suspiciousness is compounded when the dissenters have good reason to believe that the "journalist" or "news cameraman" who takes such interest in their activities may very well be reporting to City Hall rather than to the city desk.

The task force considers that the hostility and distrust demonstrated by some radical groups toward the press is due, at least in part, to such practices on the part of the police. Journalists have been assaulted by militants and excluded from their meetings, but the most serious threat posed by these police tactics is to the public. It cannot be fully informed of developments within all elements of our society if law enforcement authorities resort to masquerading and subornation.

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[5] These incidents are documented and discussed in fuller detail in the background paper below.

The principal reason why they should be stopped is not that they made the reporter's job more difficult, but that they may on occasion make the job impossible.

It seems likely that the increased use of such tactics will rapidly dissipate their usefulness to the police. As such incidents come to public notice, people will become reluctant to give important information to "reporters" not known to them; as reporters are increasingly frozen out of dissenters' meetings, so will the masquerading police agents be. In the end, law enforcement as well as the public will be shorter on information than before.

The task force condemns this form of masquerading by the police. It endangers the integrity of the press and renders it less effective in performing its responsibilities to society.

The task force notes that police officials in New York City, Chicago, Detroit and the District of Columbia have issued orders condemning the practice of police agents posing as newsmen. The Defense Department has issued an order that "there shall be no covert or otherwise deceptive surveillance or penetration of civilian organization unless specifically authorized by the Secretary of Defense or his designee." This order is regarded by Pentagon officials as prohibiting agents from posing as journalists.

In response to an inquiry from this task force, F.B.I. Director J. Edgar Hoover replied in a letter, "F.B.I. agents are not permitted to pose as reporters or press photographers in the course of their investigations."[6]

The task force is also concerned with a related practice in which the F.B.I. has been involved—compensating journalists for "services and expenses" involved in information-gathering. During the riot-conspiracy trail of the "Chicago Seven." in 1969, two journalists—Louis Salzberg and Carl Gilman—testified for the prosecution and said they had been paid for years as informants for the F.B.I. Mr. Salzberg, a photographer who began his connections with radicals as a staff member for a Spanish-language newspaper, acknowledged at the time that his F.B.I. salary had been $600 a month for at least one year. Mr. Gilman, a television newsman from San Diego, received about $10,000 for pay and expenses over a two-year period. Neither of the men was recruited by the F.B.I., but both began receiving compensation after they initiated the arrangements.

When the task force inquired of the Justice Department about the use of journalists as informants, John W. Hushen, Director of Public Information, sent the following reply "prepared by Director Hoover":

The FBI accepts from any person information which may be of value in the course of an FBI investigation. The FBI does not now, and never has, actively recruited journalists as informants. However, there is no policy against accepting information from a journalist or any news media representative if it is volunteered, which was the case with Mr. Louis Salzberg and Mr. Carl Gilman. Both of these individuals furnished information to the FBI on a voluntary basis. They were paid for their services and expenses.[7]

While it is true the arrangements in these cases were initiated by the newsmen, the task force cannot accept the characterization of "volunteering" information as an act of citizenship, when the informant, be he a journalist or any citizen, is paid.

When journalists are paid for providing information to the F.B.I. or any other law enforcement agency, the result is an infiltration—and sullying—of the profession. The task force concludes that the practice is damaging to press independence and is wrong. We think that the same considerations that prompted Mr. Hoover not to permit his agents to pose as journalists should preclude the F.B.I. from accepting journalists as paid informants.

The task force also believes that the practice of journalists accepting compensation for providing information is professionally unethical. We believe that a journalist who accepts any compensation for providing information or conducting surveillance for law enforcement officials—during work hours or not—has compromised his own neutrality as a journalist and has damaged the integrity of the journalist's craft.[8]

THE UNDERGROUND PRESS

The journalistic form that is generally known as the "underground press," "the radical press," "the alternative press," and by other names, has been a continual source of controversy in the manner of governmental power versus press freedom. Just as this form of journalism lacks a universally accepted name, so does it defy a precise definition. It has been described by one author as "a wildly unpredictable happening," as a journalistic expression of "abiding bitterness about the State of the Union," and by others as pornographic trash. In quantitative terms, it embraces 300 to 350 newspapers sprinkled across the country, plus about 200 additional publications that appear sporadically or in mimeographed form. They share a style that is irreverent, tolerant of some drugs, explicit about sex, oriented toward the political left, and consistently anti-establishment.

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[6] Letter on June 7, 1971.

[7] Letter on June 7, 1971.

[8] **Mr. de Toledano dissents, Mr. Rock comments; see footnotes.**

Its anti-establishment tone is significant, for underground publications are almost always out of favor with the local governments and in bad odor with other influential circles of the communities where they are published. They have greater proclivity for antagonizing officialdom than the daily press, yet have little or none of the protective political power of the established press. As the friction between militants of the left and the government has increased in the past few years, so have the occasions upon which local law enforcement officials have been outraged by statements in the underground press.

In 1969 the publisher of the *Los Angeles Free Press* was fined $1,000 and placed on probation for three years for having published a purloined list of state narcotics agents.

Dallas police raided an underground newspaper in October 1968 and hauled away two tons of material from an underground newspaper in an "obscenity" raid—yet failed to obtain an obscenity conviction that would stand up in Federal Court.

The Police Department of Buffalo, New York, drove the Black Panther newspaper from the streets in August 1970 by announcing its intention to arrest any vendors selling the publication.

Officials in Los Angeles, Philadelphia, Providence and Richmond denied press credentials to the reporters of the local underground newspapers.

During the autumn of 1969, the San Diego *Street Journal's* office was searched by police without a warrant and its street vendors handcuffed, searched and jailed for loitering and obstructing the sidewalk.

There have been numerous other allegations by the underground press of heavy-handed treatment by law enforcement officials. *Orpheus*, a bimonthly publication of articles drawn from various underground newspapers, described the situation:

"Although these papers have been evicted from their offices and homes, harassed by the police, had their street sellers arrested en masse, had their benefit parties raided, been bombed, burned, beaten, gypped, framed and lost printer after printer, the underground press continues to increase in size and number."

The task force has listed only those incidents that have been verified in sworn court testimony or reported in the established press, but that is evidence enough to indicate that some laws enforcement officials have used their official authority against the underground press in a way in which it would never have been invoked against the established press. These actions seem to have been based on the erroneous assumption that underground publications forfeit some degree of their protection under the First Amendment when they violate public standards of taste, preach a tolerance of drugs and sex, and criticize the police. There has been a double standard of treatment, one for the underground and one for the established press—a double standard that is inconsistent with the First Amendment's guarantee of freedom for all the press.

Unfortunately, the attitude of the established press toward official harassment of the underground press has been characterized by neglect. Of the numerous instances that were brought to the attention of the task force, instances in which elements of the underground press protested that they had been abused by the police, a majority were not mentioned in either the news or editorial columns of the established press. In those incidents that have developed into court cases, the underground press has been left largely to its own fragile devices by the more affluent elements of the news media. Others in the journalistic profession stood by and gave no aid in three legal actions involving the underground press that produced legal precedents damaging to all journalists—the prosecution of the *Los Angeles Free Press for theft* in 1969, the subpoenaing of the editor of the *Madison Kaleidoscope* after the bombing at the University of Wisconsin in 1970, and the denial of press credentials to the *Los Angeles Free Press* reporters in 1967.

The task force believes the underground press should be entitled to all legal and constitutional rights applicable to other sectors of the press, and all actions by public officials that discriminate against the underground press by subjecting it to arrest, searches, seizures or other official acts of harassment and intimidation should be vigorously opposed by all the press.[9]

In addition we recommend that journalism's professional associations form legal defense funds for the aid of underground publications subjected to unlawful pressures from government officials.

THE PENTAGON PAPERS

A fundamental problem of the relationship between governmental power and the press was posed unexpectedly in June of 1971 when the *New York Times*, the *Washington Post* and other newspapers published what have become known as the Pentagon Papers—a group of documents compiled from Defense Department files for a study of the origins of American participation in the Vietnamese war.

The circumstances that surrounded the publication challenged many concepts of the security classification system with which the United States has lived, however uneasily, for a number of decades. The study itself, which had been ordered by Robert S. McNamara while Secretary of Defense, was classified Top Secret. There had been no authorization by any responsible government official for its release to the press. Many of the individual documents, consisting to a great extent of memoranda produced by high officials in the early sixties, were quoted directly by the newspapers without any effort to paraphrase and "fuzz over" their nature. Finally, the sheer bulk of classified material—some 7,000 pages—invited a governmental response. Officialdom could not ignore the papers as it customarily ignores leaks of individual bits of classified information from Washington.

Initially, the government reaction was to seek injunctions in the Federal courts against further publication of the documents, which were being released in serial form. For the purposes of this report, it is unnecessary to trace the various steps of the litigation.[10] The important fact is that on June 30, 1971, the Supreme Court of the United States, by a vote of six to three, dissolved injunctions by lower courts, permitting the newspapers to resume publication.

Even though it decided the case, the Court's decision did not resolve the conflict. The Justices were divided even more deeply than the six to three decision indicated, and each member set forth his own views in separate statements. The Court majority concluded that the government did not have the right to prevent the publication of the specific documents in question. But the judicial door seemed pointedly held open for future prosecutions for *having published* the papers. It would be fair to sum up the decision as one which told the newspapers that they could publish a specific set of documents at their own risk.

For the press as well as for students of the problems of a free society, the outcome did not clarify, once and for all, the relationship between the press and the government. At the heart of the issue was the question of prepublication restraint—whether there are circumstances under which the government has the right to *prevent* publication. Journalists and commentators have generally assumed that the government has no such right, whatever may be the legal authority to prosecute after the fact for the publication of material offensive to the law. Very few cases have come up in the Federal courts bearing upon the issue, and in the Pentagon Papers case the government conceded there had been none which raised the problem in the context of national security.

It is worth noting the wide range of attitudes among the Supreme Court Justices on the issue of pre-publication restraint. According to the late Justice Black, "every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment"; but according to the late Justice Harlan, prohibiting prior restraints does not reach "to the point of preventing courts from maintaining the status quo long enough to act responsibly in matters of such national importance as those involved here."

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[9] Mr. Rock comments in a footnote.

[10] The complete statements of the Judiciary are printed in the appendix.

To Justice Douglas the First Amendment left "no room for governmental restraint on the press." By contrast, Justice Blackmun argued that "the First Amendment, after all, is only one part of an entire Constitution. . . . Each provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolution for the First Amendment at the cost of downgrading other provisions. . . . What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent." Justice Brennan stated that the First Amendment "tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result," although he conceded that "there is a single, extremely narrow class of cases (when the nation is at war) in which the First Amendment's ban on prior judicial restraint may be overridden."

Justice White held that "prior restraints require an unusually heavy justification under the First Amendment," and concurred in the majority finding because he did not believe the Government had met the test. But Justice Stewart commented that "I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us. I join the judgments of the Court." Justice Marshall noted that Congress has specifically declined to grant the type of authority that the Government sought, adding "It is not for this Court to fling itself into every breach perceived by some Government official nor is it for this Court to take on itself the burden of enacting law, especially law that Congress has refused to pass."

Chief Justice Burger, who dissented from the majority, agreed that there are constitutional limitations on prior restraint. He went on to say that "adherence to this basic constitutional principle, however, does not make this case a simple one. In this case, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the executive. Only those who view the First Amendment as an absolute in all circumstances—a view I respect, but reject—can find such a case as this to be simple or easy."

In sum, while basic issues were posed, basic issues were not resolved. The outcome should not be considered a criticism of the Supreme Court. There is good reason to believe that the ends of justice are frequently best served when decisions are made on the narrowest possible grounds, and that sweeping questions of policy are best determined in other arenas. But whatever merit there may be to this view, the fact remains that there is as yet no authoritative concept of whether publication boundaries exist.

The debate outside the courts over publication of the Pentagon Papers centered on questions that were largely irrelevant to the issue of prepublication restraint. Generally speaking, commentators concentrated on such matters as whether the papers proved deception of the public by the government; the propriety of publishing the documents and the vagaries of the classification system. It is probable that most of the public debate reflected attitudes on the war in Vietnam rather than attitudes on press freedom.

In retrospect, it is hardly surprising that the Supreme Court decided the case on relatively narrow grounds or that the public debate was largely irrelevant to the long-range issue affecting the press. Whatever may be the venerability of the doctrine of no prepublication restraint, the publication of the Pentagon Papers raised the issue in a new context which could not have been foreseen by those who wrote the First Amendment. But if the context is new, it does not necessarily invalidate the principles which have governed past conduct. What is clear is that a re-examination is in order. The circumstances of the case required that the litigation be settled within a few weeks, which was hardly an atmosphere conducive to re-examination of underlying issues. From this standpoint, the conduct of the Supreme Court was probably an exercise in wisdom in which the decision did no violence to traditional concepts of freedom of the press while the individual opinions left open the possibility of calmer assessment.

By and large, those who regard the doctrine of no prepublication restraint as absolute base their conviction upon the *Areopagitica*, the Zenger case, and the ultimately successful opposition to the Alien and Sedition Acts, although probably few people, including newspapermen and women, are familiar with their historical significance. They are traditional symbols for those who advocate a totally unfettered press, and they possess significance regardless of their factual content.

Their significance is that they took place when the struggle for freedom was directed against governments which thought they had an inherent right to censor the press in order to prevent dissension. The nations of Western Europe had lived with the "divine right" concept of government for so many centuries that it was difficult to emancipate men from its implications even after the concept itself had been formally renounced. So it was accepted and explicit doctrine at the time of both John Milton and John Peter Zenger (and was implicit in the Alien and Sedition Acts) that "wrong thinking" could be suppressed and that authorities were acting quite properly when they curtailed the publication of material which embarrassed them.

The public was eventually freed from the divine right concept so thoroughly (at least in the United States) that the doctrine of no prepublication restraint became deeply entrenched. If the government in June 1971 sought to suppress the publication of the Pentagon Papers on the grounds that their revelation represented heresy or embarrassment to individuals, its case would have been tossed out of court. No such accusation was made. The government's case rested upon the charge that publication would injure the nation's security and could interfere with vital foreign negotiations.

Since it was never publicly disclosed, the precise nature of the alleged injury to the national security is unclear. Nevertheless, the government was making a claim for injunctive relief on grounds which the government conceded have never been presented to the Federal courts in the past. The argument may have been old wine in a new bottle, although when the label states that the action sought is for the protection of the people of the country rather than for the protection of orthodoxy or individual members of the government, it is necessary to take another look.

Legal issues aside, it also is necessary to take into account the general background against which the government's action took place. For at least twenty-five years, the United States has regarded itself as being at "war," whether "hot" or "cold," with an alien ideology. A people who are "at war" have a tendency, rightly or wrongly, to regard the normal processes of democratic life a subordinate of the goal of victory. A plea that certain information must be suppressed to keep it from the hands of an "enemy" or to permit the formation of alliances for "survival" has a much higher degree of acceptability in such an atmosphere than it would in more placid or pacific times.

The psychology of war also fosters a trend of thought which is difficult for a group to discuss calmly. It is based upon the assumption that there are different categories of "rights"—some a matter of "survival" and others a form of "luxury." Under such an assumption, the rights granted to an individual have a tendency to wind up in the second category and those granted to the government in the first. This condition fosters a predilection for very strict enforcement of constitutional guarantees for individual right in times of serenity when such guarantees are not needed and for foregoing the "luxury" in times of stress.

This type of thinking is more likely to characterize popular debate than judicial confrontation, and no member of the Supreme Court voiced such thoughts in relation to the Pentagon Papers. But it is only one step removed to conclude that there are certain areas in which some constitutional rights are mutually exclusive, and, therefore, a choice must be made. This consideration *did* influence the thinking of some court members, most notably the Chief Justice when he contrasted the "imperative" of an unfettered press with the "imperative" of "effective functioning" of government. His coherent statement can fairly be said to represent the thinking of a large body of responsible men and women who do not regard themselves as in any way opposed to a free press or a free society. It deserves careful analysis.

At first glance, the statement appears unexceptionable. For at least three decades, the nation has accepted the concept that there are "secrets" which would injure the United States if they were revealed to a hostile world. Obviously, it is impossible to publish such secrets in the public press, without disclosing them to an enemy. Therefore, the right of a free press is incompatible with government effectiveness, and one must yield to the other. Once this line of reasoning is established, there seems to be little else to discuss other than the effectiveness of individual systems for maintaining the necessary secrecy while permitting the maximum degree of press freedom possible under such conditions.

It is possible to buttress this line of thought with a number of hypothetical examples which touch off emotional responses that subordinate critical analysis. Usually, they take the form of questions: Would you permit a newspaper to publish the movements of troop ships when enemy submarines are lurking offshore? Would you permit a newspaper to publish codes that would enable an enemy to learn our battle orders? Would you permit newspapers to publish stories that would reveal our weak spots in time of war? Would you permit newspapers to publish our plans of attack and the forces we are going to use?

The short and simple answer is that these questions pose only hypothetical dangers. The practicalities are well illustrated by the system of voluntary censorship set up through government-press cooperation during World War II. Despite occasional slips, usually inadvertent, these voluntary arrangements were entirely adequate to serve military necessity.

But while the dangers inherent in press freedom are largely hypothetical, the threat that would be posed to press freedom by prepublication restraints is very real. Historical experience is available, because what we now regard as the "free press" emerged only after a long struggle against licensing. The nation's founders knew what they were doing when they wrote the First Amendment. They had learned through bitter experience that no man—no matter how well-intentioned—can be entrusted with the power of censorship.

It is apparent that the doctrine of prepublication restraint can be made effective only through the use of censorship. Usually, the kind of material to which the government objects is not published in serial form. The Pentagon Papers were something of an exception in this respect, and it is unlikely that this kind of exception will occur again. If the government is really worried about its secrets, such fears can be allayed only by inspecting newspaper editions before they hit the streets. Such a practice would open nightmarish prospects for our free institutions.

The "hit-the-panic-button" type of question described above can be, and frequently is, used to discredit all of the safeguards for individual liberty built into the Constitution. We hear such rhetorical inquiries all the time:

"Would you permit a communist spy to go free just because of the Fifth Amendment?"

"Would you turn a rapist loose to harm women and children just because there were a few technical irregularities committed by the police when they arrested him?"

"Would you turn loose drug peddlers just because a policeman forgot to get a warrant before entering their flat?"

When these questions are analyzed without the distorting influence of emotion all they are really asking is whether people accused of committing a crime should be turned loose simply because their guilt cannot be technically and legally proven.

The type of reasoning implied in such questions was rejected by the framers of the Constitution. They knew that rights which are only partially safeguarded are not safeguarded at all, and that people who truly want freedom must be willing to suffer some unpleasant consequences.

Secrecy itself, moreover, involves a price and can have consequences fully as adverse as a breach of secrecy. It has become increasingly apparent that many Americans are losing confidence in governmental institutions at all levels of society. Citizens have become more interested in and more critical of the manner in which such elementary matters as zoning laws, tax assessments, the flotation of school-board bonds, the actions of city councils, and the activities of state legislatures and governments are handled. To some extent at least, this is because secrecy has become inherent in government operations, making it difficult for the average citizen to satisfy himself that his affairs are under competent and honest management.

Society must realize that any degree of secrecy entails social costs. It is up to our society to examine these costs and to determine whether they are too high to pay.

Governmental secrecy has a peculiar characteristic that stems from the absence of a known method of confining its exercise to limited areas on which reasonable persons can agree. Because classified security material cannot be examined by the public, the public cannot know whether only material essential to the nation's security is being classified. When people do not know, they tend to become suspicious. These suspicions may not assume a dangerous form when times are good and governmental policies are working well. But at the first setback—and setbacks are inevitable no matter how wise political leaders and their policies may be—the suspicions emerge as a hardened conviction that secrecy has been used to conceal blunders or even fraud and venality. At that point, the declassification and revelation of classified papers does little to restore confidence. An administration that has once resorted to unjustified secrecy can do little to assure a disaffected or skeptical electorate that it is coming clean.

A society without traditions of freedom can handle such disaffection by physical suppression. A free society is a different proposition altogether. Unity cannot be sustained by rifles and police. It requires the confidence of the electorate. Without that confidence, a free government becomes ineffective.

The cost of secrecy is not confined solely to the breeding of suspicion that the government is playing fast and loose with the public trust. It is also a device for cutting off the public debate through which the citizens of a nation prepare themselves for the consequences of great decisions which may mean considerable sacrifice. Nowhere is this better illustrated than in the Pentagon Papers.

The significance of the Pentagon Papers to historians is highly debatable. Whether they shed light on the entry of the United States as a military force into Vietnam is something that cannot, at this point, be determined. But they are unquestionably revealing in terms of the quality of discussion which governed that entry. The most notable characteristic of the passionate debate which was going on within governmental circles is that it took place virtually out of sight and earshot of the public. The American people had only the faintest inklings of the facts and the decisions which were to determine their destiny.

Furthermore, the debate was not conducted under circumstances which fostered calm judgment. Within the government itself, only a relative handful of people were privy to all the facts and options. Yet even this handful were conducting themselves under circumstances which violated all the rules of adversary discussion. They were in a position to write memoranda but could not be certain who would read them or what effect they would have. They did not confront contrary points of view in situations where they could find out what arguments they had to counter. They had no real chance to test their own thinking against others.

In this connection, the Pentagon Papers provide an ironic example of the ultimate futility of secrecy. The papers were put together as a result of Secretary McNamara's request for a study to assist future policy planners in avoiding mistakes made in Vietnam. Once the documents were assembled, fifteen copies were printed and locked up where it was highly unlikely that any future planners would even see them. It is difficult to regard this procedure as a satisfactory method for learning from history.

One function of public debate is to test ideas in the marketplace of thought. Another function is to prepare people psychologically for stormy days ahead. In regard to the Vietnamese war, neither function was carried out. On the contrary, all informed discussions took place under a "security" tent. This process left the public in the bewildering position of finding itself involved in a major conflict with no idea of how it got into it or what it was fighting for. Did the United States gain enough advantages from its policy of secrecy to justify the price in loss of public confidence? On balance, has the secrecy that was practiced strengthened or weakened the nation?

The members of the Supreme Court addressed themselves to the propriety of the specific classifications of the Pentagon Papers and to the rights of the government to seek injunctive relief. The task force urges the nation to ponder a broader question—the wisdom of unchecked secrecy itself.

The task force does not propose the abolition of the security classification system, although we favor a serious study of it by a disinterested group. We are well aware that government of any character will continue to practice secrecy—for good or for bad reasons—in many of its operations. Government officials are human beings, and humans generally assume they have a right to privacy in the conduct of their affairs. It is difficult to convince a person that he does NOT have that right simply because his affairs are in a public domain.

Excessive secrecy is inimical to a free society and should be combated. But we doubt that a law by itself can guarantee public inspection of the conduct of public business. The task force believes that an effective and essential instrument to achieve this end is a free and responsible press—free to investigate; free to interrogate; and free to publish.

When we weigh the imperative of secrecy against the imperative of an effective government in a free society, we believe that the balance is more heavily weighted in favor of the latter.

Admittedly, a free press is a troublesome institution. It can be, and frequently is, arrogant, obnoxious, wrong-headed. We have no illusions as to its reluctance to correct its own faults. But none of its defects is so grave as to justify the abridgment of freedom. Liberty is far too precious to be abandoned out of fear of unpleasant consequences.

Basic to freedom is the right to publish. Obviously, this is a right which entails risks—as does every other right in a free society. The founding fathers did not present the Constitution as a document to ensure a painless world. They claimed that it would safeguard liberty, which they considered a fundamental objective.

The task force has neither seen nor heard persuasive evidence that a free press will bring about the downfall of our nation. That latter condition is much more likely to come about through efforts of overly zealous government officials to protect the public from knowledge of how the public's business is transacted.

But we have seen and heard persuasive evidence that a free government can be effective only when it has the confidence of its citizens. The free press is the most effective instrument known to sustain that confidence. Therefore, a majority of the task force urges that our leaders regard the doctrine of no prepublication restraint as absolute. No matter what the difficulties, that long-term result will be a stronger and more united nation.[11]

CONCLUSION

When we met for the first time, the members of the task force possessed a wide variety of backgrounds and views on the problems of governmental power and press freedom. But all of us had already concluded from our observations of recent public events that new and potentially corrosive frictions were rising between the news media and the government. At the conclusion of our deliberations, we could appraise with precision the extent of the threat to press freedom. However, we achieved a consensus that some degree of damage to press freedom is posed by each of the five subjects discussed in this report: press subpoenas, police posing as newsmen, official harassment of the underground press, governmental investigations in the regulated broadcast media, and attempted prior restraint of publication.

Moreover, we share a feeling that press freedom might be more fragile than is widely assumed—and that its role in American democracy is so crucial that the nation cannot afford to risk its erosion. The fundamental truth about the constitutionally protected status of the press is that it exists for the public, not the press. As the late Justice Hugo L. Black put it in his opinion in the Pentagon Papers case: "In the First Amendment the founding fathers gave the free press the protection it must have to fufill its essential role in our democracy. . . . The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government."

If this principle were widely understood and vigorously defended by the public, there would be little cause for concern in governmental rumblings against the press. To act against the press would then be viewed by the people as a thrust against them, and politicians would hesitate to do so.

But the public's reaction to some recent events reveals that many people do not consider that press freedom includes the obligation to report truths that are repugnant to a critical government. Public-opinion polls disclose that the public's patience with such journalism is dangerously thin—that many, if not a majority, of the people believe that the press is being either irresponsible or unpatriotic when it publishes material that the government feels should not be made public.

At the same time a large segment of the public has come to have as many reservations about government as about the press, as witness all the talk about "credibility gaps." Furthermore, the feeling that government policies and political leaders are increasingly being "sold" to the public by one cosmetic technique or another has led to wariness and suspicion of those policies and leaders. Thus there is an ambivalent erosion of confidence in the institutions that are supposed to represent the public, making the media as much victims as reporters of news events. If the press reports dissent, it is held also to be the vehicle of dissent; yet if it does not report, it is not doing its constitutional duty to serve as the bulwark against arbitrary government. This exacerbates tensions between government and press.

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[11] **Judge Williams, Mr. Early and Mr. Rock dissent from this position. Mr. de Toledano comments in a footnote.**

The public must recognize, as the men and women who fought for the Bill of Rights recognized, that a free and independent press is vital to a free people. In the last analysis, the public has the most to lose from a whittling away of the safeguards that have, since the founding of the nation, preserved and protected the invaluable tradition of a free press. It is therefore incumbent on the media continually to reaffirm their role in a democracy and to resist any infringement by government on their constitutional rights. For this, the courts are always open. At the same time, the media must also adhere fully to their responsibility to be an open conduit of information to the public. It is this above all that will make the maintenance of a free press not a cherished cliché but the cornerstone of a free society.

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